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Representing Children In Juvenile Delinquency Proceedings:
Discovery Under Family Court Act Article Three And Criminal Procedure Law Article 245

Gary Solomon
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DISCOVERY UNDER FAMILY COURT ACT ARTICLE THREE AND CRIMINAL PROCEDURE LAW ARTICLE 245

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PART ONE: DEMAND TO PRODUCE AND OTHER DISCOVERY WITHOUT COURT ORDER

Equal Protection

Criminal Procedure Law Article 245 provides for discovery that is much broader than that provided by FCA Article Three. Until the Legislature amends Article Three to conform to CPL requirements, the attorney for the child must raise Equal Protection arguments and ask for discovery required by the CPL. This includes discovery the prosecution is automatically required to provide, and discovery that may be ordered by the court.

That said, Equal Protection arguments will have the most force when the discovery sought appears crucial to the ability to prepare for hearings, confront witnesses, raise suppression arguments and mount a defense, and will have more force when addressed to the scope of discovery rather than procedural requirements.

In *Matter of Jayson C.*, 200 A.D.3d 447 (1st Dept. 2021), the First Department, while finding an Equal Protection violation where the respondent did not receive certain discovery required under the CPL, noted that "[b]ecause appellant asks only that the information be provided under Family Court Act article 3 timelines, we need not address whether any different time frame contained in the Criminal Procedure Law must apply under equal protection principles."

So, the starting point for the AFC's Equal Protection argument is *Jayson C.* After the presentment agency disclosed via a Voluntary Disclosure Form that nine of fourteen officers were involved in at least one pending lawsuit, and listed the title and index number of each proceeding, respondent sought discovery under FCA § 331.2(1), and, citing the Equal Protection Clause of the federal and state constitutions, discovery under CPL § 245.20(1)(a)-(u). Specifically, he sought impeachment information under § 245.20(1)(k)(iv). The presentment agency emailed defense counsel "disclosure letters" about twelve of the officers, which summarized their disciplinary history, but refused as not properly discoverable upon a Demand to Produce any items sought under § 245.20(1)(a)-(u). Respondent then moved for an order directing the presentment agency to provide the discovery sought, including impeachment evidence pursuant to § 245.20(1)(k)(iv), and argued that it was unconstitutional to deny him those materials solely because he is an alleged juvenile delinquent. The family court concluded that the provisions of the CPL are expressly inapplicable and preempted in juvenile delinquency cases pursuant to FCA § 303.1(1).

The First Department reversed, holding that while not all provisions of the Criminal Procedure Law are applicable to proceedings under the Family Court Act, under these circumstances the denial of discovery of records available under CPL § 245.20(1)(k)(iv), which broadly requires disclosure of all impeachment evidence, deprived respondent of Equal Protection of the laws under the federal and state Constitutions. The court noted that a respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant, and there is no reason to allow less access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial; the need for impeachment evidence is equally crucial in all these proceedings.

The First Department's reminder that juvenile delinquency respondents and criminal defendants have the same constitutional cross-examination and witness impeachment right means that broader CPL discovery that potentially implicates the respondent's ability to effectively cross-examine prosecution witnesses will be fertile ground for Equal Protection claims.

In addition to being controlling law in all family courts in the First Department, under the rules of stare decisis *Jayson C.* is controlling law in all other New York State family courts unless an appellate court outside the First Department rules to the contrary. *Mountain View Coach Lines, Inc. v. Storm*, 102 A.D.2d 663 (2d Dept. 1984).

Pre-Article Three cases applying CPL protections in family court on Equal Protection grounds provide some additional support. *Matter of James H.*, 34 N.Y.2d 814 (1974), *Matter of Edward S.*, 80 A.D.2d 585 (2d Dept. 1981) ("Failure to extend a juvenile the benefit of a particular CPL section 'based solely upon age, without other justification, denies both due process and the equal protection of the law' (*Matter of Eric R.*, 34 AD2d 402, 403")); *Matter of Albert B.*, 79 A.D.2d 251 (2d Dept. 1981) ("We hold that fundamental fairness and due process require that a juvenile respondent be given notice prior to a fact-finding hearing of petitioner's intention to introduce evidence of respondent's prior statements to a public servant or identification testimony by a witness who has previously identified respondent").

Finally, despite any fairness claims the presentment agency might make, the fact is that the respondent may be constitutionally entitled to some of the benefits of the CPL without having to assume the obligations the CPL imposes upon the defense. The presentment agency has no Equal Protection argument to make.

Judiciary Law § 2-b(3)

To supplement an Equal Protection argument, and whenever the AFC seeks discovery for which there is no express statutory authority, the AFC can cite Judiciary Law § 2-b(3), under which a court of record has power to "devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."

Caselaw

People v. Wrotten, 14 N.Y.3d 33 (2009) (trial court did not err in permitting adult complainant living in another state to testify via real-time, two-way video after finding that because of age and poor health he was unable to travel to New York to attend court; court's inherent powers and Judiciary Law § 2-b vest it with authority to fashion procedure such as this one); *People v. Callace*, 151 Misc.2d 464 (County Ct. Suffolk Co., 1991) (court had authority to order DNA testing under § 2-b[3]); *People v. Griffin*, 138 Misc.2d 279 (Sup. Ct. Kings Co., 1988) (under § 2-b(3), court has discretion to order a complainant to submit to a psychiatric examination).

FCA Demand To Produce

While criminal defendants obtain CPL Article 245 discovery without requesting it, juvenile delinquency respondents must follow FCA procedures and serve a discovery demand.

A "Demand to produce" (hereinafter, "Demand") is a written notice served by and on a party, without leave of the court, demanding to inspect property pursuant to FCA § 331.2

or § 331.3 and giving reasonable notice of the time at which the demanding party wishes to inspect the property designated. FCA § 331.1(1).
Except to the extent protected by court order, upon a demand to produce by a respondent, the presentment agency shall disclose to the respondent and make available for inspection, photography, copying or testing, the property specified in the statute. FCA § 331.2(1).

Voluntary Disclosure Forms

As a convenient method of providing statutory notice and discovery material to which the respondent is clearly entitled, and making discovery demands of their own, presentment agencies have developed "Voluntary Disclosure Forms" (hereinafter, "VDF") that are served at the initial appearance or shortly thereafter. Much of the information contained in these forms is included in the demand to produce provisions in FCA § 331.2(1). In essence, the presentment agency anticipates the respondent's discovery requests, and provides information in an effort to forestall further discovery activity.
However, because the AFC cannot assume that the VDF is complete and accurate, and especially because of the CPL-level discovery the AFC will be seeking, the AFC will still need to serve a Demand. On the other hand, if the AFC relies upon representations in the VDF concerning the non-existence of a particular item of discovery material, and makes no further request for the item, there is no reason to believe that the VDF would not be considered a binding legal document that could be cited in a motion for preclusion or some other relief.

FCA Procedure And Timing

If the respondent has been released pending trial, the Demand must be made within 15 days after the conclusion of the initial appearance unless the deadline is extended for good cause shown. FCA § 331.7(2)(a). In no event may a demand be made after the fact-finding hearing has commenced. FCA § 331.7(2)(a).
The presentment agency must comply with the demand within 15 days after service or as soon thereafter as practicable. FCA § 331.7(2)(c). If the presentment agency objects to disclosure, a refusal to comply (hereinafter, "refusal") may be made instead. The refusal also must be made within 15 days after service of the demand, but may be served later for good cause. FCA § 331.7(2)(b). The refusal must be in writing, and must be served on the respondent and filed with the court. It must set forth the grounds for a reasonable belief that the property is not discoverable under FCA § 331.2, or that a protective order is warranted. Such grounds must be set forth as fully as possible, consistent with the objective of the refusal. FCA § 331.2(6).
If the respondent has been remanded pending trial, the demand must be made within 7 days after the conclusion of the initial appearance or prior to the commencement of the fact-finding hearing, whichever occurs sooner, unless the court grants an extension for good cause shown. FCA § 331.7(1)(a). A refusal must be made within 5 days after service of the demand, but may be made thereafter for good cause. FCA § 331.7(1)(b). In the absence of a refusal, compliance must be made within 7 days of service of the demand or as soon thereafter as practicable. If accelerated discovery is deemed desirable, the

respondent can seek a court order directing that the presentment agency comply in less than 7 days. FCA § 331.7(1)(c).
With regard to after-business-hours service, compare *People v. Infante*, 79 Misc.3d 1222(A) (Crim. Ct., Bronx Co., 2023) (dismissal ordered where discovery untimely served at 12:02 a.m. on ninety-first day) with *People v. Martinez*, _Misc.3d_, 2023 WL 4359517 (Crim. Ct., Bronx Co., 2023) (Electronic Document Delivery System may be used file documents after 5:00 p.m., and General Construction Law § 19 provides that calendar day includes time from midnight to midnight).

Incorporating The CPL Into The FCA Demand

CPL § 245.20(1) states that 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 the specified items and information.
In the Demand, the AFC should demand disclosure of all material and information identified in the FCA, and also disclosure of all material and information to which a criminal defendant would be entitled. Equal Protection law should be cited. As already noted, the Equal Protection arguments for disclosure will be stronger in some cases than in others, but there is no reason not to ask for everything included in the CPL.
Outlined below are the FCA and CPL initial discovery provisions, and some relevant caselaw. Some of the CPL provisions have FCA counterparts, which usually are narrower in scope, and some CPL provisions have no FCA counterpart at all.

Duty Of Prosecution To Locate Discovery And Make It Available

CPL § 245.20(2)
The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under § 245.20(1) and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. All items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.
FCA § 331.2(a)
The presentment agency shall make a diligent, good faith effort to ascertain the existence of property demanded and to cause such property to be made available for discovery where it exists but is not within the presentment agency's possession, custody or control; provided, that the presentment agency shall not be required to obtain by subpoena duces tecum demanded material which the respondent may thereby obtain.

Statements to Law Enforcement

CPL § 245.20(1)(a)

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

FCA § 331.2(1)(a)

Any written, recorded or oral statement of the respondent, or by a co-respondent, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

Caselaw

Re: sanctions for failure to preserve evidence or untimely disclosure, see People v. Tuthill, 49 Misc.3d 132(A) (App. Term, 2d Dept., 2015) (defendant's statements precluded where People failed to provide recording until commencement of *Huntley* hearing); *People v. Graham*, 48 A.D.3d 265 (1st Dept. 2008) (defendant prejudiced by People's failure to turn over statements until after verdict where statement contained material defendant could have used for impeachment purposes at suppression hearing and trial); *People v. Crider*, 301 A.D.2d 612 (2d Dept. 2003) (reversible error where court allowed People to use defendant's statements on rebuttal despite People's representation during discovery that defendant made only exculpatory statements); *People v. Fields*, 258 A.D.2d 809 (3d Dept. 1999) (statements could not be used on rebuttal where People failed to disclose them as required); *People v. Ames*, 119 A.D.2d 755 (2d Dept. 1986) (court erred in allowing use of statement to impeach defendant on cross-examination without holding hearing so defendant could litigate voluntariness issue).

Although statements made to a person who is neither a law enforcement official nor acting under the direction of or in cooperation with a law enforcement official are not discoverable, *People v. Mitchell*, 289 A.D.2d 776 (3d Dept. 2001), *lv denied* 98 N.Y.2d 653 (2002), the AFC could seek an appropriate remedy when the presentment agency has erroneously affirmed that no such statements exist. *See People v. Simmons*, 173 A.D.2d 875 (2d Dept. 1991).

As a matter of strategy, it is important to recognize that, if the respondent has made statements of which notice has not been given pursuant to FCA § 330.2(2) and CPL § 710.30, service of a demand may alert the presentment agency to the problem, and result in the timely service of notice. Consequently, in such a case the AFC can, as the statute clearly permits, serve the demand just prior to the end of the 15-day deadline. When appropriate, the attorney could also omit any request for the respondent's statements.

Disclosure of statements made by the co-respondent puts the respondent on notice that a potential *Bruton* problem [*see Bruton v. United States*, 391 U.S. 123 (1968)] problem will exist if the presentment agency offers a statement made by the co-respondent that implicates the respondent. Although it has been held that *Bruton* does not apply at bench trials [*see People v. Jenkins*, 115 A.D.2d 562 (2d Dept. 1985)], the respondent should still ask the court to order severance in its discretion so that a co-respondent's confession will not be heard by the trier of fact. Disclosure also may provide the AFC with some idea of the co-respondent's position, strategy and/or defenses.

The statute does not require disclosure of "res gestae" statements made during a criminal transaction. *See People v. McLean*, 128 A.D.3d 1094 (2d Dept. 2015) (since defendant

was charged with falsely reporting incident, false statement constituted res gestae statement and thus was not discoverable).

Grand Jury Testimony

CPL § 245.20(1)(b)
All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in CPL § 245.10(1), such time period may be stayed by up to an additional thirty calendar days without need for a motion pursuant to CPL § 245.70(2); except that such disclosure shall be made as soon as practicable and not later than thirty calendar days before the first scheduled trial date, unless an order is obtained pursuant to CPL § 245.70. When the court is required to review grand jury transcripts, the prosecution shall disclose such transcripts to the court expeditiously upon receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.
FCA § 331.2(1)(b)
Any transcript of testimony relating to the proceeding pending against the respondent, given by the respondent, or by a co-respondent, before any grand jury.
The presentment agency shall forthwith request that the district attorney provide a transcript of such testimony; upon receiving such a request, the district attorney shall promptly apply to the appropriate criminal court, with written notice to the presentment agency and the respondent, for a written order pursuant to Judiciary Law § 325 releasing a transcript of testimony to the presentment agency. FCA § 331.2(2)(b).

Caselaw

People v. Swift,
https://www.nycourts.gov/courts/AD1/calendar/appsmots/2020/January/2020_01_30_mot.pdf
at p. 55 (1st Dept. 2020) (defense counsel permitted to give defendant copy of grand jury testimony and victim's medical records; People's policy arguments about general importance of grand jury secrecy and medical record confidentiality irreconcilable with statutory discovery mandate); *People v. Sellars*, 73 Misc.3d 248 (County Ct., Orange Co., 2021) (preliminary notes or shorthand or digital recordings utilized by grand jury stenographer to create transcript generally not discoverable); *People v. Phillips*, 67 Misc.3d 196 (Sup. Ct., Bronx Co., 2020) (good cause found for protective order directing defense counsel not to copy grand jury minutes and give copy to defendant or to any third party, but court rejects People's contention that grand jury secrecy rules generally prevent disclosure).

Witness Names and Contact Information

CPL § 245.20(1)(c) (no FCA counterpart)

The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical address. Information under this subdivision relating to the identity of a 911 caller, the victim or witness of an offense defined under article one hundred thirty or PL § 230.34 or § 230.34-a, any other victim or witness of a crime where the defendant has substantiated affiliation with a criminal enterprise as defined in PL § 460.10(3), or a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to CPL § 245.70; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

The statute shall not require the prosecutor to ascertain the existence of witnesses not known to the police or another law enforcement agency. CPL § 245.20(2).

Caselaw

Re protective orders, see People v. Harrigan, 187 A.D.3d 830 (2d Dept., Dillon, J., 2020) (disclosure of complainants' names delayed until commencement of trial, to be provided to defense counsel only, and disclosure of names of complainants' parents delayed until 15 days prior to commencement of trial, to be provided to defense counsel only); *People v. Singh*, 187 A.D.3d 691 (2d Dept., Maltese, J., 2020) (disclosure of name and contact information of confidential informant and names and work affiliation of undercover personnel delayed until commencement of trial); *People v. Zayas*, 186 A.D.3d 1726 (2d Dept., Maltese, J., 2020) (protective order issued directing that disclosure of names, addresses and contact information of confidential informant and undercover personnel be delayed until commencement of trial); *People v. Taggart*, 186 A.D.3d 1465 (2d Dept., Wooten, J., 2020) (court should have directed that names, addresses, and contact information of witnesses, and floor plans of subject jail, be made only to defense counsel and that counsel not disclose materials or information to defendant or to anyone other than those employed by counsel or appointed to assist in defense); *People v. Harper*, 182 A.D.3d 537 (2d Dept., Iannacci, J., 2020) (court issues protective order directing that disclosure of address and contact information of complainant, and name, address, and contact information of complainant's mother and two 911 callers, be delayed until 15 days before trial and shall only be made to defense counsel and counsel's investigator; and that disclosure of last name, address, and contact information of third 911 caller be made within 15 days of decision and only to defense counsel and counsel's investigator, who shall not disclose material to defendant or anyone else aside from each other); *People v. Brown*, 181 A.D.3d 958 (2d Dept., Duffy, J., 2020) (People's contention that defense counsel might inadvertently disclose identifying information about witnesses to defendant, without more, did not constitute good cause for not providing unredacted information, including witness statements, to defense counsel with instructions not to reveal identifying information to defendant); *People v. Griggs*, 180 A.D.3d 853 (Austin, J., 1st Dept. 2020) (court, taking into account that charges were gang-related, properly allowed disclosure of

certain witnesses' names and contact information and other identifying material to defense counsel only); *People v. Artis*, 179 A.D.3d 1440 (3d Dept., Garry, J., 2020) (upholding protective order allowing defense counsel to obtain redacted copy of confidential informant's statement and to review digital video recordings of narcotics transactions, without disclosing any information to defendant that might enable him to ascertain identity of CI); *People v. Olah*, 79 Misc.3d 1240(A) (Crim. Ct., Queens Co., 2023) (statute violated where People, contacted only police, but not fire department, to ascertain names and contact information for ambulance responders at scene).

Re: prosecution arranging means of communication without providing witness contact information, compare People v. Sozoranga-Palacios, 73 Misc.3d 1214(A) (Crim. Ct., N.Y. Co., 2021) (People complied with statute by providing name of complainant and indication that complainant could be contacted through WitCom app-based system that allows defense counsel to contact witnesses through proxy phone number without witness' personal phone number being disclosed) *with People v. Feng*, NYLJ, Feb. 28, **2020**, at 21, col. 1, **2020** NYLJ LEXIS 501, at *5 (Sup. Ct., Kings Co., 2020) (WitCom smartphone app used by prosecutors so that witnesses may be contacted by defense counsel without counsel obtaining witnesses' contact information does not satisfy statutory requirement that adequate contact information be provided; court directs People to disclose active and verified email address and cell phone number for witnesses to defense counsel).

Note: Although it pertained to disclosure of Brady material, the AFC should attempt to make broader use of the Court of Appeals decision in *People v. Rong He*, 34 N.Y.3d 956 (2019) (where witnesses were favorable to defense and People had Brady obligation, People's refusal to agree to direct disclosure of witnesses' contact information, and alternative offer to provide witnesses with defense counsel's contact information, deprived defendant of meaningful access to witnesses and was tantamount to suppression of evidence; People did not bring forth evidence that defendant presented risk to witnesses).

Re: confidential informants, see also People v. Goggins, 34 N.Y.2d 163 (1974), *cert denied* 419 U.S. 1012 (when accused demands disclosure of identity of police informant who allegedly has information relevant to issue of guilt or innocence, and can show a factual basis establishing that demand does not have improper motive and is not merely angling in desperation for possible weaknesses in prosecution's investigation, disclosure of informant's identity, and even, if appropriate, production of informant should be ordered).

Names of Law Enforcement Personnel (no FCA counterpart)

CPL § 245.20(1)(d)
The name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Information under this subdivision relating to undercover personnel may be withheld, and redacted from discovery materials, without need for a motion pursuant to CPL § 245.70; but the prosecution shall notify the defendant in writing

that such information has not been disclosed, unless the court rules otherwise for good cause shown.

Statements By Witnesses and Other Persons

CPL § 245.20(1)(e)
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. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings.
The statute shall not require the prosecutor to ascertain the written or recorded statements of witnesses not known to the police or another law enforcement agency. CPL § 245.20(2).
No FCA § 331.2(1) counterpart as to non-testifying witnesses; but discovery at hearings as to testifying witnesses required under FCA § 331.4(1)(a) and (3)(a).
Under § 331.4(1)(a), at the commencement of the fact-finding hearing, the presentment agency shall, subject to a protective order, make available to the respondent: any written or recorded statement, including any testimony before a grand jury and any examination videotaped pursuant to CPL § 190.32 made by a person whom the presentment agency intends to call as a witness at the fact-finding hearing, and which relates to the subject matter of the witness's testimony. When such a statement includes grand jury testimony, the presentment agency shall forthwith [*see* FCA § 331.2(2)(b)] request that the district attorney provide a transcript of testimony prior to the commencement of the fact-finding hearing; upon receiving such a request, the district attorney shall promptly apply to the appropriate criminal court, with written notice to the presentment agency and the respondent, for a written order pursuant to Judiciary Law § 325 releasing a transcript of testimony to the presentment agency.
Under § 331.4(3)(a), upon request by the respondent and subject to a protective order, the presentment agency has the same obligation at a suppression hearing at the conclusion of the direct examination of each of its witnesses.

Reciprocal Discovery

Under § 331.4(2), at the conclusion of the presentment agency's direct case and before the commencement of the respondent's direct case, and subject to a protective order, the respondent shall make these prior witness statements available to the presentment agency. At a suppression hearing, the respondent has the same obligation as the presentment agency under § 331.4(3)(a) to make the information available upon request and subject to a protective order at the conclusion of the direct examination of defense witnesses.

CPL Sanctions

When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that it was prejudiced. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material. CPL § 245.80(1)(a).

The failure of the prosecutor or any agent of the prosecutor to disclose any written or recorded statement made by a prosecution witness which relates to the subject matter of the witness's testimony shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction, in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial. CPL § 245.80(3).

If the prosecution fails to disclose an electronic recording to the defendant pursuant to § 245.20(1)(e) due to a failure by police officers or other law enforcement or prosecution personnel to comply with the statutory obligation to preserve evidence, the court upon motion of the defendant shall impose an appropriate remedy or sanction pursuant to § 245.80. CPL § 245.55(3)(b).

FCA Sanctions

If the court finds a violation of demand discovery procedures, it may order discovery, grant a continuance, issue a protective order, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action. FCA § 331.6(1).

Strategy

If preclusion of a witness' testimony would still leave other evidence which is more than sufficient to support a finding, a mistrial may be more desirable, particularly when there is prosecutorial misconduct which might support dismissal of re-filed charges on double jeopardy grounds. If preclusion will effectively sabotage the prosecution's case, the defense should push for preclusion while keeping in mind that, since the appellate courts are not particularly fond of extreme sanctions such as preclusion or dismissal, it might be wise to move for a mistrial after preclusion is denied. It is also important for the defense to be aware of the "real life" implications of a court-ordered sanction for late disclosure. In a bench trial, an adverse inference can be an illusory remedy that the court will give minimal weight.

Caselaw

Re: prosecution's duty to ascertain and disclose statements, see People v. Yavru-Sakuk, 4 N.Y.3d 814 (2005) (relevant portions of diary kept by victim's mother, which was in People's possession, should be disclosed); *People v. Santorelli*, 95 N.Y.2d 412 (2000) (People not required to produce FBI records that were outside People's control); *People v. Fishman*, 72 N.Y.2d 884 (1988) (People not obligated to produce transcript of testifying co-defendant's plea that was ordered by People but not yet prepared); *People v.*

Mongan, 76 Misc.3d 367 (County Ct., Orange Co., 2022) (defendant entitled to discovery of relevant text messages between burglary/assault complainant and her boyfriend at time of incident); *People v. Faison*, 73 Misc.3d 900 (Crim. Ct., Kings Co., 2021) (defendant entitled to disclosure of audio recording of swearability examination conducted with child complainant prior to Child Advocacy Center interview).

Re: "camouflaged" statements not attributable to witness, see People v. Ezell, 143 A.D.3d 551 (1st Dept. 2016), *lv denied* 28 N.Y.3d 1144 (prosecutor not required to turn over all direct examination outlines regarding two witnesses, which were prepared, at least in part, during prosecutor's interviews of witnesses; court did not err in reviewing material in camera, identifying questions that might have incorporated parts of witnesses' answers and ordering disclosure of those portions of outline, and giving defense opportunity to recall witnesses).

Re: third party rendition of witness statements, see People v. Sandess Pierre, 188 A.D.3d 924 (2d Dept. 2020) (911 call during which non-testifying witness relayed information from victim was not Rosario material); *People v. Guillaume*, 152 A.D.3d 540 (2d Dept. 2017) (document containing statement of social worker indicating that victim's mother had told her that she herself was sexually abused as child was not Rosario material).

Re: statements that allegedly are duplicative equivalency of disclosed statements, see People v. Joseph, 86 N.Y.2d 565 (1995) (since court must examine material before determining whether to apply duplicative equivalency doctrine, missing documents cannot be considered duplicative); *People v. Ranghelle*, 69 N.Y.2d 56 (1986) (People not excused from producing statements under "duplicative equivalency" exception merely because undisclosed statements are harmonious or consistent with statements that were turned over); *People v. Consolazio*, 40 N.Y.2d 446 (1976) (rather than "engaging in a collateral analysis as to whether the defendant would or would not be technically entitled to disclosure," court should order disclosure if the missing writings appear to be discoverable).

Re: prejudice from untimely disclosure during trial, see People v. Perez, 65 N.Y.2d 154 (1985) ("The fairness concept embodied in the Rosario rule cannot be said to have been satisfied when pretrial statements revealing a potential trap for the cross-examiner are furnished to defense counsel only after the trap has sprung"); *People v. Justice A.*, 77 Misc.3d 128 (App. Term, 1st Dept., 2022), ***lv granted*** 39 N.Y.3d 1078 (no error where court drew adverse inference from defendant's failure to turn over statements from character witnesses); *People v. Lebovits*, 94 A.D.3d 1146 (2d Dept. 2012) (new trial ordered where prosecutor withheld witness's statements until after witness testified and thereby precluded defense from fully and adequately preparing for cross-examination and set trap which had already sprung at time notes were finally furnished); *People v. Mitchell*, 14 A.D.3d 579 (2d Dept. 2005) (defendant prejudiced where he raised identification defense at trial while relying on police reports that contained description of perpetrator that differed markedly from defendant, and People belatedly turned over other reports containing descriptions that were closer to matching defendant); *People v. Mackey*, 249 A.D.2d 329 (2d Dept. 1998), *lv denied* 92 N.Y.2d 927 (defendant prejudiced where

damaging testimony was unwittingly elicited during cross); *People v. Smith*, 190 A.D.2d 700 (2d Dept. 1993) (defendant was prejudiced where defense counsel would have altered cross-examination had he known of missing statements); *People v. Vasquez*, 143 A.D.2d 161 (2d Dept. 1988) (preclusion of testimony was appropriate sanction for late disclosure); *People v. Napierala*, 90 A.D.2d 689 (4th Dept. 1982) (preclusion of testimony of defendant's witnesses was inappropriate sanction for late disclosure); *People v. Morales*, 37 Misc.3d 1218(A) (Sup. Ct., Kings Co., 2012) ("trap" had already sprung before notes were furnished and prejudice could not have been obviated by recalling witnesses); *People v. Gayle*, 193 Misc.2d 556 (Sup. Ct., Kings Co., 2002) (mistrial granted due to late disclosure where defense counsel could no longer pursue original argument that testimony regarding defendant's incriminating statements should be rejected because of lack of law enforcement documentation).

Re: sanctions for loss or destruction of material, see People v. Martinez, 22 N.Y.3d 551 (2014) (in 4-3 ruling, Court of Appeals finds no showing of prejudice, and thus no error in trial court's refusal to give adverse inference charge regarding loss of handwritten complaint report prepared by officer, where defendants were provided with typewritten report and relied on series of improbable events to create prospect of prejudice; if such conjecture is sufficient to show prejudice, loss or destruction of material would become per se prejudicial); *People v. Asaro*, 21 N.Y.3d 677 (2013) (no error where trial court gave adverse inference charge rather than strike testimony of accident reconstruction expert as sanction for loss of notes containing mathematical calculations used in making speed computations); *People v. Joseph*, 86 N.Y.2d 565 (after holding that destroyed envelopes in which drugs had been placed could not be considered duplicative equivalent of other material, Court of Appeals finds error in trial court's refusal to give adverse inference instruction; court rejects People's claim that defendant's prejudice argument is too speculative, since it was conduct of police which made it impossible to know whether missing information was consistent with People's position at trial); *People v. Lee*, 116 A.D.3d 493 (1st Dept. 2014), *lv denied* 23 N.Y.3d 1064 (no error in court's failure to give adverse inference charge where prosecution failed to produce handwritten notes made by officer who interviewed victim but defense counsel had ample opportunity to show that victim's testimony as to identity of shooter was fabricated); *People v. Morton*, 189 A.D.2d 488 (1st Dept. 1993) (request for adverse inference charge improperly denied; defendant had no way to counter officer's claim that inconsistencies in report were result of clerical errors in transcription of missing notes); *People v. Rivas*, 184 A.D.2d 794 (2d Dept. 1992) (sanction should have been ordered where undercover destroyed notes describing seller; court notes possibility that description in buy report was conformed to match defendant's actual appearance).

Re: prejudice from complete failure to disclose during trial, see People v. Williams, 50 A.D.3d 1177 (3d Dept. 2008) (motion to set aside verdict should have been granted where People failed to disclose certain materials until after last witness testified; court notes that materials could have been used to impeach witness who corroborated testimony of only person who testified that defendant was perpetrator of robbery and defense had accused that person of the robbery, that witness who could have been impeached was not made available for further cross-examination, and that although court instructed jury that it could

infer that if witness had been further cross-examined, his credibility would have been "further impeached" and testimony would have contradicted People's other witnesses, jury was not told in what respect witness would have been impeached or how his testimony would have been different than before); *People v. Rosas*, 297 A.D.2d 390 (2d Dept. 2002), *lv denied* 99 N.Y.2d 564 (2002) (conviction set aside where undisclosed statements attributable to victim's son might have directly related to identification of defendant).

Re: indigent accused's independent Equal Protection right to obtain free transcripts, see People v. Peacock, 31 N.Y.2d 907 (1972) (readback of stenographic notes no substitute for having transcript in hand); *but see Matter of Eric W.*, 68 N.Y.2d 633 (1986) (where trial immediately followed brief suppression hearing, and involved same witnesses, counsel and judge, respondents had no right to transcript, and the denial of an adjournment for production of the transcript was not an abuse of discretion).

Re: court's duty to investigate, see *People v. Poole*, 48 N.Y.2d 144 (1979) (although representation of prosecutor ought to suffice regarding whether prior statements exist, court should determine whether relevant statements exist when accused can articulate factual basis establishing existence of prior statements or the prosecutor admits statements exist but claims they are irrelevant); *People v. Matthews*, 212 A.D.3d 512 (1st Dept. 2023) (case remanded for in camera review of memo books where victim testified that she spoke to two officers and that they wrote down what she said had occurred).

Re: protective orders, see People v. McCallum, 159 A.D.3d 1013 (2d Dept. 2018) (no error in issuance of protective order that prohibited defense counsel from providing defendant with copies of material where defendant, with court oversight, was permitted to review material with counsel over two-day period).

Expert Opinion Evidence

CPL § 245.20(1)(f)

Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and a list of proficiency tests and results administered or taken within the past ten years of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in CPL § 250.10. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in CPL § 245.10(1), that period shall be stayed without need for a motion pursuant to CPL § 245.70(2); except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than sixty calendar days before the first scheduled trial date, unless an order is obtained pursuant to CPL § 245.70. When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a

scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.
No FCA counterpart, but, if an Equal Protection argument fails, the AFC can argue that discovery of expert witness-related information pursuant to CPLR § 3101(d) and FCA § 165(a) is appropriate.

Tapes Or Electronic Recordings

CPL § 245.20(1)(g)
All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident, and a designation by the prosecutor as to which of the recordings under this paragraph the prosecution intends to introduce at trial or a pre-trial hearing. If the discoverable materials under this paragraph exceed ten hours in total length, the prosecution may disclose only the recordings that it intends to introduce at trial or a pre-trial hearing, along with a list of the source and approximate quantity of other recordings and their general subject matter if known, and the defendant shall have the right upon request to obtain recordings not previously disclosed. The prosecution shall disclose the requested materials as soon as practicable and not less than fifteen calendar days after the defendant's request, unless an order is obtained pursuant to CPL § 245.70. The prosecution may withhold the names and identifying information of any person who contacted 911 without the need for a protective order pursuant to CPL § 245.70, provided, however, the defendant may move the court for disclosure. If the prosecution intends to call such person as a witness at a trial or hearing, the prosecution must disclose the name and contact information of such witness no later than fifteen days before such trial or hearing, or as soon as practicable.
If the prosecution fails to disclose an electronic recording to the defendant pursuant to § 245.20(1)(g) due to a failure by police officers or other law enforcement or prosecution personnel to comply with the statutory obligation to preserve evidence, the court upon motion of the defendant shall impose an appropriate remedy or sanction pursuant to § 245.80. CPL § 245.55(3)(b).
Note: When the discoverable materials, including video footage from body-worn cameras, surveillance cameras, or dashboard cameras, are exceptionally voluminous or, despite diligent, good faith efforts, are otherwise not in the actual possession of the prosecution, the time period for disclosure may be stayed by up to an additional thirty calendar days without need for a motion pursuant to CPL § 245.70, and extended pursuant to such a motion. CPL § 245.10(1)(a).
FCA § 331.2(1)(f)
Any tapes or other electronic recordings which the presentment agency intends to introduce at the fact-finding hearing, irrespective of whether such recording was made during the course of the criminal transaction.

Caselaw

Re: protective orders, see People v. Singh, 187 A.D.3d 691 (2d Dept., Maltese, J., 2020) (audio and video recordings of narcotics sales disclosed to defense counsel only, to be

viewed at prosecutor's office); *People v. Clarke*, 186 A.D.3d 1707 (2d Dept., Duffy, J., 2020) (protective order improperly precluded defense counsel from disclosing recordings to those employed by counsel or appointed to assist in defense without prior approval from court).

Re: intent to introduce evidence, see People v. O'Brien, 140 A.D.3d 1325 (3d Dept. 2016) (preclusion of defendant's medical records as sanction for late disclosure soon after commencement of trial was error where defense counsel did not intend to utilize records until hearing trooper's suppression hearing testimony, and court could have granted one-day continuance for prosecutor to review records and/or pared down admitted portion, as defense counsel offered); *People v. Goldstein*, 65 Misc.3d 645 (Sup. Ct., Kings Co., 2019) (People not entitled to disclosure where defendant had stated to officer that he had recording of discussion with defense counsel, but that did not demonstrate that defense counsel intended to offer recording into evidence at trial); *People v. Soto*, 16 Misc.3d 1115(A) (Sup. Ct., Queens Co., 2007) (defendant not required to disclose recording of complainant's statements to defense investigators; although People argue that it is reasonably predictable that defense will use recording for impeachment, defendant has indicated that he has no present intent to use it).

Re: sanctions for failure to preserve evidence or untimely disclosure, see People v Viruet, 29 N.Y.3d 527 (2017) (adverse inference charge required where officer viewed nightclub's surveillance footage and obtained copy of video, but when District Attorney's office requested video from police department, officer could not locate it; trial evidence showed that camera may have captured crucial events); *Freeman v. State*, 121 So.3d 888 (Miss. 2013) (State's loss of videotape of traffic stop while there was court order to preserve tape violated defendant's Due Process right to present complete defense); *People v. Bailey*, 201 A.D.3d 601 (1st Dept. 2022), *lv denied* 38 N.Y.3d 1069 (videotape not placed within People's constructive possession when officer viewed tape and recorded portions he considered significant using camera in his phone); *People v. Torres*, 169 A.D.3d 1068 (2d Dept. 2019) (defendant entitled to permissive adverse inference charge with respect to People's loss or destruction of duly requested tape recordings of interactions between undercover officer and witness to alleged drug sale); *People v. Butler*, 140 A.D.3d 1610 (4th Dept. 2016), *lv denied* 28 N.Y.3d 969 (court erred in refusing to give adverse inference charge based on People's failure to preserve surveillance tapes from cameras operated by police in area where crime occurred where defendant used reasonable diligence in requesting tapes, which had been destroyed pursuant to normal business practices by time defendant requested them; State's duty to preserve is triggered even before request has been made by defendant, or State would have incentive to destroy evidence before defendant has chance to request it); *Matter of Raiquan M.*, 136 A.D.3d 1040 (2d Dept. 2016) (no error where court imposed sanction of permissive adverse inference for destruction of evidence from cameras located in area of alleged incident and operated by New York City Police Department; court not required to draw adverse inference); *In re Keena H.*, 100 A.D.3d 414 (1st Dept. 2012) (no adverse inference as to unpreserved surveillance videotape where it was never in presentment agency's possession; agency has no constitutional or statutory duty to acquire or prevent destruction of evidence generated and possessed by private parties); *People v. Hooks*,

71 A.D.3d 1184 (3d Dept. 2010) (People not required to obtain department store's surveillance videotape and not responsible for store's destruction of tape after 90 days pursuant to usual business policy); *People v. Torres*, 190 A.D.2d 52 (3d Dept. 1993) (court orders preclusion of testimony regarding defendant's encounter with undercover where People destroyed tape recording, and defendant raised agency defense); *People v. Saddy*, 84 A.D.2d 175 (2d Dept. 1981) (drug sale convictions reversed where police erased recordings of conversations between defendant and undercover officer).

Photographs and Drawings

CPL § 245.20(1)(h)
All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which relate to the subject matter of the case.
FCA § 331.2(1)(d)
Any photograph or drawing relating to the proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the presentment agency intends to call as a witness at a hearing, or which the presentment agency intends to introduce at a hearing.

Caselaw

Re: intent to call witness or introduce evidence, see People v. O'Brien, 140 A.D.3d 1325 (3d Dept. 2016) (preclusion of defendant's medical records as sanction for late disclosure soon after commencement of trial was error where defense counsel did not intend to utilize records until hearing trooper's suppression hearing testimony, and court could have granted one-day continuance for prosecutor to review records and/or pared down admitted portion, as defense counsel offered); *People v. Goldstein*, 65 Misc.3d 645 (Sup. Ct., Kings Co., 2019) (People not entitled to disclosure where defendant had stated to officer that he had recording of discussion with defense counsel, but that did not demonstrate that defense counsel intended to offer recording into evidence at trial); *People v. Soto*, 16 Misc.3d 1115(A) (Sup. Ct., Queens Co., 2007) (defendant not required to disclose recording of complainant's statements to defense investigators; although People argue that it is reasonably predictable that defense will use recording for impeachment, defendant has indicated that he has no present intent to use it).

Re: redactions, see People v. Rios-Liberato, 50 Misc.3d 737 (Crim. Ct., N.Y. Co., 2015) (in sex offense prosecution, defendant entitled to un-redacted photos that depict how close to complainant's vagina defendant was applying tattoo when alleged crime took place; risk of complainant's embarrassment outweighed by right of confrontation and right to obtain evidence material to guilt or innocence).

Re: sanctions for failure to preserve evidence or untimely disclosure, see People v. Malone, 88 A.D.3d 586 (1st Dept. 2011), *lv denied* 18 N.Y.3d 959 (no adverse inference where People failed to preserve cell phone photographs victim took of injuries and

showed to prosecutor); *People v. Rodriguez*, 5 A.D.3d 331 (1st Dept. 2004), *lv denied* 3 N.Y.3d 658 (sanction properly denied upon late disclosure of arrest photo of defendant depicting him with distinctive jacket, which became relevant when defendant testified that he was wearing clothes at time of arrest that differed from those in the photo; there was no evidence of bad faith, and defendant would have known that he had been photographed while wearing jacket in question); *People v. Springer*, 122 A.D.2d 87 (2d Dept. 1986) (bank robbery charges dismissed where surveillance photos were discarded by police).

Released Property Covered By PL § 450.10 (no FCA counterpart)

CPL § 245.20(1)(i)
All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release pursuant to PL § 450.10.

Penal Law § 450.10 (Disposal of stolen property) contains procedures governing the release of allegedly stolen property that is in the custody of a police officer, a peace officer or a district attorney, upon written notice to the defendant or defense counsel which shall advise the defendant or counsel of the date on which the property will be released and the name and address of a person with whom arrangements can be made for the examination, testing, photographing, photocopying or other reproduction of the property. PL § 450.10(1).
Except as otherwise provided in the statute, when a request is made for the release of property, and the property shall consist of perishables, fungible retail items, motor vehicles or any other property release of which is necessary for either the operation of a business or the health or welfare of any person, the property shall be retained until either the expiration of a 48-hour period from the receipt by the defendant's counsel of the notice of the request, or the examination, testing and photocopying, photographing or other reproduction of such property by the parties, whichever event occurs first. The 48-hour period may be extended by up to 24 additional hours by agreement between the parties. PL § 450.10(4)(a). When this request is made and the defendant is not represented by counsel, the notice shall be personally delivered to the defendant and release of the property shall not occur for a period less than 5 days from the delivery of such notice, or, in the case of delivery to a defendant in custody, from the first appearance before the court, whichever is later. PL § 450.10(11).
However, a motor vehicle alleged to have been stolen but not alleged to have been used in connection with any crime or criminal transaction other than the theft or unlawful use of the motor vehicle, which is in the custody of a police officer, a peace officer or a district attorney, may be released expeditiously to its registered owner or the owner's representative without prior notice to the defendant. Before such release, evidentiary photographs shall be taken of the motor vehicle. Such photographs shall include the vehicle identification number, registration on windshield, license plates, each side of the vehicle, including vent windows, door locks and handles, the front and back of the vehicle, the interior of the vehicle, including ignition lock, seat to floor clearance, center console, radio receptacle and dashboard area, the motor, and any other interior or exterior surfaces showing any and all damage to the vehicle. Notice of the release, and the

photographs taken of said vehicle, shall be furnished to the defendant within 15 days after arraignment or after counsel initially appears on behalf of the defendant or respondent, whichever occurs later. PL § 450.10(4)(c).
Where there has been a failure to comply with the provisions of § 450.10, and where the district attorney does not demonstrate to the satisfaction of the court that such failure has not caused the defendant prejudice, the court shall instruct the jury that it may consider such failure in determining the weight to be given such evidence and may also impose any other sanction set forth in CPL § 245.80(1); provided, however, that unless the defendant has convinced the court that such failure has caused him undue prejudice, the court shall not preclude the district attorney from introducing into evidence the property, photographs, photocopies, or other reproductions of the property or, where appropriate, testimony concerning its value and condition, where such evidence is otherwise properly authenticated and admissible under the rules of evidence. Failure to comply with any one or more of the provisions of § 450.10 shall not for that reason alone be grounds for dismissal of the accusatory instrument. PL § 450.10(10).

Reports Of Examinations, Tests, etc.

CPL § 245.20(1)(j)
All reports, documents, records, data, calculations or writings, including but not limited to preliminary tests and screening results and bench notes and analyses performed or stored electronically, concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which the prosecution intends to introduce at trial or a pre-trial hearing. Information under this paragraph also includes, but is not limited to, laboratory information management system records relating to such materials, any preliminary or final findings of non-conformance with accreditation, industry or governmental standards or laboratory protocols, and any conflicting analyses or results by laboratory personnel regardless of the laboratory's final analysis or results. If the prosecution submitted one or more items for testing to, or received results from, a forensic science laboratory or similar entity not under the prosecution's direction or control, the court on motion of a party shall issue subpoenas or orders to such laboratory or entity to cause materials under this paragraph to be made available for disclosure. The prosecution shall not be required to provide information related to the results of physical or mental examinations, or scientific tests or experiments or comparisons, unless and until such examinations, tests, experiments, or comparisons have been completed.
The prosecution shall also identify any laboratory having contact with evidence related to the prosecution of a charge. CPL § 245.20(2).
FCA § 331.2(1)(c)
Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the 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 presentment agency intends to call as a witness at a hearing, or which the presentment agency intends to introduce at a hearing.

Caselaw

Re reports made at request or direction of law enforcement, see People v. Rahman, 79 Misc.3d 129 (App. Term, 2d Dept., 2d, 11th & 13th Jud. Dist., 2023) (EMS and Fire Department records discoverable as "records … made by or at the request or direction of a public servant engaged in law enforcement activity").

Re: confidential records, see People v. Swift,
https://www.nycourts.gov/courts/AD1/calendar/appsmots/2020/January/2020_01_30_mot.pdf
at p. 55 (1st Dept. 2020) (defense counsel permitted to give defendant victim's medical records; People's policy arguments about general importance of medical record confidentiality irreconcilable with statutory discovery mandate).

Re: underlying notes, etc., and raw data, see People v. DaGata, 86 N.Y.2d 40 (1995) (FBI laboratory notes related to one-page DNA testing report were discoverable); *People v. Davis*, 196 A.D.2d 597 (2d Dept. 1993), *lv denied* 82 N.Y.2d 923 (1994) (population data-base and statistical standards used in DNA analysis were discoverable); *People v. Freshley*, 87 A.D.2d 104 (1st Dept. 1982) (where prosecution calls witness, expert or not, who testifies as to fact in issue or conclusion to be drawn, defendant entitled to examine underlying data that is basis for testimony).

Re: sanctions for failure to preserve evidence or untimely disclosure, see People v. Kelley, 19 N.Y.3d 887 (2012) (defendant's right to fair trial violated where People belatedly requested DNA analysis and disclosed results to defendant when trial was too far along for defense counsel to present new defense theory); *People v. Jenkins*, 98 N.Y.2d 280 (2002) (preclusion properly denied where late disclosure of ballistics report did not cause undue prejudice); *People v. Williams*, 176 A.D.3d 1122 (2d Dept. 2019), *lv denied* 34 N.Y.3d 1134 (precluding People from using evidence in case-in-chief, and allowing use on rebuttal after defendant denied participation in crime, was appropriate sanction for failure to disclose before trial fingerprint evidence implicating defendant's accomplice where evidence did not directly contradict defense theory and court afforded defense time to prepare and opportunity to retain fingerprint expert); *People v. Shapiro*, 117 A.D.2d 688 (2d Dept. 1986) (preclusion of lab test results was appropriate sanction for People's failure to preserve complainant's blood sample); *People v. Evans*, 111 A.D.2d 830 (2d Dept. 1985) (mistrial should have been declared when defendant learned during trial that his palmprint had been found at the scene).

Exculpatory/Favorable Evidence

CPL § 245.20(1)(k)
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 CPL § 245.10(1).
If the prosecution fails to disclose an electronic recording to the defendant pursuant to § 245.20(1)(k) due to a failure by police officers or other law enforcement or prosecution personnel to comply with the statutory obligation to preserve evidence, the court upon motion of the defendant shall impose an appropriate remedy or sanction pursuant to § 245.80. CPL § 245.55(3)(b).

FCA § 331.2(1)(g)

Anything required to be disclosed, prior to the fact-finding hearing, to the respondent by the presentment agency, pursuant to the constitution of this state or of the United States.

Caselaw

Re: disclosure of underlying police misconduct records, see People v. Hamizane, _Misc.3d_, 2023 WL 4852253 (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2023) (statute not limited to material related to subject matter of case, and, with respect to every listed potential police witness, People were obligated to disclose whether or not disciplinary records exist and provide defense with copies of existing records); *People v. Rodriguez*, 77 Misc.3d 23 (App. Term, 1st Dept., 2022) (People's Certificate of Compliance not valid where People failed to provide, inter alia, underlying impeachment materials); *Matter of Jayson C.*, 200 A.D.3d 447 (1st Dept. 2021) (denial of disclosure of underlying documents containing police officer impeachment information covered by CPL §245.20(1)(k)(iv) violated right to equal protection; need for impeachment evidence is equally crucial in criminal and juvenile delinquency proceedings); *People v. Basora*, 79 Misc.3d 1230(A) (Crim. Ct., Bronx Co., 2023) (People could not redact IAB files pursuant to Public Officers Law, and, if People want to withhold IAB complainants' information, they must seek protective order and cite POL § 89(2-b) as authority); *People v. Nisanov*, 78 Misc.3d 1224(A) (Crim. Ct., Queens Co., 2023) (court rejects People's contention that they may withhold information regarding "minor or technical violations" even if NYPD substantiates them); *People v. Rafoel*, 77 Misc.3d 1231(A) (Crim. Ct., Queens Co., 2023) (Jayson C.'s requirement that prosecution provide more than mere summaries was precedential holding necessary to resolution of issue on appeal).

Re: relevance of police misconduct, see People v. Hubbard, 132 A.D.3d 1013 (2d Dept. 2015) (order vacating judgment of conviction affirmed where court, inter alia, properly determined that undisclosed evidence concerning allegations that detective had procured false confession in unrelated matter, which led to federal lawsuit against, among others, the detective, was favorable to defense and material); *People v. Davis*, _Misc.3d_, 2023 WL 4627601 (Dist. Ct. of Suffolk County, 1st District, 2023) (although IAB reports

classified as exonerated or unfounded are not subject to disclosure, defendant should be given information regarding whether files exist so defense can attempt to raise good faith basis to question officer); *People v. Montgomery*, 74 Misc.3d 551 (Sup. Ct., N.Y. Co., 2022) (court denies disclosure of records classified as "unfounded," or "exonerated"; although defense attorney might have reasonable basis for believing truth of allegation, and thus have good faith basis for inquiry, such records do not tend to impeach since officer's denial does not impeach and in vast majority of cases officer will not newly acknowledge wrongdoing); *People v. Portillo*, 73 Misc.3d 216 (Sup. Ct., Suffolk Co., 2021) (People must disclose available IAB files regardless of police department's view of allegation as substantiated," "unsubstantiated," "unfounded," or "exonerated") *with People v. Castellanos*, 72 Misc.3d 371 (Sup. Ct., Bronx Co., 2021) (court concludes that, unlike facts underlying "exonerated" and "unfounded" complaints, facts underlying substantiated and unsubstantiated findings may provide good faith basis for cross examination); *Castellanos v. Kirkpatrick*, 2017 WL 2817048 (EDNY 2017), *appeal withdrawn* 2017 WL 7058071 (Brady violation where State withheld documents regarding allegations that detective had coerced suspects into signing false confessions, which supported petitioner's false confession theory); *People v. Hubbard*, 45 Misc.3d 328 (Sup. Ct., Suffolk Co., 2014) (Brady violation where key evidence was defendant's confession, and People failed to disclose evidence that, in unrelated case, detectives who took confession engaged in misconduct leading to false confession).

Re: misconduct records of non-testifying police, compare People v. Peralta, 79 Misc.3d 945 (Crim. Ct., Bronx Co., 2023) (People must disclose impeachment material regarding non-testifying witnesses when disclosures could assist in negating defendant's guilt, provide basis to suppress evidence, or support potential defense; and must disclose underlying CCRB files in their possession regarding testifying and non-testifying officers) and *Matter of E.S.*, 79 Misc.3d 681 (Fam. Ct., N.Y. Co., 2023) (prosecution obligated to disclose misconduct records of non-testifying officers because they tend to be favorable to defense, negate defendant's guilt, or support potential defense; although respondent made no offer of proof suggesting that records contained materials that would impeach credibility of testifying officer, respondent obviously was unable to glean such information from records to which he had no access) *with People v. Maldonado*, 77 Misc.3d 1232(A) (Crim. Ct., Bronx Co., 2023) (no provision expressly requires People to disclose materials tending to impeach credibility of non-testifying witnesses).

Re: CCRB records, see People v. Robinson, _Misc.3d_, 2023 WL 4718910 (Crim. Ct., Kings Co., 2023) (People must produce CCRB records that are in People's possession and make diligent, good faith effort to ascertain existence of information); *People v. Peralta*, 79 Misc.3d 945 (Crim. Ct., Bronx Co., 2023) (People must disclose underlying CCRB files in their possession regarding testifying and non-testifying officers); *People v. Sime*, 76 Misc.3d 1107 (Crim. Ct., Kings Co., 2022) (underlying documentation in possession of NYPD, including CCRB records, must be turned over); *People v. Soto*, 72 Misc.3d 1153 (Crim. Ct., N.Y. Co., 2021) (since CCRB is not law enforcement agency acting on government's behalf, People directed to disclose only those underlying CCRB records that are in People's possession); *People v. McKinney*, 71 Misc.3d 1221(A) (Crim.

Ct., Kings Co., 2021) (relevant CCRB records People had in their actual possession, if records were not available on CCRB's web site, were discoverable).

Re: records of civil lawsuits against police, see People v. Basora, 79 Misc.3d 1230(A) (Crim. Ct., Bronx Co., 2023) (People satisfied obligation with respect to officer's involvement in civil lawsuits where defendant was provided with salient identifiers, and, absent particularized argument that he was unable to obtain underlying records, defense counsel could not credibly argue that ability to investigate had been impeded).

Re: sealed records of police misconduct, see People v. Fortty, 78 Misc.3d 1229(A) (Crim. Ct., Bronx Co., 2023) (People not obligated to seek unsealing order).

Re: prosecutor's obligation to inquire into police misconduct, see People v. Johnson, 70 Misc.3d 1205(A) (County Ct., Albany Co., 2021) (prosecution must make reasonable inquiries of all police officers and other persons who participated in investigating or evaluating case); *People v. Rosario*, 70 Misc.3d 753 (County Ct., Albany Co., 2020) (People have affirmative duty to make inquiry of law enforcement witnesses to satisfy statute and constitutional obligations).

Re: misconduct by civilian witnesses, see People v. Hunter, 11 N.Y.3d 1 (2008) (Brady violation found where People withheld evidence that man named Parker had been indicted for raping same complainant some ten months after incident involving defendant, and that Parker admitted to having sex with complainant but said she consented to it; trial court would have had discretion to admit information about Parker's claim that complainant willingly had sex with him and then lied about it); *People v. Wilkins*, 216 A.D.3d 1359 (3d Dept. 2023) (non-prejudicial Brady violation where People failed to disclose substantiated allegations that forensic scientist who testified had cheated on TruAllele qualification exam and then lied to state investigators about her actions); *United States v. Walter*, 870 F.3d 622 (7th Cir. 2017) (prosecution failed to disclose that witness had disclosed that other witness, who had testified that he was no longer dealing drugs while cooperating with government, was in fact dealing drugs); *United States v. Olsen*, 704 F.3d 1172 (9th Cir. 2013), *cert denied* 134 S.Ct. 2711 (government violated Brady by failing to disclose results of internal investigation into forensic scientist that called into question his care in laboratory and credibility as witness); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011), *aff'd* 19 N.Y.3d 932 (Brady violation where People failed to disclose that witness's prior criminal activities included having acted as courier for someone by transporting guns or drugs); *People v. Suh*, 27 Misc.3d 143(A) (App. Term, 9th & 10th Jud. Dist., 2010), *lv denied* 15 N.Y.3d 896 (reversible error where prosecutor failed to disclose that, two years before trial, principal witness had been convicted, in same jurisdiction, of disorderly conduct upon plea entered in satisfaction of petit larceny charge and of unlawful possession of marihuana; "[m]atters of theft have 'very material relevance' for a person's capacity for 'individual dishonesty'"); *United States v. Velarde*, 485 F.3d 553 (10th Cir. 2007) (trial court directed to determine whether prosecution violated Brady by withholding evidence that complainant had made false allegations of sex abuse against school teacher and vice principal); *People v. Santiago*, 138 A.D.2d 327 (2d Dept. 1988) (conviction vacated where complainant admitted to trespass conviction, but

defendant later learned that conviction was for felony of attempted burglary and that complainant had outstanding probation violation).

Re: prior inconsistent statements, see Smith v. Cain, 565 U.S. 73 (2012) (reversible error where witness told jury he had "[n]o doubt" that defendant was gunman he stood "face to face" with, but prosecution did not inform defense that witness previously said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them"); *People v. Bond*, 95 N.Y.2d 840 (2000) (witness' prior statement that she did not see shooting would have created reasonable possibility of different verdict); *People v. Lantigua*, 228 A.D.2d 213 (1st Dept. 1996) (People failed to disclose evidence which, when viewed with other evidence, indicated that witness was distracted while shooting was in progress); *People v. Clausell*, 182 A.D.2d 132 (2d Dept. 1992), *lv denied* 81 N.Y.2d 761 (undisclosed buy report contained description of seller that differed from arresting officer's testimony).

Re: witness bias/interest, see People v. Giuca, 33 N.Y.3d 462 (2019) (although there was no cooperation agreement with witness, People have responsibility to disclose favorable information tending to show that witness had incentive to testify falsely in order to curry favor with prosecution on open criminal case, and, in this case, witness may have perceived that testimony at defendant's trial would help him remain in drug treatment program given that he was repeatedly released, without People's objection, despite drug treatment violations); *People v. Wright*, 86 N.Y.2d 591 (1995) (complainant's history as informant should have been disclosed, since it provided motive for police witnesses to support complainant's version of events); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011), *aff'd* 19 N.Y.3d 932 (Brady violation where People failed to disclose that witness believed defendant caused him to be charged with violating probation); *People v. Smith*, 127 A.D.2d 864 (2d Dept. 1987) (Brady violation occurred where People failed to inform defendant of possible conspiracy against him involving officer and 2 persons with suspected ties to organized crime); *People v. Velez*, 118 A.D.2d 116 (1st Dept. 1986) (Brady violation occurred where People withheld fact that key prosecution witness believed defendant had robbed his wife 2 weeks before trial).

Re: witnesses' conflicting statements, see People v. Geaslen, 54 N.Y.2d 510 (1981) (Brady violation occurred at suppression hearing when prosecutor failed to disclose grand jury testimony of police officer whose testimony conflicted with that of parole officer who testified at hearing); *People v. Hopper*, 87 A.D.2d 193 (1st Dept. 1982) (Brady violation occurred where grand jury testimony of uncalled witness conflicted with trial witness' testimony and indicated that trial witness had been involved in charged crime).

Re: surveillance videos, see People v. Ulett, 33 N.Y.3d 512 (2019) (reversible error where People failed to disclose surveillance video that captured scene at time of shooting, and tape contradicted witness's statement that he was alone with victim shortly before and after shooting).

Re: witness's mental health issues, see People v. Fuentes, 12 N.Y.3d 259 (2009) (although disclosure of "record of consultation" in which psychiatrist noted rape victim's

feelings of depression and minimal marijuana use would not have altered outcome of case, court "do[es] not condone the People's decision to withhold the document from defendant or their failure to, at a minimum, inform the trial judge about it and request an in camera inspection to determine its admissibility"; habeas relief granted in *Fuentes v. Griffin*, 829 F.3d 233); *People v. Ramos*, 201 A.D.2d 78 (1st Dept. 1994) (People failed to disclose, inter alia, evidence of alleged child sex abuse victim's sexually-oriented behavior).

Re: evidence of other perpetrator, see People v. Rong He, 34 N.Y.3d 956 (2019) (favorable evidence was material under Brady where witness told police that he saw two people approach one victim and strike him with beer bottle, and identified someone other than defendant as one of the assailants, and another witness arguably corroborated this description when he called 911 and claimed that two men "stated that they were going to come back with a gun when leaving location"); *People v. Negron*, 26 N.Y.3d 262 (2015) (noting that third-party culpability evidence is evaluated under ordinary evidentiary principles by balancing probative value against potential for undue prejudice, delay and confusion, court concludes that counsel was ineffective for failing to object to court's use of incorrect standard, and finds Brady violation, where no evidence established that third party committed shooting, but he did bear general resemblance to description of perpetrator, lived in same building as defendant, and was arrested in close proximity to time of offense for possessing weapons and ammunition, including type of ammunition used in shooting, under circumstances evincing consciousness of guilt); *People v. Ramunni*, 203 A.D.3d 1076 (2d Dept. 2022) (reversible error where 911 caller who witnessed incident gave description of assailant that did not match defendant, and although People disclosed caller's statement, they redacted caller's identity and contact information and denied defendant's request for caller's identity); *Mendez v. Artuz*, 303 F.3d 411 (2d Cir. 2002) (prosecution failed to disclose to defense that drug dealer had placed contract on life of victim).

FOIL Provisions Re: Law Enforcement Disciplinary Records

Public Officers Law § 86(6) ("Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.);
Public Officers Law § 86(7) ("Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.);
Public Officers Law § 86(8) ("Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in Criminal Procedure Law § 1.20, a sheriff's department, the department of corrections and

community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.);
Public Officers Law § 86(9) ("Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.);
Public Officers Law § 87(4-a) (A law enforcement agency responding to a request for law enforcement disciplinary records as defined in POL § 86 shall redact any portion of such record containing the information specified in POL § 89(2-b) prior to disclosing such record under this article.);
Public Officers Law § 87(4-b) (A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in POL § 86, may redact any portion of such record containing the information specified in POL § 89(2-c) prior to disclosing such record under this article.);
Public Officers Law § 89(2-b) (For records that constitute law enforcement disciplinary records as defined in POL § 86(6), a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article: (a) items involving the medical history of a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation; (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant Civil Service Law (CSL) Article Fourteen, or in accordance with CSL § 208(4), or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment; (c) any social security numbers; or (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in POL § 86 as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.);
Public Officers Law § 89(2-c) (For records that constitute "law enforcement disciplinary records" as defined in POL § 86(6), a law enforcement agency may redact records pertaining to technical infractions as defined in POL § 86(9) prior to disclosing such records under this article.).

Witness Cooperation Agreements

CPL § 245.20(1)(l)

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.
No FCA counterpart, although it may be discoverable as evidence favorable to defense).

Caselaw

People v. Colon, 13 N.Y.3d 343 (2009) (reversible error where prosecutor, inter alia, failed to disclose that People were assisting in relocation of witness's grandparents or that prosecutor had intervened on witness's behalf in connection with previous drug case); *People v. Steadman*, 82 N.Y.2d 1 (1993) (prosecutor's office as a whole has obligation and may not "shield" witness and trial assistants from knowledge of agreement); *People v. Novoa*, 70 N.Y.2d 490 (1987) (prosecutor failed to discover witness' agreement with Special Narcotics Prosecutor's office, and failed to disclose prosecutor's own promises or correct witness' misstatements); *People v. Cwikla*, 46 N.Y.2d 434 (1979) (prosecutor failed to disclose correspondence between DA's office and Parole Board); *People v. Flores*, _Misc.3d_, 191 N.Y.S.3d 322 (1st Dept. 2023) (conviction vacated where People failed to disclose evidence that District Attorney's Office was helping complainant obtain immigration benefit known as U visa); *People v. Smith*, 85 A.D.3d 1297 (3d Dept. 2011) (defendant should have been informed that prosecution witness had been offered favorable plea bargain even though there was no evidence plea was related to witness's appearance at defendant's trial); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011), *aff'd* 19 N.Y.3d 932 (conviction for bribing witness reversed where People failed to disclose, until after witness testified, e-mails to witness's mother from prosecutors in which prosecutor stated that she would "do everything in [her] power" to make Connecticut prosecutors who were prosecuting witness on probation violation charges "see that [the witness] deserved a break because of what had happened to him when he was younger"; prosecutors told mother they had arranged for witness to receive phone privileges at youth institution where he was incarcerated so he could call her; and prosecutor informed mother that she had arranged to stop witness from being transferred to adult facility); *People v. Conlon*, 146 A.D.2d 319 (1st Dept. 1989) (trial prosecutor should have known of promise, and, in any event, was chargeable with knowledge of deal made by another prosecutor).

<u>Tangible Objects Obtained From or Allegedly Possessed By Accused</u>

CPL § 245.20(1)(m)
A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant's possession of any tangible objects by means of a statutory presumption of possession, it shall designate

such intention as to each such object. If reasonably practicable, the prosecution shall also designate the location from which each tangible object was recovered. There is also a right to inspect, copy, photograph and test the listed tangible objects.

FCA § 331.2(1)(e)

Any other property obtained from the respondent or a co-respondent.

Caselaw

Re: sanctions for failure to preserve evidence or untimely disclosure, see People v. Dory, 59 N.Y.2d 121 (1983) (no error where, after late disclosure at commencement of trial, trial court excluded physical evidence but admitted testimony concerning items, and court's original ruling allowing introduction of physical evidence as well was proper); *People v. Gomez-Kadawid*, 66 A.D.3d 1124 (3d Dept. 2009) (in promoting prison contraband prosecution, People's failure to preserve pants that contained heroin should have resulted in instruction to jury that, had pants been produced, defendant would have proven they were not assigned to him and he was wearing someone else's pants); *People v. Cobb*, 198 A.D.2d 128 (1st Dept. 1993) (dismissal of criminal mischief and burglar's tools charges proper where bolt cutter allegedly used by defendant was lost); *People v. Terrell*, 185 A.D.2d 906 (2d Dept. 1992) (first degree robbery charge dismissed because police destroyed gun); *People v. Samuels*, 185 A.D.2d 903 (2d Dept. 1992), *lv denied* 81 N.Y.2d 794 (1993) (since police destroyed gun allegedly used in robbery without testing it and foreclosed defendant from proving it was inoperable, court reduces first degree robbery conviction to one for third degree robbery); *People v. Scalzo*, 176 A.D.2d 363 (2d Dept. 1991), *order amended* 178 A.D.2d 444, *appeal withdrawn* 79 N.Y.2d 1045 (1992) (sanction required where People failed to preserve defendant's blood sample); *People v. Deresky*, 137 A.D.2d 704 (2d Dept. 1988) (preclusion of ballistics reports and expert testimony, resulting in dismissal of one count and acquittal on another, was appropriate sanction for inadvertent destruction of gun).

Search Warrant Information (no FCA counterpart)

CPL § 245.20(1)(n)

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

Caselaw

See People v. Hirsch, _Misc.3d_, 2023 WL 4096863 (Sup. Ct., Queens Co., 2023) (defendant, facing weapon possession charges, entitled to discovery of search warrant documents relating to investigation of murder allegedly committed by defendant's husband where similar, if not identical, facts were contained in probable cause affidavits and firearms ballistic reports underpinning defendant's indictment all list husband as defendant; *People v. Thompson*, 79 Misc.3d 1220(A) (Crim. Ct., Kings Co., 2023) (search warrant materials related to dismissed charge remained relevant to remaining charge

since material was reasonably likely to be material, especially when determining credibility of complainant); *but see People v. Castillo*, 80 N.Y.2d 578 (1992) (court may, in appropriate circumstances, conduct ex parte review of search warrant applications and affidavits in order to protect identity of confidential informant); *People v. Richards*, 77 Misc.3d 616 (Sup. Ct., Erie Co., 2022) (defendant not entitled to transcript of informant's in camera testimony, which was not provided to People; legislative intent cannot possibly be elimination of confidential in camera testimony that serves as basis of search warrant).

Tangible Property Relating To Case (no FCA counterpart)

CPL § 245.20(1)(o)
All tangible property that relates to the subject matter of the case, along with a designation of which items the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in CPL § 245.10(1) that an item under this subdivision will be introduced at trial or a pre-trial hearing, the prosecution shall notify the defendant in writing, and the time period in which to designate items as exhibits shall be stayed without need for a motion pursuant to CPL § 245.70(2); but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in CPL § 245.60.

Witness Record Of Convictions and Pending Actions

CPL § 245.20(1)(p)
A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.
CPL § 245.20(1)(q)
When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision.
No FCA § 331.2(1) counterpart, but discovery required at hearings under FCA § 331.4(1)(b) and (c), (3)(b) and (c).
Under § 331.4(1)(b), the presentment agency shall, subject to a protective order, make available at the commencement of the fact-finding hearing a record of judgment of conviction of a witness the presentment agency intends to call at the fact-finding hearing if such record is known by the presentment agency to exist, and, under (c), must disclose the existence of any pending criminal action against a witness the presentment agency intends to call at the fact-finding hearing, if the pending criminal action is known by the presentment agency to exist. These provisions shall not be construed to require the presentment agency to fingerprint a witness or otherwise cause the Division of Criminal Justice Services or other law enforcement agency or court to issue a report concerning a witness.
Under § 331.4(3)(b) and (c), upon request by the respondent and subject to a protective order, the presentment agency has the same obligation at a suppression hearing at the conclusion of the direct examination of each of its witnesses.

Reciprocal Discovery Under FCA
Under § 331.4(2), at the conclusion of the presentment agency's direct case at fact-finding and before the commencement of the respondent's direct case, and subject to a protective order, the respondent shall make the information available to the presentment agency. At a suppression hearing, the respondent has the same obligation as the presentment agency under § 331.4(3)(b) and (c) to make the information available upon request and subject to a protective order at the conclusion of the direct examination of defense witnesses.

Caselaw

Re: materials that must be disclosed, compare (pre-Article 245) *People v. Adeyemi*, 32 A.D.3d 755 (1st Dept. 2006) (statute satisfied where defendant received Penal Law sections violated and dates of convictions, but not docket numbers); *People v. Moore*, 244 A.D.2d 776 (3d Dept. 1997), *lv denied* 91 N.Y.2d 975 (1998) (no violation where defendant was given tabular list of witness' prior convictions, which set forth in each case the date of conviction, the county and the offense) and *People v. Rodriguez*, 152 Misc.2d 328, 576 N.Y.S.2d 488 (Sup. Ct. Monroe Co., 1991) (People must disclose existence of sealed record of conviction) *with* (post-Article 245) *People v. Hacamet*, 79 Misc.3d 904 (Crim. Ct., Queens Co., 2023) (providing list containing witness's conviction history not enough to comply with requirement that People disclose "complete record of judgments of conviction for … all persons designated as potential prosecution witnesses") and *People v. Soto*, 72 Misc.3d 1153 (Crim. Ct., N.Y. Co., 2021) (discovery inadequate where People provided only statement that witness was convicted under a specified Florida Statute on a specified date; People ordered to provide docket number, subsection of statute, court in which conviction occurred, sentence imposed, and any other materials concerning conviction in People's possession, custody or control).

Offenses and Arrest/Seizure Dates

CPL § 245.20(1)(r)
The approximate date, time and place of the offense or offenses charged and of the defendant's seizure and arrest.
FCA § 331.2(1)(h)
The approximate date, time and place of the offense charged and of respondent's arrest.

DWI-Related Testing Information (no FCA counterpart)

CPL § 245.20(1)(s)
In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related to the certification of all reference

standards and the certification certificate, if any, held by the operator of the machine or instrument. The time period required by CPL § 245.10(1) shall not apply to the disclosure of records created six months after a test was conducted, but such disclosure shall be made as soon as practicable and, in any event, the earlier of fifteen days following receipt, or fifteen days before the first scheduled trial date.

Computer Offenses (no FCA counterpart)

CPL § 245.20(1)(t)
In any prosecution alleging a violation of PL § 156.05 or § 156.10, the time, place and manner such violation occurred.

Electronically Created Or Stored Information (no FCA counterpart)

CPL § 245.20(1)(u)
(i) A copy of all electronically created or stored information seized or obtained by or on behalf of law enforcement from:
(A) the defendant as described in subparagraph (ii) of this paragraph; or
(B) a source other than the defendant which relates to the subject matter of the case.
(ii) If the electronically created or stored information originates from a device, account, or other electronically stored source that the prosecution believes the defendant owned, maintained, or had lawful access to and is within the possession, custody or control of the prosecution or persons under the prosecution's direction or control, the prosecution shall provide a complete copy of the electronically created or stored information from the device or account or other source.
(iii) If possession of such electronically created or stored information would be a crime under New York state or federal law, the prosecution shall make those portions of the electronically created or stored information that are not criminal to possess available as specified under this paragraph and shall afford counsel for the defendant access to inspect contraband portions at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, or court.
(iv) This paragraph shall not be construed to alter or in any way affect the right to be free from unreasonable searches and seizures or such other rights a suspect or defendant may derive from the state constitution or the United States constitution. If in the exercise of reasonable diligence the information under this paragraph is not available for disclosure within the time period required by CPL § 245.10(1), that period shall be stayed without need for a motion pursuant to CPL § 245.70(2), except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than forty-five calendar days before the first scheduled trial date, unless an order is obtained pursuant to CPL § 245.70.

Disclosure Prior To Guilty Pleas (no FCA counterpart)

Upon the filing of an accusatory instrument, where the prosecution has made a guilty plea offer requiring a plea to a crime, the prosecutor must disclose to the defense, and permit the defense to discover, inspect, copy, photograph and test, all items and information that

would be discoverable prior to trial under § 245.20(1) and are in the possession, custody or control of the prosecution. CPL §245.25(1), (2).
The prosecution shall disclose the discoverable items and information not less than three (or, in some cases, seven) calendar days prior to the expiration date of any guilty plea offer by the prosecution or any deadline imposed by the court for acceptance of the guilty plea offer. If the prosecution does not comply with these requirements, then, on a defendant's motion alleging a violation, the court must consider the impact of any violation on the defendant's decision to accept or reject a plea offer. CPL § 245.25(1), (2).
If the court finds that such violation materially affected the defendant's decision, and if the prosecution declines to reinstate the lapsed or withdrawn plea offer, the court - as a presumptive minimum sanction - must preclude the admission at trial of any evidence not disclosed as required. The court may take other appropriate action as necessary to address the non-compliance. CPL § 245.25(1), (2).
These rights do not apply to items or information that are the subject of a protective order, but if such information tends to be exculpatory, the court shall reconsider the protective order. A defendant may waive these rights but a guilty plea offer may not be conditioned on such waiver. CPL § 245.25(1), (2).

Reciprocal Demand Disclosure Under FCA Article Three

Except to the extent protected by court order, upon demand to produce by the presentment agency, the respondent shall disclose and make available for inspection, photography, copying or testing, subject to constitutional limitations: (a) any written report or document, or portion thereof, concerning a physical examination, or scientific test, experiment, or comparison, made by or at the request or direction of, the respondent, if the respondent intends to introduce such report or document at a hearing, or if the respondent has filed a notice of defense of mental disease or defect pursuant to FCA § 335.1 and such report or document relates thereto, or if such report or document was made by a person, other than respondent, whom respondent intends to call as a witness at a hearing; and (b) any photograph, drawing, tape or other electronic recording which the respondent intends to introduce at a hearing. FCA § 331.2(3).
Except to the extent protected by court order, upon demand to produce by the presentment agency, a respondent who has served a written notice, under FCA § 335.1, of intention to rely upon the defense of mental disease or defect shall disclose and make available for inspection, photography, copying or testing, subject to constitutional limitations, any written report or document, or portion thereof, concerning a mental examination made by or at the request or direction of the respondent. FCA § 331.2(4).
The respondent shall make a diligent good faith effort to make such property available for discovery where it exists but the property is not within his possession, custody or control, provided that the respondent shall not be required to obtain by subpoena duces tecum demanded material that the presentment agency may thereby obtain. FCA § 331.2(5).
Note: Reciprocal discovery under CPL § 245.20(4) is broader, but the presentment agency cannot make an Equal Protection argument that it is entitled to the same discovery as the People.

Caselaw

Re: intent to call witness or introduce evidence, see People v. O'Brien, 140 A.D.3d 1325 (3d Dept. 2016) (preclusion of defendant's medical records as sanction for late disclosure soon after commencement of trial was error where defense counsel did not intend to utilize records until hearing trooper's suppression hearing testimony, and court could have granted one-day continuance for prosecutor to review records and/or pared down admitted portion, as defense counsel offered); *People v. Goldstein*, 65 Misc.3d 645 (Sup. Ct., Kings Co., 2019) (People not entitled to disclosure where defendant had stated to officer that he had recording of discussion with defense counsel, but that did not demonstrate that defense counsel intended to offer recording into evidence at trial); *People v. Soto*, 16 Misc.3d 1115(A) (Sup. Ct., Queens Co., 2007) (defendant not required to disclose recording of complainant's statements to defense investigators; although People argue that it is reasonably predictable that defense will use recording for impeachment, defendant has indicated that he has no present intent to use it).

Re: constitutional objection to defense disclosure obligation, see Facebook, Inc. v. Superior Court of San Diego County, 471 P.3d 383 (Cal. 2020) (in case involving subpoena served on Facebook seeking restricted posts and private messages of complainant, which was issued without adequate notice to complainant or People, court highlights factors courts should consider when balancing People's right to due process and meaningful opportunity to effectively challenge discovery request against defendant's constitutional rights and need to protect defense counsel's work product); *In re Colorado v. Kilgore*, 455 P.3d 746 (Colo. 2020) (court had no authority to order parties to exchange exhibits thirty days prior to trial; state discovery rule did not include exhibits, and court also potentially infringed on defendant's right to due process because compliance with disclosure order could help prosecution meet burden of proof and order compelled defendant to reveal exculpatory evidence, tip his hand vis-à-vis his investigation and the theory of his defense, and share with prosecution his trial strategy); *Kling v. Superior Court*, 239 P.3d 670 (Cal. 2010) (court's role when presented with materials produced under defense subpoena duces tecum to third party is to balance People's right to due process and meaningful opportunity to effectively challenge discovery request against defendant's constitutional rights and need to protect defense counsel's work product; defendant's constitutional rights usually can be protected by redacting materials that disclose privileged information or attorney work product, by conducting portions of in camera hearing ex parte, and by withholding disclosure to prosecution of records until defense has determined it intends to offer them in evidence at trial); *People v. Van Dyne*, 175 Misc.2d 558 (County Ct., Monroe Co., 1998) (since defendant has right to gather information without alerting prosecution to defense, court will allow defendant opportunity to present ex parte application for subpoenas and will determine whether notice to the adverse party will be required).

Open Discovery: Prosecution And Law Enforcement Agency Communication And Duties

CPL Article 245

There shall be a presumption in favor of disclosure when interpreting §§ 245.10 and 245.25, and § 245.20(1). CPL § 245.20(7).

The district attorney and the assistant responsible for the case, or, if the matter is not being prosecuted by the district attorney, the prosecuting agency and its assigned representative, shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offenses charged, including, but not limited to, any evidence or information discoverable under § 245.20(1)(k). CPL § 245.55(1).

Absent a court order or a requirement that defense counsel obtain a security clearance mandated by law or authorized government regulation, upon request by the prosecution, each New York state and local law enforcement agency shall make available to the prosecution a complete copy of its complete records and files related to the investigation of the case or the prosecution of the defendant for compliance with this article. CPL § 245.55(2).

Whenever an electronic recording of a 911 telephone call or a police radio transmission or video or audio footage from a police body-worn camera or other police recording was made or received in connection with the investigation of an apparent criminal incident, the arresting officer or lead detective shall expeditiously notify the prosecution in writing upon the filing of an accusatory instrument of the existence of all such known recordings. The prosecution shall expeditiously take whatever reasonable steps are necessary to ensure that all known electronic recordings of 911 telephone calls, police radio transmissions and video and audio footage and other police recordings made or available in connection with the case are preserved. Upon the defendant's timely request and designation of a specific electronic recording of a 911 telephone call, the prosecution shall also expeditiously take whatever reasonable steps are necessary to ensure that it is preserved. CPL § 245.55(3)(a).

If the prosecution fails to disclose such an electronic recording to the defendant pursuant to § 245.20(1)(e), (1)(g) or (1)(k) due to a failure to comply with this obligation by police officers or other law enforcement or prosecution personnel, the court upon motion of the defendant shall impose an appropriate remedy or sanction pursuant to § 245.80. CPL § 245.55(3)(b).

FCA Article Three

The presentment agency shall make a diligent, good faith effort to ascertain the existence of property demanded and to cause such property to be made available for discovery where it exists but is not within the presentment agency's possession, custody or control; provided, that the presentment agency shall not be required to obtain by subpoena duces tecum demanded material which the respondent may thereby obtain. FCA § 331.2(2)(a).

In any case in which the property includes grand jury testimony, the presentment agency shall forthwith request that the district attorney provide a transcript of such testimony; upon receiving such a request, the district attorney shall promptly apply to the appropriate criminal court, with written notice to the presentment agency and the respondent, for a written order pursuant to Judiciary Law § 325 releasing a transcript of testimony to the presentment agency. FCA § 331.2(2)(b).

Continuing Duty To Disclose

CPL § 245.60
If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of Article 245 had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this article. This section also requires expeditious disclosure by the prosecution of material or information that became relevant to the case or discoverable based on reciprocal discovery received from the defendant pursuant to CPL § 245.20(4).
FCA § 331.5(4)
If additional discoverable material is acquired after initial discovery proceedings have been completed, a party shall promptly comply with the demand or court order, refuse to comply where refusal is authorized, or apply for a protective order.

Request For Bill Of Particulars

Scope Of Disclosure
A "Bill of particulars" is a written statement by the presentment agency specifying, as required by this section, items of factual information which are not recited in the petition and which pertain to the offense charged and including the substance of each respondent's conduct encompassed by the charge which the presentment agency intends to prove at a fact-finding hearing on its direct case, and whether the presentment agency intends to prove that the respondent acted as principal or accomplice or both. However, the presentment agency shall not be required to include in the bill of particulars matters of evidence relating to how the presentment agency intends to prove the elements of the offense charged or how the presentment agency intends to prove any item of factual information included in the bill of particulars. FCA § 330.1(1)(a):
A bill of particulars "merely amplifies or enlarges upon the pleadings [citation omitted]," and, therefore, is a much more limited discovery device than a demand to produce or the presentment agency's Voluntary Disclosure Form. *People v. Brandt*, 75 Misc.3d 1204(A) (Sup. Ct., Onondaga Co., 2022) (acts that were subject of People's Molineux application were not within scope of bill of particulars discovery).
However, in *People v. Iannone*, 45 N.Y.2d 589 (1978), the Court of Appeals noted that "[i]t is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense." 45 N.Y.2d at 599.
In delinquency cases, the supporting depositions must contain evidentiary allegations which, if true, establish a prima facie case [*see Matter of Jahron S.*, 79 N.Y.2d 632 (1992)], and, therefore, the respondent is often faced with fairly detailed factual allegations. However, when the respondent is alleged to have acted in concert with others, the petition may allege conduct establishing the elements of the charged offenses, but fail to specify which respondent performed which acts. The statute makes it clear that a respondent charged under a theory of accessorial liability is entitled to notice of the acts that he or she is alleged to have committed personally.

Procedure

A bill of particulars is sought by way of a "Request for a bill of particulars," which "is a written request served by respondent upon the presentment agency, without leave of the court, requesting a bill of particulars, specifying the items of factual information desired, and alleging that respondent cannot adequately prepare or conduct his defense without the information requested." FCA § 330.1(1)(b).

The request must be made within 30 days after the conclusion of the initial appearance, and, in any event, before the commencement of trial. If there are delays in the appearance of an attorney for the child, the 30 days start running on the date the child's attorney initially appears. If good cause for late service of a request is shown, the court may direct compliance. FCA § 330.1(3).

Since discovery motions ordinarily must be made within 30 days after the conclusion of the initial appearance [FCA § 332.2(1)], and all applications are supposed to be included within the same set of motion papers "wherever practicable" [FCA §332.2(2)], the AFC may choose to serve the request within 15 days after the initial appearance so that the presentment agency's service of a written refusal, or the presentment agency's failure to respond on time, will have occurred prior to the 30-day deadline.

However, the fact remains that the statute creates a right to a 30-day period, which cannot be abridged by the court without compelling reason. *See Matter of Veloz v. Rothwax*, 65 N.Y.2d 902 (1985) (court improperly ordered service of motions prior to 45-day CPL deadline).

If the respondent chooses to use up the entire 30-day period, then one set of motion papers is not practicable, and a motion to compel service of a bill of particulars "could not reasonably have [been] raised" within 30 days [*see* FCA §332.2(3)].

Upon a timely request, the presentment agency must, within 15 days after service, serve upon the respondent or counsel, and file with the court, the bill of particulars. If the respondent is on remand, the child's attorney should ask the court to direct, and the court shall direct, the filing of the bill of particulars on an expedited basis prior to the commencement of the fact-finding hearing. FCA § 330.1(2).

Refusal Of Request

The presentment agency may refuse to comply with the request for a bill of particulars or any portion of the request for a bill of particulars to the extent it reasonably believes that the item of factual information requested is not authorized to be included in a bill of particulars, or that such information is not necessary to enable the respondent adequately to prepare or conduct his defense, or that a protective order would be warranted or that the demand is untimely. The refusal must be in writing, set forth the grounds for refusing disclosure, and be served upon the respondent and filed with the court within 15 days of the request or "as soon thereafter as practicable." FCA § 330.1(4).

Obviously, when the respondent has been remanded pending trial, the court should require that a refusal be made earlier. See FCA § 330.1(2).

Drafting The Request For A Bill Of Particulars

To avoid receiving a response that merely refers the respondent to the depositions attached to the petition, to the VDF, or to other documents, or makes a conclusory assertion that the information sought is evidentiary, the AFC must be careful not to make the request for information too general. The AFC should use the supporting deposition as

a point of departure, and, if more specific facts are desired, ask the presentment agency to elaborate upon language that is already in the deposition.
There is nothing improper, or unwise, about requesting items of information that are already contained in a supporting deposition or another document in the AFC's possession. While a supporting deposition can be used to impeach a witness, a bill of particulars is a formal document that further locks the presentment agency into a particular theory.

Protective Orders
Upon a motion brought by the presentment agency or any affected person, upon its own initiative or when it decides the respondent's motion for a court-ordered bill of particulars, the court may issue a protective order denying, limiting, conditioning, delaying or regulating the bill of particulars for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the need for the bill of particulars. FCA § 330.1(7)(a). The protective order may require that information contained in or derived from the bill of particulars be maintained in the exclusive possession of the respondent's attorney and be used only for preparation of a defense in the delinquency proceeding. FCA § 330.1(7)(b).

Amendment
Before the commencement of the fact-finding hearing, the presentment agency may, without leave of court, serve upon the respondent and file with the court an amended bill of particulars. Upon the presentment agency's application, made with notice to the respondent, the court may, after giving the respondent an opportunity to be heard, permit the presentment agency to amend the bill of particulars during the hearing upon a finding that no undue prejudice will result and that the presentment agency has acted in good faith. Regardless of when an amendment is permitted, the court must, upon the respondent's application, adjourn the fact-finding hearing or take any other appropriate action to insure that the respondent has an adequate opportunity to prepare. FCA § 330.1(8).
During trial, the court may not permit an amendment to the bill of particulars, or the presentation of evidence that varies from the bill of particulars, where the result is a prejudicial change in the theory of prosecution. *See People v. Howard*, 163 A.D.2d 846 (4th Dept. 1990), *lv denied* 77 N.Y.2d 996 (1991) (at rape trial, People could not employ theory of forcible compulsion that was not advanced in the bill of particulars); *Matter of Elliton J.*, 120 Misc.2d 392 (Fam. Ct. Queens Co., 1983) (presentment agency could not proceed at trial under subdivision of PL § 120.05 different from the one specified in prosecutor's response to dismissal motion); *but see People v. Kavvadas*, 43 Misc.3d 137(A) (App. Term, 2d Dept., 2014) (where superseding information was filed, People were no longer limited by theory of case as set forth in bill of particulars filed in connection with original information).

Supplemental Discovery: Uncharged Misconduct And Criminal Acts Of Accused

As soon as practicable but not later than 15 calendar days prior to the first scheduled trial date [CPL § 245.10(b)], the prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of
(a) impeaching the credibility of the defendant, or
(b) as substantive proof of any material issue in the case.
The prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof. CPL § 245.20(3).
No FCA counterpart, *but see People v. Ventimiglia*, 52 N.Y.2d 350 (1981) (prior to Molineux testimony, "prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court"); *Matter of Daniel C.*, 29 Misc.3d 548 (Fam. Ct., Queens Co., 2010) (citing former CPL § 240.43, court orders presentment agency to notify respondent of prior uncharged criminal, vicious or immoral conduct agency intended to use to impeach respondent's credibility if he testified at trial).

Remedies Or Sanctions For Non-Compliance With Automatic Discovery

CPL Article 245
Obligations specified in CPL § 245.20(1) - (4) shall have the force and effect of a court order, and failure to provide discovery pursuant to those provisions may result in application of any remedies or sanctions permitted for non-compliance with a court order under § 245.80. CPL § 245.20(5).
When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that it was prejudiced. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material. CPL § 245.80(1)(a).
When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy or sanction is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure. CPL § 245.80(1)(b).
The failure of the prosecutor or any agent of the prosecutor to disclose any written or recorded statement made by a prosecution witness which relates to the subject matter of the witness's testimony shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction, in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a reopened pre-trial hearing when such statements were disclosed before the close of evidence at trial. CPL § 245.80(3).
FCA § 331.6(1)

If, during the course of discovery proceedings, the court finds that a party has failed to comply with any of the provisions of FCA §§ 331.2 through 331.7, the court may order such party to permit discovery of the property not previously disclosed, grant a continuance, issue a protective order, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action.

Re: sanctions for failure to preserve material that is not automatically discoverable, see People v. Handy, 20 N.Y.3d 663 (2013) (adverse inference charge should have been given where defendant sought access to surveillance tapes but images had been destroyed because of jail policy to record over images after 30 days; jury should be told it may draw inference in defendant's favor where defendant, using reasonable diligence, requested evidence reasonably likely to be material but evidence has been destroyed by State agents); *People v. Allgood*, 70 N.Y.2d 812 (1987) (while concluding that inadvertent destruction of "rape kit" did not require reversal, Court of Appeals notes that defendant was aware of existence of rape kit some 8 months before it was destroyed, but did not express an interest in testing it until he learned that it had been destroyed).

Notice Of Alibi Witnesses Under FCA Article Three

At any time not more than 15 days after the conclusion of the initial appearance and before the fact-finding hearing the presentment agency may serve upon the respondent and file a copy thereof with the court, a demand that if the respondent intends to offer a defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must within 10 days of service of such demand, serve upon such agency, and file a copy thereof with the court, a “notice of alibi”, reciting; (a) the place or places where the respondent claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for service of the notice. FCA § 335.2(1).

Within a reasonable time after receipt of the respondent's witness list but not later than 10 days before the fact-finding hearing, the presentment agency must serve upon the respondent and file a copy thereof with the court, a list of witnesses such agency proposes to offer in rebuttal to discredit the respondent's alibi at the trial together with the residential addresses, the places of employment and the addresses thereof of any such rebuttal witnesses. A witness who will testify that the respondent was at the scene of the crime is not such an alibi rebuttal witness. For good cause shown, the court may extend the period for service. FCA § 335.2(2).

If at the trial the respondent calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the presentment agency, grant a reasonable adjournment. FCA § 335.2(3). Similarly, if the presentment agency fails to serve and file a list of any rebuttal witnesses, the provisions of (3) shall reciprocally apply. FCA § 335.2(4).

The respondent and the presentment agency shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing a witness list. FCA § 335.2(5).

Caselaw

Respondent's own testimony may not be precluded as a sanction. People v. Dawkins, 289 A.D.2d 589 (2d Dept. 2001); *People v. Peace*, 256 A.D.2d 1014 (3d Dept. 1998).

Re: evidence that is not true alibi evidence, and thus not covered by statute, compare State v. Deffebaugh, 89 P.3d 582 (Kansas 2004) (alibi notice statute does not apply to witness who would testify that he was at scene of crime but defendant was not there); *Edwards v. State*, 930 N.E.2d 48 (Ind. Ct. App. 2010) (same as *Deffebaugh*); *State v. Volpone*, 376 A.2d 199 (N.J. App. Div. 1977) (same as *Deffebaugh*); *People v. Hicks*, 94 A.D.3d 1483 (4th Dept. 2012) (testimony regarding defendant's activity at least one hour before crimes would not have accounted for defendant's whereabouts during crime or placed him away from crime scene shortly thereafter and thus did not constitute alibi testimony; fact that testimony may be taken as circumstantial alibi evidence does not require that notice be given); *People v. Green*, 70 A.D.3d 39 (2d Dept. 2009) (no alibi notice required where defense counsel stated that she was offering testimony solely for purpose of impeaching other witness's account of what happened some 40 minutes before crime) and *People v. Nichols*, 289 A.D.2d 605 (3d Dept. 2001) (testimony placing victim at place other than scene of crime, which corroborated defendant's testimony that he was not with victim at time she testified crime occurred, was not alibi testimony) *with People v. Moreno*, 139 A.D.3d 401 (1st Dept. 2016), *lv denied* 28 N.Y.3d 934 (where People's theory was that defendant entered apartment via fire escape, evidence that defendant was never on fire escape and was nearby on street smoking marijuana was alibi).

Re: use of alibi notice to impeach witnesses at trial, compare People v. Shuff, 168 A.D.2d 348 (1st Dept. 1990), *lv denied* 77 N.Y.2d 967 (1991) (prosecutor properly allowed to impeach defendant with notice of alibi) *with People v. Rodriguez*, 3 N.Y.3d 462 (2004) (alibi notice improperly used by prosecution to discredit testimony of alibi witnesses who did not make statements contained in notice); *People v. Burgos-Santos*, 98 N.Y.2d 226 (2002) (withdrawn notice may not be used) and *People v. Nelu*, 157 A.D.2d 864 (2d Dept. 1990) (notice was merely document prepared by counsel and did not contain prior statements of defendant or witness).

Re: good cause for extension of period for service, see People v. Parsely, 30 Misc.3d 1237(A) (Sup. Ct., West. Co., 2011) (defendant granted leave to file untimely notice even though defense previously was given leave to file untimely notice identifying different witnesses and failed to justify additional delay; although it would be reasonable to deny application, People do not allege prejudice and thus application is granted in interest of justice); *People v. Lenihan*, 30 Misc.3d 289 (Sup. Ct., Queens Co., 2010) (People's failure to give reciprocal notice excused where prosecutor could not reasonably have been aware of facts giving rise to opportunity for rebuttal until after defendant's witnesses had

testified); *Matter of J.A.*, 18 Misc.3d 1101(A) (Fam. Ct., Nassau Co., 2007) (court grants respondent's request for extension of time, noting that late notice would not prejudice Presentment Agency).

Re: documentary evidence, see People v. Harrison, 23 A.D.3d 689 (3d Dept. 2005), *lv denied* 6 N.Y.3d 813 (no error in preclusion of testimony of Boys and Girls Club employee who had found defendant's name on sign-in sheet from same day as crime); *People v. Sirmons*, 242 A.D.2d 883 (4th Dept. 1997) (prosecution entitled to discovery of documents which will be offered at trial in support of alibi defense).

Re: preclusion of defense witness, compare People v. Thomas, 208 A.D.3d 1617 (4th Dept. 2022) (where late notice was due to counsel's negligence and counsel had no objection to brief adjournment for People to investigate alibi, defendant's constitutional right to offer witness's testimony outweighed any prejudice to People or their interest in having trial begin as scheduled); *People v. Lukosavich*, 189 A.D.3d 1895 (3d Dept. 2020) (preclusion improperly ordered where court, without hearing from defendant, failed to consider lesser sanctions, and testimony would have been important to defense given that People relied on accomplice testimony, and People were already aware of alibi witness's statement); *People v. Almonte*, 171 A.D.3d 470 (1st Dept. 2019), *lv denied* 33 N.Y.3d 1102 (alibi evidence improperly precluded where notice was untimely and defective in that it only stated location of alibi without naming witnesses, but record did not show willfulness); *People v. Cruz*, 50 A.D.3d 490 (1st Dept. 2008) (court should have admitted evidence where counsel's failure to serve alibi notice resulted from good faith belief that no notice was required rather than from desire to obtain tactical advantage); *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001), *cert denied* 534 U.S. 886 (where less onerous sanctions, such as adjournment, were available, testimony could not be excluded unless defense counsel's failure was willful or designed for tactical advantage) and *People v. Peterson*, 96 A.D.2d 871 (2d Dept. 1983) (preclusion was error where notice was served 174 days late but 2 weeks before trial) *with People v. Moreno*, 139 A.D.3d 401 (evidence disclosed after People rested properly precluded where defendant's relative belatedly told defense counsel about witness); *People v. Valdez*, 81 A.D.3d 550 (1st Dept. 2011), *lv denied* 16 N.Y.3d 863 (testimony of three alibi witnesses, who were family members and resided with defendant, properly precluded where defendant offered notice on day of jury selection after court had rejected another last-minute attempt by defendant to delay trial, and passage of time was likely to have made People's investigation difficult or futile) and *People v. Walker*, 294 A.D.2d 218 (1st Dept. 2002), *lv denied* 98 N.Y.2d 772 (2002) (alibi evidence precluded where defendant waited until close of People's case to give notice; since defendant must have known of alibi from time of arrest, it was immaterial when defense counsel learned of witness' whereabouts).

Notice Of Defense Of Mental Disease Or Defect Discovery For Presentment Agency Under FCA

The respondent may not introduce evidence in support of a defense of mental disease or defect unless written notice of an intention to rely upon such a defense is served upon the presentment agency and filed with the court no more than 30 days after the conclusion

of the initial appearance, or before the fact-finding hearing, whichever is sooner. In the interest of justice and for good cause shown, the court may permit late notice before the conclusion of the fact-finding hearing. FCA § 335.1.

Caselaw

Re: form and content of notice, see People v. Curran, 139 A.D.3d 1087 (2d Dept. 2016) (court rejects defendant's contention that People had "constructive notice" since statute requires written notice); *People v. Budwick*, 20 Misc.3d 1139(A) (County Ct., Essex Co., 2008) (defendant directed to serve corrected notice specifying which disorders listed in notice form basis for each defense, but defendant not required to describe relationship between defense or defenses and each disorder).

Re: types of evidence included, see People v. Gonzalez, 22 N.Y.3d 539 (2014) (statute does not apply where defendant offers no evidence at trial but relies solely upon evidence presented by People); *People v. Diaz*, 15 N.Y.3d 40 (2010) (statute applies when defendant intends to rely solely on lay testimony); *People v. Curran*, 139 A.D.3d 1087 (defendant's claim that jail's failure to administer medication prescribed to treat panic and anxiety disorders caused him to be unable to breathe or engage in rational thought at time of incident was psychiatric defense requiring notice).

Re: preclusion of defense witness, compare People v. Diaz, 15 N.Y.3d 40 (degree of prejudice to prosecution flowing from late notice may be less significant where defendant plans to rely on lay testimony alone, and trial courts enjoy wide discretion in considering late notice); *People v. Morris*, 173 A.D.3d 1220 (2d Dept. 2019), *lv denied* 34 N.Y.3d 953 (court erred in refusing to permit late notice where evidence of defendant's auditory hallucinations would have corroborated his testimony that he entered house intending to aid woman who was yelling, and any prejudice to People was substantially outweighed by defendant's interest in presenting evidence); *People v. Gracius*, 6 A.D.3d 222 (1st Dept. 2004), *lv denied* 2 N.Y.3d 800 (psychiatric testimony improperly excluded where written notice established relevance of evidence, and People did not claim prejudice); *People v. Oakes*, 168 A.D.2d 893 (4th Dept. 1990), *lv denied* 78 N.Y.2d 957 (1991) (good cause found where defendant believed notice was not required) *with People v. Hill*, 4 N.Y.3d 876 (2005), *aff'g* 10 A.D.3d 310 (1st Dept. 2004) (defense properly precluded from raising defense where notice was timely but inadequate and for 3 years defendant did not seek psychiatric examination or provide People with particulars of defense despite repeated requests); *People v. Almonor*, 93 N.Y.2d 571 (1999) (in *Pitts*, preclusion upheld where defendant named a disorder but failed to identify which defense would be offered; in *Almonor*, preclusion upheld where defense indicated for first time during trial intent to call 3 additional witnesses); *People v. Castro*, 206 A.D.3d 1444 (3d Dept. 2022), *lv denied* 38 N.Y.3d 1132 (no error in ruling precluding defendant from raising psychiatric defense based upon prescription medications where defendant repeatedly failed to execute authorizations so People could gain access to medical records providers) and *People v. Goldstein*, 14 A.D.3d 32 (1st Dept. 2004) (testimony properly precluded where defendant initially failed to disclose information, stating that expert would not testify as to extreme emotional disturbance defense, and then served late notice that expert would testify as

to EED but failed to produce expert's report), *rev'd on other grounds* 6 N.Y.3d 119 (2005) (court notes that preclusion ruling was not abuse of discretion).

PART TWO: COURT-ORDERED DISCOVERY

Motion For Enforcement Of Demand Or Bill Of Particulars

Arguably, court-ordered discovery may be sought despite the absence of a demand to produce. *See People v. DaGata*, 86 N.Y.2d 40 (1995) (defendant's initial request for materials in omnibus motion and several requests subsequent to motion sufficiently preserved issues); *but see Matter of C.W.J.*, 16 Misc.3d 1117(A) (Fam. Ct., Nassau Co., 2007).

If the court concludes that the presentment agency's refusal to disclose was not justified, it must order discovery. If the presentment agency failed to serve a timely written refusal and simply ignored the respondent's demand, the court must order discovery, or impose a sanction authorized by FCA § 331.6, unless the presentment agency shows good cause why such an order should not be issued. FCA § 331.3(1).

Given the wording of the statute, and the fact that the presentment agency should be in a weaker position when it fails to respond at all to a demand, it appears that, unless the presentment agency shows good cause, the court must order discovery, or impose a remedial sanction, even if, technically speaking, the demand includes property that does not come within FCA § 331.2(1). *See People v. Reynolds*, 193 Misc.2d 697 (County Ct., Essex Co., 2002) (in fairness, and because People failed to respond to discovery demand or oppose defendant’s motion for discovery, court orders disclosure of complainant’s entire medical record).

In contrast, the statute refers to a respondent's refusal to disclose, but not to a respondent's failure to respond at all, and provides that discovery must be ordered if the respondent's refusal is not justified. FCA § 331.3(2)(a).

The motion must be made within 30 days after the conclusion of the initial appearance, and before the commencement of the fact-finding hearing. If the respondent is not represented and the case is adjourned for the appearance of an attorney for the child, the 30 days start running when the attorney appears. FCA § 332.2(1).

The court may entertain a motion made after 30 days which is "based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have [been] raised within [30 days]." The court also may entertain the motion "in the interest of justice and for good cause shown...." FCA § 332.2(3); *Matter of C.W.J.*, 16 Misc.3d 1117(A) (court entertains untimely motion).

If the respondent is detained, the court must hear and determine the motion on an expedited basis. FCA § 332.2(4).

Motion For Court-Ordered Bill Of Particulars

When the presentment agency has timely served a written refusal, the court must, upon the respondent's written motion, order compliance unless a protective order is warranted, the items are not authorized to be included in a bill of particulars, the information is not necessary to enable the respondent to prepare or conduct a defense adequately, or the request was untimely and there was no good cause for the delay. FCA § 330.1(5). It has been held that, in the absence of a request for a bill of particulars, court-ordered discovery

may not be sought. *Matter of C.W.J.*, 16 Misc.3d 1117(A) (Fam. Ct., Nassau Co., 2007); *but cf. People v. DaGata*, 86 N.Y.2d 40 (1995) (defendant's initial request for materials in omnibus motion and several requests subsequent to motion sufficiently preserved issues).

In contrast, when the presentment agency has not made timely service of a written refusal, the court must, unless it is satisfied that the presentment agency has shown cause why such an order should not be issued, issue an order requiring the presentment agency to comply or providing for any other sanction, such as preclusion, authorized by § 331.6(1). FCA § 330.1(5). Thus, the presentment agency is punished for its default. Arguably, even those items of information that, technically speaking, would not be discoverable by way of a bill of particulars must be provided unless the presentment agency can show good cause. Obviously, since the presentment agency must raise the standard objections (e.g., the item is "evidentiary") in a written refusal, "good cause" should not be found when such objections are raised after a default.

The respondent's motion must be filed within 30 days after the conclusion of the initial appearance. FCA § 330.1(6), § 332.2(1). As noted earlier, if the request was served more than 15 days after the initial appearance, there would, in view of the presentment agency's 15-day response time, appear to be adequate justification for service after the expiration of 30 days. In the alternative, the respondent could make a motion for a court-ordered bill of particulars within the 30-day deadline, and then withdraw any requests that are satisfied by the presentment agency's response. Notably, information contained in the presentment agency's motion papers can be treated as the equivalent of a bill of particulars. *See Matter of Elliton J.*, 120 Misc.2d 392 (Fam. Ct. Queens Co., 1983).

If the court grants the respondent's motion, "the presentment agency must file with the court a bill of particulars, reciting every item of information designated in the order, and serve a copy thereof upon the respondent." The fact-finding hearing is stayed until the presentment agency complies. FCA § 330.1(6).

Any objection to the sufficiency of a bill of particulars must be raised in a pre-trial motion, or it is waived. *See Matter of Kareem T.*, 180 A.D.2d 802 (2d Dept. 1992).

Non-Testimonial Evidence

Pursuant to FCA § 331.3(2)(b) - CPL counterpart is CPL § 245.40(1) - the court, upon motion of the presentment agency, and subject to constitutional limitation, may order the respondent to provide non-testimonial evidence. Such order may, among other things, require the respondent to: (i) appear in a line-up; (ii) speak for identification by witness or potential witness; (iii) be fingerprinted, provided that the respondent is subject to fingerprinting pursuant to this article; (iv) pose for photographs not involving reenactment of an event, provided the respondent is subject to fingerprinting pursuant to this article; (v) permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto; (vi) provide specimens of his handwriting; and (vii) submit to a reasonable physical or medical inspection of his body. The statute shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of a petition consistent with such rights as the respondent may derive from FCA Article 3, or the State or Federal Constitution. With respect to what may be “authorized

by law" before the filing of a petition, it must be noted that FCA Article 3 has not incorporated CPL Article 690, and thus a family court judge has no power to issue a search warrant.
In criminal proceedings, the timeliness of a prosecution's motion for discovery of non-testimonial evidence is governed by the 45-day deadline in CPL § 240.90(1). In juvenile delinquency proceedings, the 30-day deadline in FCA § 332.2(1) applies to "pre-trial motions" specified in FCA § 332.1, which do not include presentment agency motions. Certainly, however, defense counsel can argue that the presentment agency should be bound by the 30-day deadline for discovery motions applicable to respondents under FCA § 332.1(6).

Caselaw

Re: constitutional standards: A court order may be issued if the prosecution establishes probable cause to believe the suspect has committed the crime; a clear indication that relevant material evidence will be found, and that the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concerns for the suspect's constitutional right to be free from bodily intrusion on the other. And, if there is no exigency, the target of the application must be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed. *Matter of Abe A.*, 56 N.Y.2d 288 (1982).

Re: notice requirement, *see People v. Fomby*, 103 A.D.3d 28 (3d Dept. 2012), *lv denied* 21 N.Y.3d 1015 (DNA evidence obtained via buccal swab suppressed where search warrant was issued upon application made without notice to defendant or exigent circumstances that prevented notice); *People v. Smith*, 95 A.D.3d 21 (4th Dept. 2012) (DNA evidence suppressed where defendant lacked notice of application and police used excessive force to obtain buccal swab; although defendant failed to appear in opposition to People's earlier application for swab, each order constitutes bodily intrusion warranting notice and opportunity to be heard).

Re: probable cause, *see People v. Oliver*, 92 A.D.3d 900 (2d Dept. 2012) (no probable cause for taking of buccal swab sample for DNA analysis where prosecutor asserted only that defendant injured himself during burglary and that blood was recovered at crime scene); *Matter of David M. v. Dwyer*, 107 A.D.2d 884 (3d Dept. 1985) (blood and hair samples denied where People failed to establish that blood other than that of decedent was found at crime scene or that blood on defendant's sweatshirt was of decedent's type, and merely alleged that hairs did not appear to belong to portion of decedent's body on which they were found).

Re: investigative use of evidence in other cases, compare People v. Flores, 61 Misc.3d 1219(A) (Crim. Ct., N.Y. Co., 2018) (court issues protective order directing that any DNA result from buccal saliva sample be used solely for comparison in instant case); *People v. Blank*, 61 Misc.3d 542 (Sup. Ct., Bronx Co., 2018) (court directs that sample be used

only for comparison to DNA profile generated from swab of firearm in present case and not be utilized for any other purpose or comparison or be added to state or OCME databases before conviction and sentencing); *People v. Velez*, 54 Misc.3d 1208(A) (Sup. Ct., Bronx Co., 2017) (protective order directed that DNA sample would be used only in connection with instant case and not for any other purpose or comparison and would not be added to databases prior to conviction and sentencing) with *People v. White*, 60 Misc.3d 304 (Sup. Ct., Bronx Co., 2018) (court denies motion for protective order limiting comparison of DNA to this case and prohibiting inclusion in state DNA database).

Preservation Of Evidence (no FCA counterpart)

At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship to such individual, agency or entity, on condition that the probative value of that evidence is preserved by a specified alternative means. CPL § 245.30(1).

Caselaw

See Freeman v. State, 121 So.3d 888 (Miss. 2013) (State's loss of videotape of traffic stop while there was court order to preserve tape violated defendant's Due Process right to present complete defense).

Access To Premises

Without prejudice to its ability to issue a subpoena pursuant to this chapter and after an accusatory instrument has been filed, the defendant may move, upon notice to the prosecution and any impacted individual, agency, or entity, for a court order to access a crime scene or other premises relevant to the subject matter of the case, requiring that counsel for the defendant be granted reasonable access to inspect, photograph, or measure such crime scene or premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall consider defendant's expressed need for access to the premises including the risk that defendant will be deprived of evidence or information relevant to the case, the position of any individual or entity with possessory or ownership rights to the premises, the nature of the privacy interest and any perceived or actual hardship of the individual or entity with possessory or ownership rights, and the position of the prosecution with respect to any application for access to the premises. The court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means. If the court grants access to the premises, the individual or entity with ownership or possessory rights to the premises may request law enforcement presence at the premises while defense counsel or a representative thereof is present. CPL § 245.30(2).

No FCA counterpart, but, if an Equal Protection argument fails, the AFC should argue that discovery pursuant to CPLR § 3120(1)(ii) and FCA § 165(a) is appropriate.

Caselaw

In re A.B., 99 A.3d 782 (N.J. 2014) (when accused seeks access to home of alleged victim that is crime scene, he/she must articulate reasonable basis to believe inspection will lead to relevant evidence on material issue, and any discovery is subject to appropriate time, place and manner restrictions intended to protect privacy interests of alleged victim); *People v. Sharpe*, _Misc.3d_, 2023 WL 20509077 (County Ct., Warren Co., 2023) (access denied where defendant had direct knowledge of, and/or access to information about, layout, fixtures and furnishings of complainant's apartment); *People v. Beach*, _Misc.3d_, 2023 WL 5193804 (County Ct., Orange Co., 2023) (access denied where defendant already had information since he lived at location for over a month and had been provided with videos and photographs of premises as they appeared at time of alleged crime); *People v. Mongan*, 76 Misc.3d 367 (County Ct., Orange Co., 2022) (burglary/assault defendant, who alleged that incident occurred in common area, not in complainant's home, denied access to complainant's home but granted access to other portions of premises, including common areas up to and including threshold of complainant's apartment); *People v. Cruz*, 70 Misc.3d 1206(A) (Sup. Ct., Kings Co., 2020) (court denies motion for order granting access and entry into apartment from which witness observed defendant stab man to death on sidewalk where defendant was provided with copy of clear cell phone video witness recorded from window, video surveillance recordings of stabbing, body camera footage, and crime scene photographs; also, during pandemic, permitting entry would unreasonably place apartment dweller in harm's way).

DNA Comparison (no FCA counterpart)

Where property in the prosecution's possession, custody, or control consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation of the crime, or the defendant, or the prosecution of the defendant, and the defendant establishes (a) that such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and (b) that the data meets state DNA index system or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may, upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information is pending, order an entity that has access to the combined DNA index system or its successor system to compare such DNA profile against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon notice to both parties and the entity required to perform the search, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this section, a "keyboard search" shall mean a search of a DNA profile against the databank in which

the profile that is searched is not uploaded to or maintained in the databank. CPL § 245.45.

Relevant And Material Information

CPL § 245.30(3)

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

FCA § 331.3(1)(c)

The court "may order discovery with respect to any other property which the presentment agency intends to introduce at the fact-finding hearing, upon a showing by the respondent that discovery with respect to such property is material to the preparation of his defense, and that the request is reasonable."

Upon a similar showing by the presentment agency, the court must, when it has granted the respondent's motion, direct discovery of the same type of property by the presentment agency if the respondent intends to introduce it at the fact-finding hearing. FCA § 331.3(1).

Caselaw

People v. Sharpe, _Misc.3d_, 2023 WL 20509077 (County Ct., Warren Co., 2023) (court refused to permit defendant to photograph complainant’s hands, face, and neck since jury would be able to view her and compare what they see to photographs allegedly taken earlier in time).

Protective Orders

Upon motion of the respondent, the presentment agency, or any affected person, or upon determination of a motion for court-ordered discovery, or upon its own initiative, the court may issue a protective order "denying, limiting, conditioning, delaying or regulating discovery for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the

confidentiality of informants, or any other factor or set of factors which outweighs the usefulness of the discovery." FCA § 331.5(1)

Note: “Good Cause” Guidance From CPL

In determining good cause under this section the court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; 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; the nature and circumstances of the factual allegations in the case; whether the defendant has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; 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; danger to any person stemming from factors such as a defendant's substantiated affiliation with a criminal enterprise as defined in Peal Law § 460.10(3); and other similar factors found to outweigh the usefulness of the discovery. CPL § 245.70(4).

Caselaw (expedited review by single AD Justice under CPL § 245.70[6])

People v. Escobales, 204 A.D.3d 1157 (3d Dept. 2022) (in appropriate case, court may permit ex parte or in camera submissions and proceedings, but generally defense counsel should be permitted to view application and materials at issue - with appropriate caveat barring disclosure to or discussion with defendant regarding contents pending determination of application - and be excluded from participation only to extent necessary to preserve confidentiality of sensitive information); *People v. Belfon*, 181 A.D.3d 696 (2d Dept., Scheinkman, J., 2020) (People should have been required to disclose to defense counsel general nature of information People sought to protect, and, without revealing information, disclose reasons for application; defense counsel should be excluded from participation in protective order review process only to extent necessary to preserve confidentiality of sensitive information pending court’s determination); *People v. Bonifacio*, 179 A.D.3d 977 (2d Dept., Scheinkman, J., 2020) (Article 245 provision cannot reasonably be construed to permit protective order to be sought entirely ex parte in every case; proceedings should be entirely ex parte only where applicant demonstrates clear necessity for entirety of application, and submissions in support, to be shielded from opposing party, and, even where some aspects of application should be considered ex parte, other portions may be disclosed; *People v. Beaton*, 179 A.D.3d 871 (2d Dept., Scheinkman, J., 2020) (where a pure question of law is concerned, reviewing Appellate Division justice decides question de novo, but where issue involves balancing defendant’s interest in obtaining information against concerns for witness safety and protection, question is whether determination made by trial court was provident exercise of discretion; People and defense counsel should provide trial courts with sufficiently detailed factual predicate to enable courts to evaluate applicability of statutory factors, assess weight to be given to each factor, and draw appropriate balance, and, in this case, court should have examined whether information could be disclosed only to defense

counsel and defense investigator, and failure to consider that statutorily authorized option when asked to do so by defense counsel was error of law);

Remedies Or Sanctions For Non-Compliance

CPL § 245.80(2)
For failure to comply with any discovery order imposed or issued pursuant to this article, the court may make a further order for discovery, grant a continuance, order that a hearing be reopened, order that a witness be called or recalled, instruct the jury that it may draw an adverse inference regarding the non-compliance, preclude or strike a witness's testimony or a portion of a witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal of all or some of the charges, or make such other order as it deems just under the circumstances; except that any sanction against the defendant shall comport with the defendant's constitutional right to present a defense, and precluding a defense witness from testifying shall be permissible only upon a finding that the defendant's failure to comply with the discovery obligation or order was willful and motivated by a desire to obtain a tactical advantage.
FCA § 331.6(1)
If, during the course of discovery proceedings, the court finds that a party has failed to comply with any of the provisions of FCA §§ 331.2 through 331.7, the court may order such party to permit discovery of the property not previously disclosed, grant a continuance, issue a protective order, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action.

Court Ordered Procedures To Facilitate Compliance (no FCA counterpart)

To facilitate compliance with this article, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order: 1. Requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court; 2. Requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff; 3. Requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information within § 245.20(1)(k), including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or 4. Requiring other measures or proceedings designed to carry into effect the goals of this article. CPL § 245.35.

HIV Testing Of Respondent For Victim Under FCA

In any proceeding where the respondent is found to have committed a felony offense enumerated in Penal Law Article 130, or an offense enumerated in Penal Law §130.20, for which an act of “sexual intercourse,” “oral sexual conduct” or “anal sexual conduct” is

required, the court must, upon a request of the victim, order that the respondent submit to human immunodeficiency testing. The testing is to be conducted by a state, county, or local public health officer designated by the order. Test results, which shall not be disclosed to the court, shall be communicated to the respondent and the victim named in the order in accordance with the provisions of Public Health Law § 2785-a. FCA § 347.1(1)(a).

The term “victim” means the person with whom the respondent engaged in an act of “sexual intercourse,” “oral sexual conduct” or “anal sexual conduct” where the conduct was the basis for the court's finding. FCA § 347.1(1)(b).

Any request made by the victim pursuant to this section must be in writing, filed with the court and provided by the court to the respondent and his or her counsel. The request must be filed with the court prior to or within ten days after the filing of the fact-finding order, provided that, for good cause shown, the court may permit such request to be filed at any time prior to the entry of an order of disposition. FCA § 347.1(2).

Any requests, related papers and orders made or filed pursuant to this section, together with any papers or proceedings related thereto, shall be sealed by the court and not made available for any purpose, except as may be necessary for the conduct of judicial proceedings directly related to the provisions of this section. All proceedings on such requests shall be held in camera. FCA § 347.1(3).

The application for an order to compel a respondent to undergo an HIV-related test may be made by the victim but, if the victim is an infant or incompetent person, the application may also be made by a representative as defined in CPLR §1201. The application must state that (a) the applicant was the victim of the offense which the court found the respondent to have committed; and (b) the applicant has been offered counseling by a public health officer and been advised of (i) the limitations on the information to be obtained through an HIV test on the proposed subject; (ii) current scientific assessments of the risk of transmission of HIV from the exposure he or she may have experienced; and (iii) the need for the applicant to undergo HIV related testing to definitively determine his or her HIV status. FCA § 347.1(4).

The court shall conduct a hearing only if necessary to determine if the applicant is the victim of the offense the respondent was found to have committed. The court ordered test must be performed within fifteen days of the date on which the court ordered the test, provided however that whenever the respondent is not tested within the period prescribed by the court, the court must again order that the respondent undergo an HIV related test. FCA § 347.1(5).

Test results shall be disclosed subject to the following limitations, which shall be specified in any order issued pursuant to this section: (i) disclosure of confidential HIV related information shall be limited to that information which is necessary to fulfill the purpose for which the order is granted; (ii) disclosure of confidential HIV related information shall be limited to the person making the application; redisclosure shall be permitted only to the victim, the victim's immediate family, guardian, physicians, attorneys, medical or mental health providers and to his or her past and future contacts to whom there was or is a reasonable risk of HIV transmission and shall not be permitted to any other person or the court. FCA § 347.1(6)(a).

Unless inconsistent with this section, the court's order shall direct compliance with and conform to the provisions of Public Health Law Article 27-F. Such order shall include

measures to protect against disclosure to others of the identity and HIV status of the applicant and of the person tested and may include such other measures as the court deems necessary to protect confidential information. FCA § 347.1(6)(b).

Any failure to comply with the provisions of this section or Public Health Law §2785-a shall not impair the validity of any order of disposition entered by the court. FCA §347.1(7).

No information obtained as a result of a consent, hearing or court order for testing issued pursuant to this section nor any information derived therefrom may be used as evidence in any criminal or civil proceeding against the respondent which relates to events that were the basis for the respondent's adjudication, provided however that nothing herein shall prevent prosecution of a witness testifying in any court hearing held pursuant to this section for perjury pursuant to Penal Law Article 210. FCA § 347.1(8).

PART THREE: SUBPOENAS FOR CONFIDENTIAL RECORDS

Child Welfare Agency Records

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (defendant entitled to in camera review for favorable evidence); *Matter of Damien H.*, 268 A.D.2d 475 (2d Dept. 2000) (in camera review ordered where respondent made particularized showing that unfounded report of child abuse might contain exculpatory material); *People v. Doe*, 178 Misc.2d 534 (Sup. Ct., Monroe Co., 1998) (where defendant claimed that complainant had history of mental problems and had recanted a prior complaint of sexual abuse, court issued subpoena for DSS records and conducted in camera review; court furnished to defendant impeachment material pertaining to complainant, and provided the People with impeachment material pertaining to potential defense witnesses).

Psychiatric, Psychological and Counseling Records of Witness

State v. Chambers, 288 A.3d 12 (N.J. 2023) (to be entitled to in camera inspection of records, defendant must demonstrate substantial, particularized need; that alleged mental illness is relevant and material to complainant's ability to perceive, recall, or recount alleged assault, or proclivity to imagine or fabricate it; and that information cannot be obtained through less intrusive means); *People v. McCray*, 23 N.Y.3d 193 (2014), *rearg denied* 24 N.Y.3d 947 (where court had measure of discretion in deciding whether rape defendant's interest in obtaining complainant's mental health records was outweighed by complainant's interest in confidentiality, and defendant had made specific Brady request and his interest could be outweighed if there was no reasonable possibility that withheld materials would lead to acquittal, there was no error in court's disclosure of only a few of the records; most of the undisclosed documents were either cumulative or of little if any relevance, proof of some details was prohibited by the Rape Shield Law, and, although there was evidence of what may have been a false report in 2004, when the complainant was 13, regarding sexual assault by her father, that accusation was far removed in time and quite different from accusation made in this case); *People v. Butler*, 184 A.D.3d 704 (2d Dept. 2020) (after in camera review, court erred in redacting portions that could be viewed by jury as exculpatory and materially relevant); *People v. Horton*, 181 A.D.3d 986 (3d Dept. 2020), *lv denied* 35 N.Y.3d 1045 (no in camera review of mental health and any substance abuse records where defense counsel made "speculative" assertion that victim had drinking problem in light of one alcohol-related driving infraction and there was vague witness testimony about occasions when victim was allegedly intoxicated, and victim testified that she had seen counselor at advocacy center a few times after incident and had "sought out a specialist, therapist for" "post-traumatic syndrome"); *People v. Kiah*, 156 A.D.3d 1054 (3d Dept. 2017) (in rape prosecution, court erred in denying motion for subpoena and in camera review or records where there was history of bipolar disorder and depression, and, at trial, complainant admitted she was taking - at the time of incident and of trial - two medications that could have impaired her thinking, especially when combined with crack cocaine); *People v. Ouanes*, 123 A.D.3d 480 (1st Dept., 2014) (in camera review of victim's psychiatric records denied where defendant failed to show that records from when victim was

teenager would be relevant to incident that occurred six years later); *People v. Thurston*, 209 A.D.2d 976 (4th Dept. 1994), *lv denied* 85 N.Y.2d 915 (1995) (defendant entitled to disclosure of children's center records concerning sex abuse victims); *People v. Rivera*, 138 A.D.2d 169 (1st Dept. 1988), *lv denied* 72 N.Y.2d 923 (court erred in denying defendant access to victim's psychiatric records); *People v. Knowell*, 127 A.D.2d 794 (2d Dept. 1987) (court should have conducted in camera examination where defendant established reasonable likelihood that records were relevant to witness' credibility); *People v. Cunningham*, 7 Misc.3d 1023(A) (Crim. Ct., N.Y. Co., 2005) (People directed to obtain records for in camera inspection; confidentiality under MHL § 33.13 must yield to possibility that records contain information relevant to determination of guilt or innocence).

School Records

Matter of Terry D., 81 N.Y.2d 1042 (1993) (respondent not entitled to names and phone numbers of potential witnesses; court notes that subpoena cannot be used to expand discovery beyond scope of statute); *People v. Doe*, 24 Misc.3d 1203(A) (Rochester City Ct., 2009) (where counsel alleged that "[u]pon information and belief [the complainant's] school records will contain records of suspensions and disciplinary measures taken against him," court concludes that request is legitimate, targeted request for relevant information since assault allegedly occurred in school setting and records may contain first person accounts of alleged altercation, and thus meets threshold for in camera review; however, court found no discoverable material, and noted that suspension or expulsion does not mean that school authorities found that student engaged in specific immoral, vicious or criminal acts which have bearing on credibility).

The Federal Educational Rights and Privacy Act -- 20 USC § 1232g and 34 CFR Part 99 -- contains provisions governing the release by schools of education records. *See Zaal v. State*, 602 A.2d 1247 (Md. 1992) (where defendant shows need for inspection of records, court may review records alone in camera, conduct the review in the presence of counsel, or permit review by counsel alone subject to restrictions; the greater the need to inspect, the more the court should lean towards allowing review by counsel).

Statements To Press And Shield Law (Civil Rights Law § 79-h)

People v. Combest, 4 N.Y.3d 341 (2005) (defendant satisfied 3-prong test in Civil Rights Law, and was entitled to disclosure of videotape of a police interrogation, where videotapes were relevant to defendant's claims that he acted in self-defense and that his statements were involuntary); *People v. Juarez*, 143 A.D.3d 589 (1st Dept. 2016), *rev'd on other grounds* 31 N.Y.3d 1186 (no disclosure of reporter's notes of interview with defendant regarding charge that he killed four-year-old girl where People had videotaped confession that had been found admissible and was consistent with other evidence, and did not make clear and specific showing that disclosure was critical or necessary to proof of material issue); *United States v. Treacy*, 639 F.3d 32 (2d Cir. 2011) (district court erred in treating reporter's interest as competing interest to be balanced against defendant's Confrontation Clause rights, and improperly restricted cross-examination of reporter); *In*

re Daily News, L.P., 31 Misc.3d 319, 920 N.Y.S.2d 865 (Sup. Ct., Kings Co., 2011) (court denies motion to quash subpoena seeking identity of police source of report that "according to authorities," co-defendant's mother had shouted "shoot the cop"; defendant's claim that someone else made statement was critical to defense, there was available source other than Daily News, and People's claim that defendant was accomplice was almost completely dependent on statement).

HIPAA

Matter of Miguel M., 17 N.Y.3d 37 (2011) (HIPAA requires notice to patient of request for records; violation does not always require suppression of evidence); *People v. Marrero*, 71 Misc.3d 1078 (Sup. Ct., N.Y. Co., 2021) (so-ordered subpoena is akin to court order, but even if subpoena violated HIPAA, records were not subject to outright suppression); *People v. Berotte*, 25 Misc.3d 740 (Dist. Ct., Nassau Co., 2009) (defendant denied discovery of additional records where he already has been provided with records showing that complainant had prior neck injury, that he experienced pain from neck injury, and that he received treatment for pain, as well as documents and reports regarding treatment, since, with these materials, defendant could craft cross-examination regarding pain arising out of charged assault as distinguished from pain previously experienced as result of the pre-existing neck condition; to conclude otherwise "would open the floodgates and afford access to private individual medical records where any prior treatment involved pain, regardless of the date and origin of that pain"); *People v. Olsen*, 23 Misc.3d 593 (Dist. Ct., Nassau Co., 2009) (while finding no grounds for recusal, court concludes that where it was concerned that defendant had obtained complainant's HIPAA-protected records with subpoena that was not HIPAA-compliant, court acted properly in suggesting that the prosecution file motion to quash so that matter could be properly briefed); *Matter of Antonia E.*, 16 Misc.3d 637 (Fam. Ct., Queens Co., 2007) (court denies Presentment Agency's motion for issuance of judicial subpoena duces tecum directing production of hospital records relating to treatment of assault complainant; although HIPAA anticipates disclosure pursuant to court order, it does not preempt state law when that law is more stringent, and physician-patient privilege in CPLR § 4504 is more stringent than HIPAA).