

REPORT OF THE NEW YORK STATE JUSTICE TASK FORCE OF ITS RECOMMENDATIONS REGARDING CRIMINAL DISCOVERY REFORM

Introduction

The New York State Justice Task Force (“Task Force”) was convened on May 1, 2009 by Chief Judge Jonathan Lippman of the New York State Court of Appeals. Its mission is to eradicate the systemic and individual harms caused by wrongful convictions and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future. Because it is a permanent task force, it is charged not only with the task of implementing reforms but monitoring their effectiveness as well.

The Justice Task Force is chaired by the Honorable Janet DiFiore, District Attorney for Westchester County, and the Honorable Carmen Beauchamp Ciparick, former Senior Associate Judge of the New York State Court of Appeals. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims’ advocates. The differing institutional perspectives of Task Force members allow for thorough consideration of the complex challenges presented by wrongful convictions and the evaluation of recommendations to prevent them, while also remaining mindful of the need to maintain public safety.

Since the inception of the Task Force, its recommendations have led to significant legislative proposals and reform. The Task Force’s recommendations for expansion of the New York State DNA databank and regarding post-conviction access to DNA testing and databank comparisons have both been enacted into law. Other important recommendations, regarding the electronic recording of custodial interrogations and best

practices for the administration of identification procedures, formed part of a package of legislative proposals that, while not yet enacted into law, have led to significant voluntary compliance and increased awareness of the need for these reforms. Further, a recommendation made in late 2012 relating to the disclosure of documentation underlying forensic laboratory reports (sometimes referred to as “forensic case file materials” or “bench notes”) has led New York laboratories voluntarily to include language in forensic reports notifying recipients that additional documentation exists concerning the testing performed.

The Task Force now turns its attention to the critical issue of criminal discovery reform. New York’s criminal discovery statute (C.P.L. Article 240) was progressive at the time of its inception in 1980, but has not been significantly revised since. New York now lags behind a majority of states in both the scope and the timing of pretrial disclosures. In recent years, lawyers, judges and scholars have called for a statutory overhaul.

As Chief Judge Lippman observed in his 2014 State of the Judiciary address, robust pretrial disclosure of evidence is a critically important protection against wrongful convictions. Documented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *People v. Baxley*, 84 N.Y.2d 208 (1994) is one issue that has galvanized proponents of reform. The Task Force addresses this issue with a groundbreaking proposal – namely, a recommendation for legislation requiring all relevant witness statements to be disclosed, regardless of whether the prosecutor considers the content exculpatory or intends to have the witness testify at trial. The effect of the

proposed legislation is to remove the subjective determination of whether a given statement is exculpatory or not – all relevant statements will be disclosed.

When prosecutors disclose material information in their possession in advance of trial, the entire criminal justice system benefits. Early disclosure may encourage early resolutions where appropriate, and conserve prosecutorial resources. It will also help defense lawyers by better enabling them to investigate their cases and prepare for trial. Better preparation and a more vigorous defense are effective bulwarks against wrongful convictions – the prevention of which is critical to the integrity of the system.

The Task Force’s proposed reforms provide earlier and more robust discovery to defendants while also protecting witness safety and the integrity of ongoing investigations. The protection of witnesses from physical harm, harassment, or tampering – an important and relevant consideration when expanding discovery – was an overarching consideration that informed many of the recommendations in this report.

With the above issues in mind, the Task Force examined the current legislative framework for discovery in New York, as well as a host of possible reforms. The Task Force’s examination of these issues was informed by presentations from numerous speakers, including prosecutors from New York, New Jersey, and Massachusetts; defense attorneys from various jurisdictions; victims’ rights representatives, and law enforcement officials. The Task Force also reviewed reports, memoranda and statistical compilations regarding the existing law and proposed legislation in New York State; solicited from the Task Force’s counsel a 50-state survey of criminal discovery statutes; and reviewed proposals from the Legal Aid Society, the Innocence Project, the New York State Bar

Association, and other bodies. Other sources ranged from case law to news articles and commentary.

After more than eighteen months of consideration, and with the assistance of a specially designated Discovery Subcommittee, the Task Force began consideration of possible reforms on an item-by-item basis. The Task Force extensively discussed and debated these issues, meeting five times (at meetings that sometimes lasted five hours or more) to consider not only the potential benefits of each proposal, but also the practical implications. The diverse backgrounds of Task Force members provided valuable perspectives.

The twenty-two voting members of the Task Force sought to reach broad consensus wherever possible, and is pleased to announce that it achieved consensus on the vast majority of the issues it considered. A substantial majority of Task Force members agreed on the groundbreaking recommendation that statements of non-testifying witnesses should be provided to defendants. The Task Force also voted by a wide margin to recommend mandatory preliminary conferences in criminal cases (at which the court would establish a discovery schedule) and adherence to fixed trial dates. These were among several recommendations aimed at expanding the role of the judiciary in the criminal discovery process. A substantial majority of the Task Force also voted to recommend expanding the scope of expert disclosure, including requiring the exchange of written reports in advance of trial.¹

¹ In contrast, several recommendations received considerable debate and were approved by a more narrow margin, reflecting deeply-held and sharp differences of opinion on such issues. The fact that a given recommendation was approved does not mean that every Task Force member voted in favor of it. Among the most contested issues was the timing of disclosure of identifying information and statements of witnesses. The time frames ultimately recommended were driven by particular concern about protecting the safety and integrity of civilian witnesses, and the integrity of ongoing investigations. Those same (...continued)

Attached to this report as Exhibit A are the specific recommendations that the Task Force has endorsed. As detailed in Exhibit A (which contains the language of the Task Force’s reform proposals), and in summary form in the sections of this report that follow, the Task Force recommends accelerating the disclosure of several types of material already discoverable under existing law; broadening discovery to encompass several new types of material; and, equally important, expanding the role of the judiciary in shaping and monitoring the discovery process.

I. Recommendations That Accelerate or Broaden Discovery

A substantial majority of Task Force members agreed that the discovery currently available in criminal cases is highly circumscribed and that the available discovery often comes too late to permit both sides to investigate facts fully and make informed decisions before trial. Accordingly, the Task Force voted to accelerate the disclosure of specific categories of material already discoverable in New York and expand specific categories of materials to be disclosed. All of these recommendations permit the prosecutor to redact or withhold material to protect witness safety or integrity, or to preserve the integrity of ongoing investigations. These recommendations also exclude felonies involving gang violence.

Finally, to the extent consistent with state and federal constitutional protections of defendants, the recommendations below are intended to be reciprocal.

(continued....)
considerations led a majority of the Task Force to recommend exempting cases involving gang violence from any accelerated disclosure obligations.

A. Disclosure of Identifying Information and Statements of Witnesses²

The Task Force recommends:

1. Names (and, if deemed necessary by the court, addresses or other contact information) and recorded statements³ of

- (a) testifying civilian witnesses; and
- (b) non-testifying civilian witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense,

should be disclosed at least 30 days before trial.

2. Names, statements, work locations, work telephone numbers, and badge numbers of

- (a) testifying law enforcement witnesses; and
- (b) non-testifying law enforcement witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense,

should be disclosed at least 90 days before trial.

3. Statements of testifying and non-testifying confidential informants should be disclosed at least 30 days before trial.

² These recommendations are intended to be consistent with CPL Article 240.20, which requires that the prosecutor “shall make a diligent, good faith effort to ascertain the existence of demanded property and to cause such property 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 demanded material which the defendant may thereby obtain.”

³ The Task Force defines a “witness statement” to include “any written or otherwise recorded statement relating to the subject matter of the case, without regard to whether the People intend to call the person as a witness on their direct case, regardless of whether the statement is signed or otherwise adopted by the witness, and any statement made by such witness that is written or recorded, by a person who heard or otherwise witnessed it.”

4. The prosecutor may redact any of the statements referred to in paragraphs A.1 through A.3 if disclosure would impair witness safety, witness integrity⁴ and/or the integrity of ongoing investigations, unless otherwise ordered by the Court. The prosecution shall inform the defense of any redaction, and upon application by the defendant, the Court shall consider the validity of the reason for the redaction and whether the items are material to the preparation of the defendant for trial..

B. Tangible Objects

The Task Force recommends:

1. Accelerating the timing of disclosure of all tangible objects in the prosecutor's possession, custody, or control that were obtained from or allegedly belong to the defendant or a co-defendant, regardless of whether the co-defendants are to be tried jointly.

2. Requiring the disclosure of all tangible objects and documents that are within the prosecutor's or defendant's possession, custody, or control that the possessing, custodial, or controlling party intends to introduce at a pre-trial hearing or during trial.

C. Search Warrants and Supporting Information

The Task Force recommends providing search warrants and supporting documents, including transcripts of the testimony of confidential informants, on an accelerated basis. The prosecutor may redact search warrants and supporting documents

⁴ For purposes of these recommendations, a concern about impairment of "witness integrity" as a reason to withhold or redact information means "a good-faith belief that disclosure will create 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."

for the same reasons and subject to the same disclosure obligation as described in Section I.A.4.

D. Expert Witness Disclosures

1. The Task Force recommends requiring detailed pre-trial summaries or reports for all testifying expert witnesses at least 30 days before the first scheduled trial date.

2. The summaries or reports must, in terms borrowed substantially from the Federal Rule of Civil Procedure 26, “provide a complete statement of the witness’s opinions and the bases and reasons for those opinions, describe any facts or data the witness used in forming such opinions, and describe any exhibits that will be used to summarize such opinion.”

3. The Task Force also recommends requiring all expert witnesses to disclose cases in which they have testified within the previous four years, and requiring all retained witnesses to disclose the compensation they have received or will receive for the case.

The above recommendations passed with a clear majority after a presentation by the Innocence Project, with the support of several Task Force members, to the effect that inaccurate or misleading expert testimony is one of the leading causes of wrongful convictions. The overwhelming conclusion was that detailed pre-trial summaries or reports would help parties and judges scrutinize expert testimony more effectively.

E. Criminal History Records

The Task Force recommends:

1. Requiring the court (or, where the court is unable to act promptly, the prosecution) to provide the defendant with the DCJS Criminal History Record for any co-defendant.
2. Requiring the prosecution to disclose all other criminal history information of testifying witnesses to be used at trial, with disclosure of that information to be provided at the same time as witness statements (30 days prior to trial).

II. Recommendations Regarding Enhanced Statutory Provisions Concerning Witness Intimidation and Tampering

1. The Task Force recommends enhancing statutory penalties for witness intimidation and tampering.
2. The Task Force agreed to list specific statutory enhancements that the Subcommittee considered, without specifically endorsing any particular enhancement. The list of enhancements considered by the Task Force can be found in Exhibit A at page

III. Recommendations Regarding Enhanced Judicial Authority and Involvement in Criminal Discovery

Many of the Task Force's recommendations for accelerating and broadening discovery rely on and require a more robust role for the judiciary in scheduling and monitoring pretrial disclosures. The Task Force recommends several procedural reforms to ensure that the judiciary possesses the requisite authority.

A. Preliminary Discovery Conference

1. The Task Force recommends that judges be required to conduct a preliminary conference to address discovery scheduling, among other issues.

2. During this conference, the parties – represented by counsel who are familiar with the case and authorized to resolve issues – would stipulate to a discovery schedule agreeable to both sides, and the court would so-order the stipulation and set a trial date.

The above recommendations would ensure close judicial supervision over the timing of discovery. Moreover, it would reinforce New York Uniform Court Rule 200.12, which already provides that judges shall conduct a preliminary conference in criminal matters, but which is not always followed.

B. Fixed Trial Date

The Task Force recommends that fixed trial dates be set and adhered to by the court in order to have a workable discovery process, unless refusal to adjourn a trial date would impair the fair administration of justice.

This approach is consistent with the recent pilot program made available for certain cases by the New York County District Attorney’s Office, with the full support of District Attorney Cyrus Vance, which provides for a fixed trial date in many cases, and requires *Rosario* material to be disclosed three weeks before that date. That pilot program was developed to address the concern, repeatedly expressed by prosecutors in New York County, that the lack of fixed trial dates was one of the major impediments to providing earlier discovery because early discovery followed by trials that are delayed for months or even years raises concern about protecting the safety and integrity of civilian witnesses, and the integrity of investigations. The final assessment of the pilot program (which requires both defendant and prosecutor to “opt in”) is still pending, although thus far the program has had a generally positive reception.

C. Redacted or Withheld Discovery

1. The Task Force recommends that judges resolve any disputes with respect to the prosecution's redactions to or withholding of discovery.
2. In order for this to occur, the Task Force recommends requiring the prosecution to inform the defense of any redactions or withholding of discovery. Upon application by the defendant, the court should consider "if disclosure would impair witness safety, witness integrity, and/or the integrity of ongoing investigations."⁵

These recommendations would ensure close judicial supervision over disclosure as well as efforts to protect witness safety and integrity.

D. Alternate Discovery Procedures Through Protective Orders

The Task Force recommends expanding the protective order statute to list alternative procedures for disclosure that judges could employ to balance witness safety and integrity with the defendant's need for information. These procedures, for example, could permit only a defendant's attorney – or standby counsel for a pro se litigant – to see certain documents or interview certain witnesses, limiting disclosure while ensuring that potentially vital information is available for the preparation of the defendant's case.

The Task Force concluded that judges could already use protective orders to implement these alternate procedures under existing law, but that enumerating these alternative procedures would be helpful in promoting their use.

⁵ The Task Force also considered a recommendation for interlocutory review of judicial decisions regarding redacted or withheld discovery. Proponents of this measure suggested that, given the importance of these decisions to witness safety and integrity, an interlocutory appeal would be a worthwhile safeguard against error. Opponents of this measure argued that the cost of resulting delays in criminal cases and the burden on the courts would outweigh the value of the procedure. Ultimately, the Task Force voted down the measure.

E. Scope of Court-Ordered Discovery

The Task Force recommends:

1. Judges should have the ability to order discovery with respect to any property in the possession, custody or control of the prosecution that is not otherwise provided for by state law, the State or Federal Constitution, or any specific recommendation of the Task Force, where the defendant shows that such discovery is material to the case and that the request is reasonable.
2. The defendant should bear a reciprocal discovery burden regarding similar property.

F. Access to Crime Scene

The Task Force recommends that, upon application by a party after an accusatory instrument has been filed, the court may permit the prosecution or the defendant to access a relevant area or place – or, alternatively, to access photographs and measurements of the scene. In such instances, the requesting party, upon notice to the property owner (who has a right to be heard), must demonstrate that such access would be material to the preparation of the case or helpful to the jury in determining any material factual issue. Further, law enforcement must not in good faith be engaged in a continued investigation of the area. The Task Force noted that using photographs and measurements as an alternative to physical access may be necessary to address the safety and security of a crime scene, or the privacy of those in possession of private premises, but added that this alternative should be used only where necessary and not considered a default.

The Task Force debated at length the appropriate provisions for access to a crime scene. Proponents of broad access argued that both parties, but particularly the

defendant, can prepare for trial more effectively if permitted to examine a crime scene in advance of trial. Other members of the Task Force advocated for more limited access to protect the privacy of victims and private property owners, and to preserve the integrity of ongoing investigations. Ultimately, the Task Force adopted the above approach as a way to balance these considerations.

G. Documenting Discovery Compliance

The Task Force recommends requiring the prosecution and defendant to file or otherwise memorialize on the record a clear record of what has been produced.

The Task Force believes this measure will facilitate judicial oversight of the discovery process as well as provide evidence that discovery obligations have been met.

IV. Recommendations That Maintain Existing Law

Finally, the Task Force made two other noteworthy decisions to decline potential reforms and instead endorse existing law.

A. Discovery Sanctions

The Task Force considered whether, in light of the recommendations above, the sanctions for noncompliance with discovery obligations should be changed. The Task Force recommends that the sanction for noncompliance with discovery obligations should be left to the Court's discretion, as is currently provided by CPL 240.70(1) and applicable case law (including, *e.g.*, *People v. Kelly*, 62 N.Y.2d 516 (1984), and *People v. Handy*, 20 N.Y.3d 663 (2013)) – that is, sanctions for the failure to provide discovery materials should be proportionate to the harm caused by the failure to provide such materials. As under current law, sanctions for providing discovery materials after the deadline for production of such materials should be imposed only if the opposing party is prejudiced by the belated production.

B. The Prosecution's Constitutional Disclosure Obligations

The Task Force considered recommending changes to the way New York's discovery statute describes the prosecution's constitutional disclosure obligations under *Brady*, 373 U.S. 83, and *Baxley*, 84 N.Y.2d 208. Currently, CPL 240.20(1)(h) simply requires the prosecution to meet its constitutional disclosure obligations, without describing those obligations in detail. The Task Force debated several proposed changes to this provision that would have described the prosecution's constitutional obligations with more specificity, and – in some cases – imposed additional obligations as well.

This topic sparked a lengthy debate, as many members of the Task Force deemed *Brady* violations a principal cause of wrongful convictions. Proponents of a more detailed statutory description of prosecutorial obligations contended that more specificity would help to clarify constitutional requirements and thus curb *Brady* violations. Opponents argued that the existing language would better accommodate evolving interpretations of the prosecution's constitutional obligations, since new case law could render a more specific statute outdated.

Ultimately, a clear majority of the Task Force voted to retain the current statutory text. However, while the Task Force is not recommending that a specific definition of a prosecutor's *Brady* obligations be codified, several of the Task Force's recommendations relating to the scope and timing of discovery are directly linked to preventing wrongful convictions resulting from instances of inconsistent application of the requirement to disclose exculpatory information. The most significant of these is the groundbreaking recommendation that statements of non-testifying civilian witnesses be disclosed. Under current law such statements would only be provided to the defense if a prosecutor

determined that disclosure was required under *Brady* or *Baxley*. The Task Force recommendation therefore removes the subjective decision-making that may otherwise lead to the non-disclosure of important evidence.

The Task Force has asked the Subcommittee to consider additional recommendations relating to *Brady* in the future, including with respect to the training of prosecutors.

EXHIBIT A

**JUSTICE TASK FORCE RECOMMENDATIONS
REGARDING CRIMINAL DISCOVERY REFORM**

JUSTICE TASK FORCE RECOMMENDATIONS
REGARDING CRIMINAL DISCOVERY REFORM

TABLE OF CONTENTS

	PAGE
I. AUTOMATIC VERSUS ON DEMAND EXTRAJUDICIAL DISCOVERY	1
II. TIMING OF EXTRAJUDICIAL DISCOVERY	1
III. WITNESS IDENTIFYING INFORMATION AND WITNESS STATEMENTS.....	1
IV. POLICE REPORTS	3
V. ALTERNATE PROCEDURES	4
VI. STATUTORY PROVISIONS CONCERNING WITNESS INTIMIDATION AND TAMPERING.....	5
VII. TANGIBLE OBJECTS.....	6
VIII. INFORMATION RELATING TO SEARCH WARRANTS	6
IX. EXPERT WITNESSES	6
X. INFORMATION REGARDING CRIMINAL HISTORY, PRIOR BAD ACTS AND UNCHARGED CRIMES.....	7
XI. COURT-ORDERED DISCOVERY	8
XII. RECIPROCAL DISCOVERY.....	9
XIII. COURT CONFERENCES AND COURT-ORDERED DISCOVERY TIMETABLE.....	9
XIV. DOCUMENTING DISCOVERY COMPLIANCE.....	9
XV. SANCTIONS FOR NONCOMPLIANCE.....	9
XVI. <i>BRADY</i> MATERIAL	10
XVII. FIXED TRIAL DATES	10

JUSTICE TASK FORCE RECOMMENDATIONS
REGARDING CRIMINAL DISCOVERY REFORM

I. AUTOMATIC VERSUS ON DEMAND EXTRAJUDICIAL DISCOVERY

Certain categories of discovery should be provided automatically, without a request by the defendant or prosecutor, and certain categories of discovery should be provided upon request.

II. TIMING OF EXTRAJUDICIAL DISCOVERY

Discovery should proceed in stages, with certain materials provided to the defendant within a specified number of days tied to a specific event or date. For example, some materials may be required to be provided within X days *after* arraignment upon an accusatory instrument; other materials may be required to be provided within X days *before* the first scheduled trial date after all motion practice is completed or, if applicable, a scheduled pretrial proceeding; still other materials may be required to be provided at a later time. In each case, the accessibility and feasibility of disclosure at the time shall be taken into account when assessing whether the above requirements are met.

III. WITNESS IDENTIFYING INFORMATION AND WITNESS STATEMENTS

A. Identifying information (as defined below in Section F) of the following witnesses should be provided to the defendant on an accelerated basis in accordance with the timeframes outlined below in Section D:

1. Testifying law enforcement witnesses;
2. Non-testifying law enforcement witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense;
3. Testifying civilian witnesses; and
4. Non-testifying civilian witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense.

B. Witness statements (as defined below in Section F) of the following witnesses should be provided to the defendant on an accelerated basis in accordance with the timeframes outlined below in Section D:

1. Testifying law enforcement witnesses;
2. Non-testifying law enforcement witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense;

3. Testifying civilian witnesses;
 4. Non-testifying civilian witnesses whom the prosecutor knows have relevant information about a charged offense or potential defense;
 5. Confidential informants who testify at trial; and
 6. Statements of non-testifying confidential informants whom the prosecutor knows have relevant information about a charged offense or potential defense.
- C. Identifying information and statements of the witnesses referenced in sections A and B may be withheld or redacted by the prosecution if disclosure would impair witness safety, witness integrity (as defined below in Section F), and/or the integrity of ongoing investigations, unless otherwise ordered by the Court. The prosecution shall inform the defense of any redaction, and upon application by the defendant, the Court shall consider the validity of the reason for the redaction and whether the items are material to the preparation of the defendant for trial.¹

D. Timing of Accelerated Production of Witness Identifying Information and Statements

1. Civilian witness identifying information and statements should be provided to the defendant no later than 30 days before the first scheduled trial date after all motion practice is complete.
2. Law enforcement witness identifying information and statements (excluding civilian witness identifying information or statements contained therein) should be provided to the defendant no later than 90 days before the first scheduled trial date after all motion practice is complete.

E. Exclusion for Felonies Involving Gang Violence

1. Felonies involving gang violence should be excluded from the requirement to provide identifying information and statements of civilian witnesses or confidential informants (whether testifying or not) on an accelerated basis.
2. Other violent felony offenses or A felonies should not be excluded from the requirement to provide identifying information and statements of civilian witnesses or confidential informants (whether testifying or not) on an accelerated basis.

¹ For the avoidance of doubt, nothing in this or any other recommendations that concern redacting information or statements of testifying witnesses is intended to or should be interpreted in any way to limit or curtail the discovery that is already provided pursuant to CPL Articles 240.44 and 240.45.

F. Definitions

1. **“Identifying information” of law enforcement witnesses** shall consist of, and be limited to, the name, work location, work telephone number, and badge number of any such witness.
2. **“Identifying information” of civilian witnesses** shall consist of, and be limited to, the name of any such witness, unless the Court orders that the address or, in lieu of address, other adequate contact information also be provided.
3. **“Witness Statements”** subject to disclosure shall consist of any written or otherwise recorded statement relating to the subject matter of the case, without regard to whether the People intend to call the person as a witness on their direct case, regardless of whether the statement is signed or otherwise adopted by the witness, and any statement made by such a witness that is written or recorded by a person who heard or otherwise witnessed it. Grand jury minutes shall not be excluded from the definition of “witness statements” subject to disclosure.
4. For purposes of these recommendations, a concern about impairment of **“witness integrity”** as a reason to withhold or redact information means a good-faith belief that disclosure will create 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.²

IV. POLICE REPORTS

The Task Force determined that it was unnecessary to make a specific recommendation regarding the disclosure of police reports, recognizing that police reports are encompassed within the category of “Law Enforcement Witness Statements.” The Task Force’s recommendations regarding “Law Enforcement Witness Statements” appear above in Section III.

² This language is adapted from CPL Article 240.50.

V. ALTERNATE PROCEDURES

The following alternate procedures, which many judges already implement when a party seeks a protective order, should be incorporated into the current order-of-protection statute (CPL Article 240.50) as examples of alternative procedures that judges may consider when determining whether to issue a protective order:

A. Attorney's Eyes Only

The Court may allow the prosecutor, when the disclosure of witness identifying information or witness statements would impair witness safety, witness integrity (as defined in Section III.F) and/or the integrity of ongoing investigations, to provide the identifying information or statements to the defendant's attorney, provided that the defendant's attorney may not disclose or permit the disclosure of this information to the defendant or anyone else, other than to persons employed by the attorney for the preparation of the case, subject to the same restrictions.

B. Arranged Interview

The Court may allow the prosecutor, when the disclosure of witness identifying information would impair witness safety, witness integrity (as defined in Section III.F) and/or the integrity of ongoing investigations, to arrange a witness interview solely with the defendant's attorney, with the consent of the witness.

C. Pro Se Defendants

The Court may allow the prosecutor, where the defendant is acting as his or her own attorney, to provide civilian witness identifying information to a standby counsel appointed by the Court. Contact with civilian witnesses may only be made through this standby counsel, who may not disclose or permit disclosure of civilian witness identifying information to the defendant or to anyone else unless otherwise ordered by the Court. Upon motion or application of a defendant acting as his or her own attorney, the Court may at any time modify or vacate any condition or restriction relating to access to discoverable material or information, for good cause shown.

VI. STATUTORY PROVISIONS CONCERNING WITNESS INTIMIDATION AND TAMPERING

- A.** New York's witness intimidation and tampering statutes should be enhanced and strengthened.
- B.** The Task Force determined not to make a specific recommendation endorsing any particular statutory enhancements, but listed below are the several potential enhancements that were discussed:
 - 1.** Legislation to address situations where witness integrity (as defined in Section III.F) is compromised without the presence of physical threats or intimidation.
 - 2.** Adoption of a general obstruction of justice statute that punishes acts or threats that impact witness safety and/or integrity without the presence of physical threats or intimidation.
 - 3.** Legislation to address situations where witnesses are intimidated or integrity is compromised at any stage of the investigation, during a proceeding or at a post-conviction stage.
 - 4.** Increasing penalties for witness tampering, including consideration of whether to make penalties for witness tampering and intimidation commensurate with or otherwise tied to the penalty for the underlying offense with which the defendant is charged.
 - 5.** Legislation to address the issue of investigators and counsel misrepresenting whom they work for when interviewing witnesses in connection with a criminal matter or investigation, including consideration of whether to include a requirement that investigators and counsel clearly identify themselves, including the full name of the agency they work for, and whether they represent or have been retained by the prosecutor or defendant, before commencing the interview or questioning.
 - 6.** Legislation that would make it a felony to intentionally disclose that which an actor knows or has reason to know is protected by a protective order.
 - 7.** Allowing prior sworn inconsistent statements to be admitted as substantive evidence, rather than merely to impeach as under current law, upon a showing that the inconsistent statement resulted from witness intimidation or tampering.

VII. TANGIBLE OBJECTS

- A.** Tangible objects obtained from or allegedly belonging to the defendant or a co-defendant that are in the prosecutor's possession, custody, or control should be made available for discovery by the defendant on an accelerated basis, regardless of whether the co-defendants are to be tried jointly.
- B.** Tangible objects and documents that are within the party's possession, custody, or control and that such party intends to introduce in its case-in-chief at trial or at a pre-trial hearing (if any) should be made available for discovery on an accelerated basis.

VIII. INFORMATION RELATING TO SEARCH WARRANTS

Search warrants and supporting documents should be provided to the defendant on an accelerated basis, subject to redactions by the prosecutor if disclosure would impair witness safety, witness integrity (as defined in Section III.F), and/or the integrity of ongoing investigations, unless otherwise ordered by the Court. The prosecution shall inform the defense of any redaction, and upon application by the defendant, the Court shall consider the validity of the reason for the redaction and whether the items are material to the preparation of the defendant for trial.

IX. EXPERT WITNESSES

The prosecutor and defendant shall exchange written reports of the anticipated testimony of any expert to be called as a witness at trial. If no such reports exist of experts anticipated to testify at trial, then the prosecutor and defendant must provide written summaries of the anticipated testimony, along with the identity and the qualifications of such experts. This shall in no way affect or enlarge current law regarding the presentation of psychiatric evidence by a defendant and the psychiatric examination of a defendant upon application of the prosecutor (CPL Article 250.10).

A. Content of Written Reports or Summaries

Similar to Federal Rule of Civil Procedure 26, the written report or summary should provide a complete statement of the witness's opinions and the bases and reasons for those opinions, describe any facts or data the witness used in forming such opinions, and describe any exhibits that will be used to summarize such opinion.

B. Other Information for Disclosure

In addition to providing the witness's qualifications and identity, for any witness the parties shall disclose cases in which such witness has testified within the last four years and any compensation a retained witness has or will receive for such testimony.

X. INFORMATION REGARDING CRIMINAL HISTORY, PRIOR BAD ACTS AND UNCHARGED CRIMES

A. For Witnesses Who Testify at a Trial or Proceeding

In addition to what is currently provided by court order, state law, or the State or Federal Constitution, the Division of Criminal Justice Services (DCJS) Criminal History Record for witnesses who testify at a trial or proceeding should be provided to the defendant by the prosecutor or the Court at the same time that witness statements are required to be provided to the defendant.

B. For Co-Defendants

In addition to what is currently provided by court order, state law, or the State or Federal Constitution, the Division of Criminal Justice Services (DCJS) Criminal History Record for co-defendants should be provided to the defendant by the prosecution or the Court.

C. For Defendant

1. The Court should be required to provide the defendant with his or her DCJS Criminal History Record promptly upon receipt from DCJS in compliance with CPL Article 160.40. In the event that the Court is unable to provide the DCJS Criminal History Record in compliance with CPL Article 160.40, the prosecution shall obtain and provide it to the defendant.
2. Any information relating to the criminal history of the defendant, including both information provided pursuant to CPL Article 160.40 and information relating to prior bad acts and uncharged crimes, that the prosecution intends to use at trial for purposes of impeaching the credibility of the defendant or as substantive evidence, should be provided to the defendant by the prosecution at the same time that witness statements are required to be disclosed.

XI. COURT-ORDERED DISCOVERY

A. Materials Not Otherwise Provided

The Court should be permitted to order discovery with respect to any property in the possession, custody or control of the prosecution that is not otherwise provided for by state law, the State or Federal Constitution, or the specific recommendations of the Task Force upon a showing by the defendant that discovery with respect to such property is material to the case, and that the request is reasonable.

If the Court permits such discovery to the defendant, then the defendant shall be required to provide reciprocal discovery of the same or a similar type of property, consistent with the protections afforded by the State and Federal Constitutions, without a requirement that the prosecution show that such property is material to the case and that the request for such property is reasonable.

B. Access to Crime Scene

Without prejudice to its ability to issue a subpoena pursuant to the Criminal Procedure Law, after an accusatory instrument has been filed, on application of the prosecution or the defendant for access to an area or place relevant to the case in order to inspect, photograph, or measure same, and upon notice to the property owner with a right to be heard, the Court may, upon a finding that such would be material to the preparation of the case or helpful to the jury in determining any material factual issue, enter an order authorizing same on a date and time reasonable for the parties and those in possession of the area or place, provided that law enforcement is not in good faith engaged in a continued investigation of the area or place. The Court may in the alternative otherwise provide for the securing of photographs or measurements of the area or place, particularly when necessary to protect the privacy of those in possession of private premises, or when necessary to preserve the safety and security of a place. The Court may also limit access and/or the distribution of photographs or measurements to the parties or their counsel.

XII. RECIPROCAL DISCOVERY

If discovery proceeds in stages, then within a certain number of days of the close of each phase of discovery by the prosecution, the defendant should provide reciprocal discovery of like information, consistent with the protections afforded by the State and Federal Constitutions.

XIII. COURT CONFERENCES AND COURT-ORDERED DISCOVERY TIMETABLE

Judges should be required to conduct a preliminary conference in criminal cases in accordance with New York Uniform Court Rule 200.12, with counsel who are familiar with the case and authorized to resolve issues. During the preliminary conference, the parties shall stipulate to a discovery schedule agreeable to both sides, which shall be so-ordered by the Court, and the Court shall set a trial date.

XIV. DOCUMENTING DISCOVERY COMPLIANCE

To create a reviewable record of disclosures, the prosecution and defendant shall file or otherwise memorialize on the record a clear record of what has been produced.

XV. SANCTIONS FOR NONCOMPLIANCE

The sanction for noncompliance with discovery obligations should be left to the Court's discretion, as is currently provided by CPL Article 240.70(1) and pursuant to applicable case law (including, *e.g.*, *People v. Kelly*, 62 N.Y.2d 516 (1984), and *People v. Handy*, 20 N.Y.3d 663 (2013))—to wit, sanctions for failure to provide discovery materials should be proportionate to the harm caused by the failure to provide such materials. Sanctions for providing discovery materials after the deadline for production of such materials should be imposed only if the opposing party is prejudiced by the belated production.

XVI. BRADY MATERIAL

There should be no specific reference to *Brady v. Maryland*, and the statutory language of CPL Article 240.20(1)(h) should be retained (“Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States”).

XVII. FIXED TRIAL DATES

Fixed trial dates should be set and adhered to in New York State in order to have a workable discovery process, unless refusal to adjourn a trial date would impair the fair administration of justice.