

COUNTY OF MADISON, STATE OF NEW YORK

**PEOPLE'S STANDING ANSWER TO DEMANDS FOR DISCOVERY
UNDER C.P.L. ARTICLE 240 AND/OR C.P.L. ARTICLE 245**

I, Robert A. Mascari, Esq., an attorney duly admitted to practice in the Courts of the State of New York, pursuant to Rule 2106 of the C.P.L.R., do hereby subscribe and affirm the following to be true under the penalties of perjury, except as to those matters alleged on information and belief, and as to such matters, I believe them to be true:

1. That I am the Chief Assistant District Attorney in the Madison County District Attorney's Office and in such capacity I am providing a standing answer to any purported discovery demands made by the defense under either C.P.L. Article 240 and/or C.P.L. Article 245.

DEMAND FOR DISCOVERY UNDER C.P.L. ARTICLE 240

2. As the Courts and counsel are well aware, C.P.L. Article 240 ceases to exist as of January 1, 2020. Even should the Courts consider a demand made under the soon to be repealed Article 240 valid, the People decline to answer the Defendant's demands for three separate reasons:
 - a. The demand is untimely under Article 240;
 - b. The demands made are improper under Article 240;
 - c. The standing Brady Order now issued by the Courts, the receipt of which the People acknowledge, make any sections of a discovery demand covered by the standing order moot.
3. At this point, any purported demands being made under C.P.L. Article 240 are not timely. C.P.L. § 240.80(1) makes clear that "a demand to produce shall be made within thirty days after arraignment and before the commencement of trial". The People raise the passage of time since the arraignment as a reason to decline to answer.

4. Any purported demands being made are improper under C.P.L. Article 240:
 - a. Under the old statute, the decisional law established a fundamental principle that absent an independent mandate, any item not listed in C.P.L. § 240.20 is not discoverable. (*People v. Colavito*, 87 N.Y. 2d 423, 427 (1996)) Further, any discovery that is unavailable by statute cannot be ordered (*Pirro v. LaCava*, 230 A.D.2d 909, 910 (2nd Dept. 1996), *app. den.* 89 N.Y.2d 813 (1997); (*Matter of Sackett v. Bartlett*, 241 A.D.2d 97, 101 (3rd Dept. 1997), *app. den.* 92 N.Y.2d 806 (1998)) In sum, it has been held that § 240.20 “may not be utilized as a vehicle for directing earlier discovery than is otherwise mandated or for compelling the People to create or compile material or obtain it from sources beyond its control”. (*Sackett*, *supra*, at p. 102 citing *Colavito*, *supra*);
 - b. Any other demands which go outside C.P.L. § 240.20 would also be improper in that they go to proof at trial and/or are premature in that they actually request *Rosario* material and are thus not discoverable under Article 240. (See, *People v. Stephens*, 219 AD2d 854 (4th Dept. 1995)) It should also be noted that laboratory protocols and manuals are neither *Brady* nor *Rosario* and are not discoverable. (*People v. Kelly*, 288 A.D.2d 695 (3rd Dept. 2001), *app. den.* 97 N.Y.2d 756 (2002));
 - c. The People also decline to answer any demands made under C.P.L. Article 240 on the grounds that such requests are improper, outside the mandates of Article 240, request materials that are collateral in nature, and/or request materials that are not in the possession and/or control of the Madison County District Attorney's Office;
 - d. As for any demands that could be construed as requesting *Rosario* material and prior bad acts, such a disclosure cannot be ordered under Article 240 because the statutory scheme under C.P.L. § 240.43 provided that the disclosure of such material properly requested is to be made “within a period of three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection”. Further, Article 240’s statutory scheme was further set

forth in C.P.L. § 240.45 which provided the disclosure of any such material properly requested to be made “after the jury has been sworn and before the prosecutor’s opening address”.

5. As mentioned, the People acknowledge the receipt of the *Brady* Order in this matter and are aware of their obligations thereunder. Given this, the demands made by defense counsel in this matter are moot since they are already covered by the court’s order.

DISCOVERY UNDER C.P.L. ARTICLE 245

6. Realizing that Article 240 ceases to exist as of January 1, 2020, the Courts may be inclined to treat the defendant’s demands as being made under C.P.L. Article 245. Should the Court take this approach, the People nonetheless decline to answer.

7. The statutory scheme of C.P.L. Article 245 is, by its terms, self-executing and does not provide a procedure for the filing of discovery demands since the same are no longer necessary to trigger the People’s obligation to provide discovery to the defense:

- a. The Madison County District Attorney has the obligation to perform “due diligence” in obtaining all the mandated discovery on each and every case that we are prosecuting;
- b. This obligation is spelled out in Criminal Procedure Law § 245.20(2) which provides that the District Attorney’s Office “shall make a diligent, good faith effort to ascertain the existence of material or information discoverable 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”;
- c. In furtherance of this “due diligence” obligation, Criminal Procedure Law § 245.20(2) goes on to provide that “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”;

- d. The ability and authority of the District Attorney's Office to obtain the materials "deemed to be in the possession of the prosecution" is first found in Criminal Procedure Law § 245.55(1) which provides "that the district attorney and the assistant responsible for the case 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";
- e. The unequivocal direct authority to request and receive from law enforcement agencies all such materials is found in Criminal Procedure Law § 245.55(2) which provides that "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";
- f. The discovery statute makes clear that the request to produce all materials in law enforcement's possession is recognized in Criminal Procedure Law § 245.60 to be a "continuing duty to disclose" thus making the previously cited provisions an on-going obligation both as to past, present, and future materials;
- g. C.P.L. § 245.20(3) also provides for the automatic disclosure of "supplemental discovery" of "all misconduct and criminal acts of the defendant not charged in the indictment" that the People intend to use for impeachment and/or on their case in chief;
- h. This "continuing duty to disclose", coupled with the cited sections above and the lack of a statutory procedure for making a discovery demand, leads to the unmistakable conclusion that a "demand for discovery" does not exist under the new statute.

8. That as part of their compliance with C.P.L. Article 245, the People have provided for disclosure as set forth in the following special situations that certain materials are “available” (as provided in C.P.L. §§ 245.20(2), 245.50(1), 245.55(3)):
 - a. That notice as to the availability for inspection of 911 calls, body worn cameras, and stationhouse cameras has been provided to the defense as well as contact information to arrange to inspect, view, and copy the same. A copy of this notice and the contact information is attached to and made a part hereof;
 - b. That notice as the availability of calibration records at the District Attorney’s website for inspection, viewing, and downloading has been provided to the defense. A copy of this notice is attached to and made a part hereof;
 - c. If applicable to a particular case, that notice as to the availability for inspection of audio-video playable only on proprietary software and of audio-videos exceeding ten (10) hours in length has been provided to the defense as well as contact information to arrange to inspect, view, and copy the same. A copy of the language of these notices, which are a part of a larger discovery answer and used only if applicable, is attached to and made a part hereof.
9. It should also be noted even prior to the enactment of C.P.L. Article 245, the Madison County District Attorney’s Office has had an “open file policy” that has not changed with the advent of the discovery statute. It continues to be our policy, subject to appropriate protective orders and other statutory exceptions, to provide any and all existing discoverable materials in our actual or constructive possession to the defense and to provide such additional materials as subsequently become available to the defense without delay. This “open file” policy is

considered by the District Attorney's Office to be an on-going office policy and an obligation consistent with our ethical duty to be fair in seeking justice in each case that is prosecuted.

10. Should the defense believe that the People are in violation of their discovery obligations, the proper remedy is a motion before the Court to compel discovery or seek sanctions under, for example, C.P.L. §§ 245.30, 245.45, 245.55(3)(b), 245.70, and 245.80. The proper procedure is not to make a demand for discovery since such a demand is neither found nor authorized under C.P.L. Article 245.

Dated: January 1, 2020

Robert A. Mascari
Chief Assistant District Attorney
Madison County District Attorney's Office

*Printed Name Above is an Electronic Signature As
Per Article 3 of the New York State Technology Law*

TO: Presiding Judge
Court Clerk
Attorney for Defendant

COUNTY OF MADISON

STATE OF NEW YORK

**PEOPLE'S STANDING AND ON-GOING C.P.L. § 245.20 NOTICE AS TO ALL TAPES OR
OTHER ELECTRONIC RECORDINGS (INCLUDING 911 RECORDINGS) AND
CALIBRATION RECORDS**

TO BE SERVED VIA EDISCOVERY IN EACH CASE -

**C.P.L. § 245.20(1)(g) NOTICE AS TO ALL TAPES OR OTHER ELECTRONIC RECORDINGS
(INCLUDING 911 RECORDINGS)**

PLEASE TAKE NOTICE of the following:

911 Calls & CAD Abstract

As to all **911 calls** associated with this incident made or received in connection with the alleged criminal incident, the system employed by the Madison County Emergency Management Center is not capable of automatically segregating by case (incident) the many calls that come in to the Center. The calls that are received on unrelated cases are sequentially recorded as received and are intermixed with the calls relating to this case. Often those unrelated call contain confidential or privileged information, such as a sexual assault victim's identity and address, on a completely unrelated case. While the calls on a particular incident can be relatively easily searched and listened to, the preparation of a digital file of only calls that came in on a particular case has to be done call by call and is a time consuming process.

Therefore, to timely comply with the People's discovery obligation, any call to 911 from a victim or a non-law enforcement witness in this matter or any other call that is relevant to this case such that the People plan to use the same at trial have been extracted and turned over to the defense. Further, for this incident a CAD abstract that shows all calls/transmissions associated with this incident has been provided to the defense. As to any such additional calls are indicated on the CAD abstract, they are preserved for a period of **ninety (90) days** from the date of the call as per the Madison County Emergency Management protocol. Further, assuming the District Attorney's Office became aware of such other calls within the **ninety (90) day** preservation period, Emergency Management has been directed by the District Attorney's Office to preserve the same.

For ninety (90) days from the date of the initial call in this case, the same are available for inspection by the defense by contacting Frank McFall at the Madison County Emergency Management at 315-366-2789 to set up an appointment to listen to the same. After inspection, any further calls not previously provided to the defense will, **if requested by the defense**, be copied and provided to the defense.

Dash Cam Video, Body Cam Video, & Stationhouse Cameras

PLEASE TAKE NOTICE that law enforcement agencies in Madison County may or may not employ dash cam videos, body cam videos, and stationhouse cameras. Attached hereto is the **Audio/Video Disclosure Statement** for all agencies engaged in law enforcement in Madison County. It details whether such video devices are employed, the retention policy for those video devices, and a contact number for the defense to contact the appropriate agency to arrange for a date and time to inspect the same. After inspection, the same, **if requested by the defense**, will be copied and turned over to the defense.

C.P.L. § 245.20(1)(s) NOTICE AS TO CALIBRATION RECORDS

PLEASE TAKE NOTICE that the law enforcement agency records called for in this section are available for viewing, inspection, and copying by visiting the Madison County District Attorney's website and then clicking on the discovery section. These records are kept current and updated as received from law enforcement. The web address for the Madison County District Attorney's Office is: <https://www.madisoncounty.ny.gov/259/District-Attorney>

PLEASE TAKE FURTHER NOTICE that the time period required by subdivision one of section 245.10 of this article 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.

Dated: January 1, 2020

Robert A. Mascari

Chief Assistant District Attorney
Madison County District Attorney's Office

*Printed Name Above is an Electronic Signature As
Per Article 3 of the New York State Technology Law*

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	CPL § 245.20(1)(g) - BODY WORN CAMERAS, DASH CAMS, STATIONHOUSE CAMERAS, OTHER, & 911 DISCLOSURE														
2															
3	Current as of 01/01/2020														
4															
5															
6	BODY WORN CAMERA				DASH BOARD CAMERA				STATIONHOUSE CAMERA				OTHER		
7	AGENCY				YES NO RETENTION PERIOD				YES NO RETENTION PERIOD				(CALL TO VIEW VIDEO)		
8	911 Center (Madison County)												CONTACT #		
9															
10	Canastota Police Department				X				X				DVR Inoperable		
11	Cazenovia Police Department				X				One Year				Chief James Zophy		
12	Chittenango Police Department				X				Six Months (Not All)				Chief Michael A. Hayes		
13	Hamilton Police Department				X				X				April Stanistreet		
14	Madison County Sheriff's Office				X				X				Matthew Janczuk		
15	NYS Dept. of Environmental Conservation				X				X				315-824-3311		
16	New York State Park Police				X				X				Exterior - Not Operational		
17	New York State Police - Troop D				X				X				Booking - Cannot Burn to Disk		
18	New York State Police - Troop T				X				X				Dep. Frank McCully		
19	Oneida City Police Department				X				X				315-366-2205		
20	Oneida Nation Police Department				X				Not Operational				Lt. Mark Colesante		
21	SUNY Morrisville Police Department				X				90 Days				315-567-1835		

C.P.L. § 245.20(1)(g) NOTICE AS TO ALL TAPES OR OTHER ELECTRONIC RECORDINGS

PLEASE TAKE NOTICE that the defense's attention is to the notices supplied in eDiscovery entitled "1 CPL 245 Notice - 911 Calls, Dashcam, Bodycam, Stationhouse Cameras, & Calibration Records" for information as to inspecting these items if they exist.

Notice as to Proprietary Software

[] **If this box is checked, PLEASE TAKE NOTICE** that a tape or other electronic recording has been supplied to law enforcement and/or created by law enforcement which uses proprietary software and cannot be converted to a format such as mp3. Therefore, the same are available for inspection by the defense by contacting the arresting agency as per the attached **Audio/Video Disclosure Statement** to arrange for a time to view the same. After inspection and if requested by the defense, a copy will be made to include any propriety software player if possible.

Notice as to Recordings Exceeding Ten (10) Hours in Length

[] **If this box is checked, PLEASE TAKE NOTICE** that the discoverable materials under this paragraph exceeded ten hours in total length and the People have disclosed only the recordings that it intends to introduce at trial or a pre-trial hearing. **A list of the source and approximate quantity of other recordings and their general subject matter if known** [] has already been provided to defense counsel [] is attached hereto. The defendant shall have the right upon request to obtain recordings not previously disclosed and the People 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 C.P.L. § 245.70 of this article.