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COMMENTS

CRIMINAL DISCOVERY IN NEW YORK: THE EFFECT OF THE NEW ARTICLE 240

I. Introduction

At common law there existed no right to discovery in criminal cases.¹ Criminal discovery developed in the late nineteenth and early twentieth century when statutes were enacted in England that introduced the use of a preliminary hearing.² Most jurisdictions in the United States, including New York, left the development of criminal discovery to case law.³ For many years, however, the lack of common law precedents and the philosophical objections of many judges prevented criminal defendants from obtaining any prosecution evidence before trial.⁴

The most prevalent of the early objections to criminal discovery was that the specter of severe penalties would motivate criminal defendants to use discovery to conjure up perjured testimony and to fabricate defenses.⁵ This argument was based on the traditional

1. 6 J. WIGMORE, EVIDENCE § 1850 (Chadbourn rev. ed. 1976). In *King v. Holland*, 100 Eng. Rep. 1248 (K. B. 1792), the court of the King's Bench, in reaction to a motion for discovery of a report on which the charges against the defendant were based, stated: "Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law. . . . And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent." *Id.* at 1249-50.

2. 6 J. WIGMORE, EVIDENCE §§ 1850 n.1, 1859 n.1 (Chadbourn rev. ed. 1976). See generally Traynor, *Ground Lost and Found In Criminal Discovery in England*, 39 N.Y.U.L. REV. 748 (1964) [hereinafter cited as Traynor]; Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557 [hereinafter cited as Zagel & Carr].

3. Comment, *Discovery in New York: The Effect of The New Criminal Procedure Law*, 23 SYRACUSE L. REV. 89 (1972) [hereinafter cited as *Discovery in New York*].

4. See, e.g., *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.); *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953); *People ex rel. Lemmon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927) (Cardozo, C.J.). See also Goldstein, *The State and the Accused: The Balance of Advantage In Criminal Procedure*, 69 YALE L. J. 1148, 1181 (1960) [hereinafter cited as Goldstein].

5. This argument against criminal discovery and those to follow are discussed in the following commentaries: *Discovery In New York*, *supra* note 3, at 89-90; Brennan, *The Criminal Prosecution: Sporting Events of Quest For Truth?*, 1963 WASH. U.L.Q. 279, 289 [hereinafter cited as Brennan]; Zagel & Carr, *supra* note 2, at 557, 560-61; McKenna, *Opening up Criminal Discovery In New York*, Memorandum and Proposed Statute Re Discovery, reprinted in 1974 N.Y. Laws 1860-78 (McKinney) [hereinafter cited as McKenna]; Committee

notion that criminal defendants would lie or would call witnesses who would lie.⁶ A second objection was that criminal discovery would result in the intimidation of prosecution witnesses.⁷ It was also argued that the existing procedural safeguards for the rights of the criminally accused were more than adequate to protect defendants and that any rights of discovery would only serve to prevent the effective enforcement of the criminal law.⁸ Finally, opponents of criminal discovery contended that the fifth amendment right against self incrimination would practically preclude any effective provisions for reciprocal discovery of defense material by the prosecution.⁹

These longstanding arguments against criminal discovery eventually came under criticism. One commentator characterized the argument that criminal discovery by the defendant invited perjury as a "hobgoblin" and a "complete fallacy" because there was no evidence to show that discovery in criminal cases would result in a greater incidence of perjury and fabrication.¹⁰ In addition, the per-

on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, *Pre-trial Discovery in Criminal Cases*, 31 RECORD 710, 716 (1976) [hereinafter cited as ABA Report].

6. See 6 J. WIGMORE, EVIDENCE § 1863 (Chadbourn rev. ed. 1976). Indeed, it was this distrust of criminal defendants which had been the underlying basis for the common law rule that denied defendants the right to call witnesses or to testify in their own behalf. *Id.* In England, criminal defendants were not given the right to call witnesses and to present a defense until 1867. Traynor, *supra* note 2, at 753.

7. See sources cited in note 5 *supra*.

8. *Id.* In *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923), Judge Learned Hand stated:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the honest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is at least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Id. at 649.

9. See sources cited in note 5 *supra*.

10. Brennan, *supra* note 5, at 290-91. One survey's empirical findings supported the conclusion that the fears of perjury, intimidation of witnesses, and reluctance of witnesses to testify were largely unfounded. Knudson, *Disclosure of Grand Jury Testimony*, 60 F.R.D. 237, 360 (1973). In addition, it has been argued that there is an equal danger of perjury in civil cases where discovery is allowed and that, in any event, it is the job of a skilled lawyer to expose a witness who is committing perjury. McKenna, *supra* note 5, at 1870.

jury argument was criticized as insulting the criminal defense bar by implying that defense attorneys would encourage perjury once discovery was obtained.¹¹ It was also noted that the assumption that defendants would lie assumes that they are guilty, a view contrary to the presumption of innocence.¹² The claim that criminal discovery would lead to intimidation of witnesses was answered simply by pointing out that protective orders and other sanctions could be administered in the discretion of the trial court based on the circumstances of the particular case.¹³ The contention that the accused has the advantage in criminal prosecutions was answered with the argument that the prosecution has all the investigative advantages, especially in terms of manpower and facilities.¹⁴ It was also argued that the investigative superiority of the prosecution and the right to seize evidence virtually precluded the need for reciprocal discovery by the prosecution.¹⁵ In addition, proponents of criminal discovery argued that a criminal defendant, who if convicted would lose his liberty, should be accorded the same rights of discovery as a civil defendant on the grounds of fairness and logic.¹⁶ Finally, it was maintained that allowing discovery in criminal cases would be consistent with the presumption of innocence because if the defendant is presumed innocent he must also be presumed to have no knowledge of the crime charged.¹⁷

In addition to responding to the traditional objections to criminal discovery, proponents argued that criminal discovery would produce numerous benefits. Proponents explained that pretrial disclosure would promote the ends of justice and the search for the truth by ensuring that all relevant facts would be brought out at trial and that the use of surprise tactics would be eliminated.¹⁸

11. Brennan, *supra* note 5, at 291-92.

12. McKenna, *supra* note 5, at 1870.

13. Brennan, *supra* note 5, at 292.

14. Zagel & Carr, *supra* note 2, at 561. In addition, the accused has often given the prosecution a statement or confession or has been made to appear in a line-up. *Id.* at 560.

15. *Id.* at 560. It should be noted that in urban areas police forces spend most of their time patrolling the streets rather than investigating criminal activity; and it is the responsibility of grand juries to charge rather than investigate. *Id.* at 560 n.19.

16. Pye, *The Defendant's Case For More Liberal Discovery*, 33 F.R.D. 82, 83 (1963) [hereinafter cited as Pye]; Zagel & Carr, *supra* note 2, at 560.

17. Zagel & Carr, *supra* note 2, at 560.

18. *Id.* But see Pulaski, *Criminal Trials: A "Search For Truth" or Something Else?* 16 CRIM. L. BULL. 41 (1980). This was the rationale for adopting discovery in civil cases. Zagel

This would not only make the administration of criminal justice more efficient, but also assure the defendant his right to a fair trial by enabling him to prepare his case effectively.¹⁹ The goal of efficiency was especially important in light of the continuing importance placed on plea bargaining in the criminal justice system.²⁰ Pretrial discovery, it was argued, would enable an accused and his counsel to weigh the evidence against him to determine whether to enter a plea of guilty or not guilty.²¹ Finally, it was claimed that pretrial disclosure would alleviate the problems in trial preparation posed by the fact that adequate investigation is sometimes difficult or impossible for the defendant.²² In connection with this claim, it was argued that affording defendants pretrial discovery rights would help to balance the advantage held by the prosecution in the superiority of its investigatory force.²³

Despite the persuasiveness of the arguments in favor of criminal discovery, they were slow to find acceptance in the courts of New York.²⁴ In 1927, Chief Judge Cardozo of the New York Court of Appeals, in *People ex rel. Lemon v. Supreme Court*,²⁵ had been able to discern only "[t]he beginnings or at least the glimmerings" of a criminal discovery doctrine.²⁶ In that case Chief Judge Cardozo affirmed a reversal of a trial court's order that the prosecution disclose certain evidence to the defense, holding that a defendant was not entitled to pry into the state's evidence simply because it would be helpful to him.²⁷ Chief Judge Cardozo also stated, however, that "[t]he decision of this case does not require us to affirm

& Carr, *supra* note 2, at 560.

19. Pye, *supra* note 16; ABA Report, *supra* note 5, at 715; Zagel & Carr, *supra* note 2, at 562.

20. See *Santobello v. New York*, 404 U.S. 257, 260-61 (1971).

21. Zagel & Carr, *supra* note 2, at 559.

22. Brennan, *supra* note 5, at 285-87; Zagel & Carr, *supra* note 2, at 560; Goldstein, *supra* note 4, at 1182-83.

23. See note 22 *supra*.

24. This is not to imply that there was absolutely no discovery in criminal cases prior to this time. In the actual practice of criminal prosecutions there was probably a good deal of evidentiary material made available to defense attorneys by prosecutors who hoped that by revealing part of their case the defendant would be persuaded to plead guilty, thereby saving both the time and expense of a trial. Brennan, *supra* note 5, at 282. See also *People v. Bennett*, 75 Misc. 2d 1040, 1045, 349 N.Y.S.2d 506, 513 (Erie County Ct. 1973).

25. 245 N.Y. 24, 156 N.E. 84 (1927).

26. *Id.* at 32, 156 N.E. at 86.

27. *Id.* at 34, 156 N.E. at 88.

or deny the existence of an inherent power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice."²⁸

After *Lemon*, criminal discovery in New York developed on an *ad hoc* basis resulting in inconsistent determinations.²⁹ The reason for this was the absence of criteria more definite than "in furtherance of justice."³⁰ Some cases following *Lemon* continued to hold that defendants in criminal cases had no right to discovery.³¹ As time went on, however, decisions of trial courts began to reflect a more liberal trend, holding that it was within their "inherent discretionary power" to grant pretrial discovery to criminal defendants in order to prevent injustice.³²

The inconsistent and conflicting state of the case law involving criminal discovery moved the New York State Legislature, when it enacted the Criminal Procedure Law (CPL) in 1971, to include in it article 240, which provided specific criteria for judges to follow in granting discovery and expanded an accused's right to pretrial discovery well beyond the most liberal pre-CPL case law.³³ In 1979, the New York State Legislature repealed the original article 240 as enacted in 1971 and replaced it with a wholly new article 240 which became effective on January 1, 1980.³⁴

The purpose of this Comment is to set forth the current status of statutory discovery in criminal prosecutions in the State of New

28. *Id.* at 32, 156 N.E. at 86.

29. *Discovery in New York*, *supra* note 3, at 91; Comment, *Discovery Procedures Under New York's New Criminal Procedure Law*, 38 BROOKLYN L. REV. 164 (1971) [hereinafter cited as *Discovery Procedures*].

30. *Discovery Procedures*, *supra* note 29, at 164.

31. *People v. Spina*, 14 A.D.2d 505, 217 N.Y.S.2d 247 (4th Dep't 1961); *People v. Golly*, 43 Misc. 2d 122, 250 N.Y.S.2d 210 (Sup. Ct. 1964); *Widziewicz v. Golding*, 52 Misc. 2d 837, 277 N.Y.S.2d 62 (Dutchess County Ct. 1966); *People v. Graziane*, 46 Misc. 2d 936, 261 N.Y.S.2d 546 (Columbia County Ct. 1965); *People v. Parkinson*, 181 Misc. 603, 43 N.Y.S.2d 690 (Ct. Gen. Sess. N.Y. County 1943); *People v. Gatti*, 167 Misc. 545, 4 N.Y.S. 2d 130 (Ct. Gen. Sess. N.Y. County 1938).

32. *People v. Chirico*, 61 Misc. 2d 157, 163, 305 N.Y.S.2d 237, 242 (Fulton County Ct. 1969). See *Silver v. Sobel*, 7 A.D.2d 728, 180 N.Y.S.2d 699 (2d Dep't 1958); *People v. Abbatiello*, 46 Misc. 2d 148, 259 N.Y.S.2d 203 (Sup. Ct. 1965); *People v. Quarles*, 44 Misc. 2d 955, 255 N.Y.S.2d 599 (Sup. Ct. 1964); *People v. Preston*, 13 Misc. 2d 802, 176 N.Y.S.2d 542 (Kings County Ct. 1958).

33. 1970 N.Y. Laws ch. 996 (McKinney) (repealed 1979 N.Y. Laws ch. 412, § 1) (McKinney) [hereinafter cited as CPL].

34. 1979 N.Y. Laws ch. 412 (McKinney).

York.³⁵ Part II of this Comment will detail what evidence was discoverable under the original article 240 and the procedures by which it could be obtained. Part III will present a number of the significant case law problems that arose under the original article 240. Part IV will analyze the effectiveness of the newly enacted statute in addressing these problems and in offering a comprehensive guideline to criminal discovery in New York.

II. Discovery Under the Original Article 240

The original article 240 was, in large measure, an adoption of rule 16 of the Federal Rules of Criminal Procedure.³⁶ Rule 16 established precise and liberal guidelines for criminal discovery in the federal courts.³⁷ Article 240 was designed to do the same in New York.³⁸ The goal of the original article 240, and that of Federal Rule 16, was to allow the defendant an opportunity to adequately prepare for trial while not hindering the prosecutorial function.³⁹

Article 240, as passed in 1971, permitted a defendant against whom an indictment was pending, to make a motion for discovery.⁴⁰ In order for the motion to be granted, the defendant had to

35. There are numerous ways and methods by which both the defense and the prosecution become aware of each other's evidence which are not covered by article 240. For instance, discovery is often obtained through the use of subpoenas, in the process of preliminary hearings, and in even more informal ways. In addition, there are sections in the CPL other than the discovery article which provide for exchanges between the defense and prosecution, including a bill of particulars supplied to the defendant by the prosecutor (N.Y. CRIM. PROC. LAW § 200.90 (McKinney Supp. 1979)), a notice by the defendant of intent to rely on the defense of mental disease (*Id.* § 250.10), and a bill of particulars supplied by the defendant upon the prosecutor's demand where the defendant intends to use an alibi defense (*Id.* § 250.20). These methods will not be discussed in this Comment. There is also a large body of case law involving the discovery of an informant's identity. This case law has not been codified and will therefore not be discussed in this Comment in order to focus specifically on discovery under the CPL's discovery provision. For a good discussion of discovery of an informant's identity, see Note, 39 ALB. L. REV. 561 (1975).

36. N.Y. CRIM. PROC. LAW art. 240, commentary (McKinney 1971) (repealed 1979) [hereinafter cited as Practice Commentary]. New York courts that first dealt with discovery issues under the original article 240 looked to federal case law on rule 16 to determine the proper scope and interpretation to be given to article 240. See, e.g., *People v. McMahon*, 72 Misc. 2d 1097, 341 N.Y.S. 2d 318 (Albany County Ct. 1973); *People v. Leto Bros., Inc.*, 70 Misc. 2d 347, 334 N.Y.S.2d 298 (Albany County Ct. 1972).

37. Practice Commentary, *supra* note 36.

38. *Id.* See also *Discovery in New York*, *supra* note 3, at 92-93.

39. Practice Commentary, *supra* note 36.

40. CPL, *supra* note 33, sec. 1, § 240.20.

act with due diligence.⁴¹ A motion made subsequent to the commencement of trial could be summarily denied.⁴² The court, however, in the interest of justice and for good cause could grant a discovery motion at any time before or during trial but prior to the conclusion of the evidence.⁴³ If the motion was granted, the court would issue an order of discovery⁴⁴ directing the prosecution to allow the defendant to inspect the property requested.⁴⁵ After complying with an order of discovery, a party who found additional property covered by the order would be required to promptly notify his adversary or the court.⁴⁶ Trial courts were given wide discretion to remedy a failure to comply with a discovery order.⁴⁷

The original article 240 exempted two kinds of material from pretrial discovery.⁴⁸ The first exemption protected "reports, memoranda or other internal documents or work papers made by district attorneys, police officers or other law enforcement agents or by a defendant or his attorneys, or agents, in connection with the investigation [and] prosecution . . . of a criminal action."⁴⁹ The second exemption protected statements of witnesses and prospective witnesses of both parties.⁵⁰

Section 240.20 was the heart of the original article. This section set forth the types of material discoverable in criminal cases. Under subdivision one of this section, a defendant was entitled to mandatory and unconditional discovery of his testimony given before the grand jury that issued the indictment.⁵¹ A defendant could also obtain any written or recorded statements made by him to law enforcement personnel.⁵²

41. *Id.* § 240.30.

42. *Id.*

43. *Id.*

44. *Id.* § 240.20.

45. *Id.* § 240.10(1). This included the right to copy or photograph the property. *Id.*

46. *Id.* § 240.40.

47. *Id.*

48. *Id.* § 240.10(3).

49. *Id.* § 240.10(3)(a).

50. *Id.* § 240.10(3)(b). Discovery of this material is not totally prohibited, but is actually delayed until after the witness has testified at trial. In federal courts this practice is required by the Jencks Act. 18 U.S.C. § 3500 (1976). The New York Court of Appeals adopted this approach in *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450, *cert. denied*, 368 U.S. 886 (1961).

51. CPL, *supra* note 33, sec. 1, § 240.20(1)(a).

52. *Id.* § 240.20(1)(b). There was no requirement in § 240.20(1) that the discoverable

Under subdivision two of section 240.20, a court could order discovery of reports of physical and mental examinations and scientific tests made in connection with the defendant's case.⁵³ Such documents were discoverable if the district attorney knew or should have known that they were in his possession.⁵⁴ Unlike the unconditional and mandatory discovery provided for in subdivision one, the discovery of material under subdivision two was discretionary with the court and could be made conditional⁵⁵ upon reciprocal discovery by the prosecution of similar material within the defendant's possession and which the defendant intended to produce at trial.⁵⁶ To avail itself of reciprocal discovery, the prosecution was required to make a motion for discovery of material similar to that requested by the defendant.⁵⁷ This motion would be granted if the prosecution could show that the property it sought was material to the preparation of its case.⁵⁸ In addition, the reciprocal request had to be reasonable and could not involve exempt property.⁵⁹

Subdivision three of section 240.20 created a much "broader classification" of discoverable material than did the first two subdivisions.⁶⁰ Under this subdivision, the court in its discretion could order discovery by the defendant of "other property" within the possession and control of the prosecution where the defendant

statements be admissible into evidence. Therefore, constitutionally inadmissible evidence was discoverable. *Discovery Procedures*, *supra* note 29, at 170. The only limitations provided for by section 240.20(1) were that the statements had to have been made to a law enforcement official and that no discovery could be ordered as to statements made in the course of an intercepted communication pursuant to an eavesdropping order.

53. CPL, *supra* note 33, sec. 1, § 240.20(2).

54. *Id.* § 240.20(2). If the prosecutor produced at trial a report which he purposely or negligently failed to turn over to the defense before trial under a discovery order, the document might have been excluded from evidence. *Id.* § 240.40. Discovery of physical and mental examinations and scientific reports has generally been free of controversy. This is due to the obvious importance of this material to the adequate preparation of the defendant's case and the fact that such material is generally safe from alteration before trial. *See, e.g.,* *People v. McMahon*, 72 Misc. 2d 1097, 341 N.Y.S.2d 318 (Albany County Ct. 1972); *People v. Johnson*, 68 Misc. 2d 708, 327 N.Y.S.2d 690 (Dutchess County Ct. 1971).

55. CPL, *supra* note 33, sec. 1, § 240.20(2).

56. *Id.* § 240.20(4). Discovery under subdivision two was also subject to protective orders and *in camera* inspection by the court as provided for in section 240.20(5).

57. *Id.* § 240.20(4).

58. *Id.*

59. *Id.* It should be noted that although the defendant need not have alleged that the material he sought would be admissible into evidence, the prosecution's reciprocal discovery was limited to material which the defendant intended or was likely to produce at trial. *Id.*

60. Practice Commentary, *supra* note 36, § 240.20.

showed that the property was material to the preparation of his case and that the request was reasonable.⁶¹ This subdivision also provided that such material could not be exempt property and had to be specifically designated.⁶²

III. Issues and Problems Under the Original Article 240

A. What Constitutes a Recorded Statement?

Under the original article's provision for automatic and unconditional discovery by the defendant of his own written or recorded statements,⁶³ it was unclear whether oral statements not written or recorded were discoverable. A companion issue that arose was whether the defendant could discover notes taken by a police officer of an oral statement made by the defendant. Also of importance was whether summaries of oral statements contained in exempt property, such as police reports, could be discovered. Section 240.20(1)(b) did not address these issues.⁶⁴

61. CPL, *supra* note 33, sec. 1, § 240.20(3). An appellate division case, decided before the original article 240 was enacted, based its decision on requirements similar to those later to be included in section 240.20(3). In *People v. Cleary*, 33 A.D.2d 814, 305 N.Y.S.2d 384 (3d Dep't 1969), the court stated that: "[T]o be entitled to any additional information from the file of the prosecution there must be some demonstration that it exists and is material and necessary for his defense." *Id.* at 814-15, 305 N.Y.S.2d at 384-85.

62. CPL, *supra* note 33, sec. 1, § 240.20(3).

63. *Id.* § 240.20(1)(b). See note 52 *supra* and accompanying text.

64. An additional, though relatively minor, issue arising under section 240.20(1)(b) involved the limitation contained in that section that defendant's discoverable statements must have been made to public servants engaged in law enforcement activity or persons acting in cooperation with them. See note 52 *supra*. The Federal Rule contains no reference to law enforcement agents. FED. R. CRIM. P. 16(a). Early federal case law interpreted this provision to mean that virtually all statements were discoverable whether or not they were made to a law enforcement official. *United States v. Sink*, 56 F.R.D. 365, 369 (E.D. Pa. 1972); *United States v. Lubomski*, 277 F. Supp. 713, 720 (N.D. Ill. 1967). In New York, the question was raised whether persons not within the definition of "police" or "peace" officers (CPL, *supra* note 33, sec. 1, § 1.20 (33)-(34)) could be considered law enforcement officials so that statements made to them were discoverable. An early court of appeals case held that statements made to a private citizen who was working closely with authorities were properly discoverable. *People v. Rupert*, 26 N.Y.2d 437, 259 N.E.2d 906, 311 N.Y.S.2d 481 (1970). A later lower court case held that a town building official was "a public servant engaged in law enforcement activity" on the grounds that such officials were responsible for enforcing building codes and town ordinances. *People v. Brogan*, 70 Misc. 2d 282, 332 N.Y.S.2d 499 (Dist. Ct. 1972). In *People v. Bennett*, 75 Misc. 2d 1040, 349 N.Y.S.2d 506 (Sup. Ct. 1973), a case involving a prisoner uprising at Attica State Prison, the court held that the limitation on section 240.20(1)(b) should be accorded a very broad interpretation and allowed discovery of defendants' statements made not only to police or correction officers, but also to deputy sheriffs, medical personnel, monitors, members of the National Guard and prison staff. *Id.*

Several cases prior to the enactment of the CPL addressed the issue of whether oral statements were discoverable. In *People v. Riley*,⁶⁵ the court denied the defendant's motion for discovery of an alleged oral admission and held that he was entitled to discover only "confessions or admissions written by defendant himself or signed by defendant or in such question-answer form as would be admissible as an exhibit"⁶⁶ The court stated that where a defendant has given "an oral admission, whether or not a police officer has made a note thereof or given the substance or content thereof in some paper for the use of the District Attorney, there is no 'copy' which can be furnished to defendant's counsel in advance."⁶⁷ Similarly, in *People v. Cusano*,⁶⁸ the court denied a motion for discovery of a defendant's oral statements, ruling that "an alleged oral statement has no legal existence until and as testified to by [a] witness."⁶⁹

Relying on these pre-CPL cases, several cases subsequent to the passage of the original article 240 continued to hold that defendants' oral statements were not discoverable.⁷⁰ Other New York courts, however, took a more expansive view of the statute. In *People v. Zacchi*,⁷¹ the defendants moved, pursuant to section 240.20(1)(b), for discovery of tape recordings of bribe offers which they had allegedly made to police officers.⁷² The court granted the motion, maintaining that statements by defendants discoverable under section 240.20(1)(b) were not "limited to recitals of past oc-

at 1051-52, 349 N.Y.S.2d at 519. In a more recent case, a zoning inspector was held to be engaged in law enforcement activity within the meaning of section 240.20(1)(b). *People v. Wayman*, 82 Misc. 2d 959, 371 N.Y.S.2d 791 (Just. Ct. 1975). The newly enacted article 240 retains the requirement that discoverable statements have been made to persons "engaged in law enforcement activity." 1979 N.Y. Laws ch. 412, sec. 2, § 240.20(1)(a) (McKinney). Further problems with this limitation, however, should abate in light of the above case law interpreting the limitation broadly to include almost all civilians acting in close cooperation with the police.

65. 46 Misc. 2d 221, 258 N.Y.S.2d 932 (Sup. Ct. 1965).

66. *Id.* at 223, 258 N.Y.S.2d at 934.

67. *Id. Accord*, *People v. Cohen*, 60 Misc. 2d 706, 708, 303 N.Y.S.2d 109, 112 (Richmond County Ct. 1969).

68. 63 Misc. 2d 906, 313 N.Y.S.2d 833 (Nassau County Ct. 1970).

69. *Id.* at 908, 313 N.Y.S.2d at 835.

70. *People v. Gaissert*, 75 Misc. 2d 478, 480, 348 N.Y.S.2d 82, 84 (Nassau County Ct. 1973); *People v. Thomas*, 71 Misc. 2d 1069, 1072, 338 N.Y.S.2d 2, 5 (Nassau County Ct. 1972).

71. 69 Misc. 2d 785, 331 N.Y.S.2d 86 (Sup. Ct. 1972).

72. *Id.* at 786, 331 N.Y.S.2d at 87.

currences, such as confessions," but included tape recordings of "incriminating conversations such as bribe attempts."⁷³ In *People v. Bennett*,⁷⁴ the court entertained a discovery motion made on behalf of forty-three defendants involved in an inmate uprising at Attica State Prison.⁷⁵ With respect to the defendants' motion for discovery of their own statements, the *Bennett* court cited the *Zacchi* decision with approval and held that "[t]he manner in which the statement has been written or recorded is immaterial, and oral statements of a defendant reflected or summarized in any report, notes or memoranda, are subject to production without regard to whether or not they are verbatim or substantially verbatim."⁷⁶ The *Bennett* decision also provided that to the extent that the report or memorandum in which the defendant's statements were contained was considered exempt property under section 240.10(3)(a),⁷⁷ the material could be redacted before discovery by the defendant.⁷⁸

The *Bennett* decision was expressly accepted in two subsequent cases. In *People v. Harrison*,⁷⁹ the defendant moved for discovery of the handwritten notes made by police of his conversations with them after his arrest for drunken driving.⁸⁰ The court granted the motion stating that if notations of a defendant's oral statements "are summarized, abridged, referred to, or reflected in any book, record or paper . . . they are subject to discovery."⁸¹ In *People v. Wyssling*,⁸² a defendant charged with perjury arising out of alleged discrepancies between his grand jury testimony and statements he made during a previous interview with the district attorney moved to discover the notes of the interview.⁸³ The court rejected the district attorney's contention that the notes of the interview with the defendant were exempt, stating that "[l]aw enforcement officers . . . are not to limit the mandatory discovery rights of a defendant merely by placing discoverable material with other matter into a

73. *Id.* at 787-89, 331 N.Y.S.2d at 88.

74. 75 Misc. 2d 1040, 349 N.Y.S.2d 506 (Sup. Ct. 1973).

75. *Id.* at 1044, 349 N.Y.S.2d at 512.

76. *Id.* at 1051, 349 N.Y.S.2d at 519.

77. See text accompanying notes 48-49 *supra*.

78. 75 Misc. 2d at 1051, 349 N.Y.S.2d at 519.

79. 81 Misc. 2d 144, 364 N.Y.S.2d 760 (Just. Ct. 1975).

80. *Id.* at 146, 364 N.Y.S.2d at 762.

81. *Id.*

82. 82 Misc. 2d 708, 372 N.Y.S.2d 142 (Suffolk County Ct. 1975).

83. *Id.*

report which is then characterized as exempt."⁸⁴

Despite the preceding cases broad interpretation of section 240.20(1)(b) allowing discovery of statements recorded in notes or contained in reports which were arguably exempt material under section 240.10(3)(a), it was several years before a court explicitly held that oral statements were discoverable.⁸⁵ The first case which expressly granted discovery of unrecorded oral statements was *People v. Utley*.⁸⁶ In that case, the defendant moved to discover both his written and oral statements.⁸⁷ The court granted the motion stating that it was "inclined to view the difference between oral and written statements as one of mere form rather than substance."⁸⁸ The court directed the prosecution to "reduce to writing the substance of those oral statements, not already written or recorded."⁸⁹ The *Utley* court based its decision on the same reasoning utilized by the courts and the legislature in providing for discovery of written or recorded statements;⁹⁰ that is, prosecutorial disclosure of the defendant's oral statements is important to ensure that defendant's rights to due process and representation by counsel would not be denied.⁹¹ The *Utley* court reiterated the view expressed in *Bennett* that the manner of recordation was immaterial and that the exempt material could be redacted if the recording was contained in an exempt report or memorandum.⁹²

Those cases that considered the manner of recordation to be immaterial were reasonably consistent with the statute's provision for discovery of "written and recorded" statements.⁹³ The *Utley* holding, however, that oral statements were discoverable, was inconsistent with the express terms of section 240.20(1)(b) which made no

84. *Id.* at 710, 372 N.Y.S.2d at 144.

85. The closest any case had come to such a holding was in *People v. McMahon*, 72 Misc. 2d 1097, 341 N.Y.S.2d 318 (County Ct. 1972), where, without opinion, the court granted a motion for discovery of "a transcription of oral statements . . . reduced to writing or if not so reduced, then to provide the defense with the substance of the latter statements." *Id.* at 1098-100, 341 N.Y.S.2d at 318-20. Such a holding was tantamount to recognizing oral statements to be discoverable.

86. 77 Misc. 2d 86, 353 N.Y.S.2d 301 (Nassau County Ct. 1974).

87. *Id.* at 87, 353 N.Y.S.2d at 306.

88. *Id.* at 94, 353 N.Y.S.2d at 312.

89. *Id.* at 97, 353 N.Y.S.2d at 316.

90. *Id.* at 94, 353 N.Y.S.2d at 312-13.

91. *Id.* at 89-94, 353 N.Y.S.2d at 308-13.

92. *Id.* at 89, 353 N.Y.S.2d at 308.

93. See notes 71-84 *supra* and accompanying text.

reference to oral statements. Indeed, the court in *Utley* did not base its decision on any provision in the original article 240, but said that it had

the inherent power to compel disclosure of evidence which is material and relevant to the defense, or which is favorable to the accused, or where disclosure is necessary to avoid delay in trial or to protect natural, essential basic or constitutional rights of the defendant or where it is otherwise necessary to guarantee a fair trial or in the interest of justice.⁹⁴

Another case in which the court found that defendants could discover their unrecorded oral statements despite the fact that such discovery was not expressly provided for in 240.20(1)(b) was *People v. Daniels*.⁹⁵ In *Daniels*, the court had ordered disclosure of all written or recorded statements of the defendant.⁹⁶ When the prosecution applied for a clarification of the order, the court held that unrecorded oral statements were subject to discovery "in the court's discretion where a proper showing of materiality to the preparation of the defense and reasonableness of the request has been made," pursuant to section 240.20(3).⁹⁷ Whether section 240.20(3) actually supported the discovery of defendants' unrecorded statements, especially in light of the express requirement in section 240.20(1)(b) of a "written or recorded statement," is unclear. What is clear, however, is that in granting discovery to defendants of their own statements, many courts simply refused to be restrained by the statute.

B. Discovery Requests Outside the Scope of the Original Article 240

Under section 240.20(3), defendants could make a motion for discovery of "other property" within the possession of the prosecution.⁹⁸ Upon such a motion, courts, in their discretion, had to determine if the defendant had satisfied the four requirements imposed

94. 77 Misc. 2d at 96, 353 N.Y.S.2d at 315.

95. 82 Misc. 2d 780, 371 N.Y.S.2d 595 (Suffolk County Ct. 1975).

96. *Id.*

97. *Id.* at 782, 371 N.Y.S.2d at 597. See notes 60-62 *supra* and accompanying text. The defendant in *Daniels* failed to make the required showing. *Id.* at 782-83, 371 N.Y.S.2d at 597-99.

98. See notes 60-62 *supra* and accompanying text. See also notes 95-97 *supra* and accompanying text for a discussion of *People v. Daniels*, a case which based its holding on section 240.20(3).

by the section. The property requested had to be non-exempt property, specifically designated, material to the preparation of the defendant's case, and the request itself had to be reasonable.⁹⁹ This catch-all provision was theoretically the basis for many discovery motions by defendants because it freed defense counsel to move for discovery of property not otherwise discoverable under subsections one and two of section 240.20.¹⁰⁰ In many cases, however, defense counsel did not specifically base their discovery motions on section 240.20(3) despite the fact that it was the only section in the original article 240 under which the items requested could have been discovered. In addition, most courts did not state that the motion was being decided under that section. Rather, defense counsel would make broad omnibus motions¹⁰¹ for pretrial discovery and courts would decide them on the basis of their inherent discretionary power to advance the interests of justice. In so doing, courts would often take into account such factors as the preservation of the right to a fair trial and efficiency in the administration of criminal justice.

Whether specifically stated as being made pursuant to section 240.20(3) or not, the resulting defense motions were both imaginative and far reaching. Among these were requests for police and other investigatory or prosecutorial reports, names and addresses of prospective prosecution witnesses, grand jury testimony and statements of prospective prosecution witnesses, and exculpatory evidence. The ability of defendants to discover material not specifically stipulated as discoverable by the original article 240 will be discussed in this section. Specifically, it will be shown that confusion and conflict developed in the courts of New York in regard to all these defense requests.

1. *Police and Other Investigatory or Prosecutorial Reports*

Prior to the enactment of article 240 in 1971, New York courts consistently denied discovery motions for such items as investigative reports, memoranda or notes of police officers and prosecutors, and other investigatory related material.¹⁰² These holdings were

99. See notes 61-62 *supra* and accompanying text.

100. See notes 51-56 *supra* and accompanying text.

101. See N.Y. CRIM. PROC. LAW § 255.20 & commentary (McKinney Supp. 1979).

102. *People v. Buchalter*, 289 N.Y. 244, 45 N.E. 2d 425 (1942) (police records); *People v. Marshall*, 5 A.D.2d 352, 172 N.Y.S.2d 237 (3d Dep't 1958) (worksheets and files); *Mulry v.*

codified in the section of the original article 240 which defined exempt property.¹⁰³ Shortly after the enactment of article 240, however, New York courts began to criticize and circumvent this restriction. In *People v. Inness*,¹⁰⁴ for example, a court granted a motion for discovery of accident investigation reports arising out of a vehicular homicide.¹⁰⁵ The court criticized the definition of exempt property in section 240.10(3)(a) as a generalization and granted the motion "in the interests of justice."¹⁰⁶ The court rationalized its disregard for section 240.10(3)(a) by distinguishing between material constituting work product and material constituting routine accident investigation reports relating to physical facts.¹⁰⁷

In *People v. Wright*,¹⁰⁸ the defendant made a motion for discovery of "any and all reports, papers and forms" of the police department "concerning the investigation and arrest of the defendant," and then specifically named the various forms sought.¹⁰⁹ In granting the motion, the court made a lengthy argument for the expansion of criminal discovery.¹¹⁰ The court held that section 240.10(3)(a)'s express exemption from discovery of "reports . . . made by . . . police officers,"¹¹¹ did not include "the usual police arrest reports, incident reports and the like . . ."¹¹² The court distinguished this material from "work papers that result from interviews and actual trial preparation which are not discoverable."¹¹³ Discovery of the requested material, the court concluded, would lead to an "earlier disposition" of the case, perhaps through the defendant's pleading guilty.¹¹⁴

This trend of allowing discovery of routine reports continued despite the fact that section 240.10(3) did not distinguish between

Beckmann, 188 Misc. 648, 69 N.Y.S.2d 43 (Sup. Ct. 1947) (police records). In fact, it seemed that virtually every document in the prosecution file was free from discovery by the defense. See *People v. Giles*, 31 Misc. 2d 354, 220 N.Y.S.2d 905 (Erie County Ct. 1961).

103. CPL, *supra* note 33, sec. 1, § 240.10(3)(a). See text accompanying note 49 *supra*.

104. 69 Misc. 2d 429, 326 N.Y.S.2d 669 (Westchester County Ct. 1971).

105. *Id.*

106. *Id.* at 430-31, 326 N.Y.S.2d at 671-72.

107. *Id.* at 431, 326 N.Y.S.2d at 671.

108. 74 Misc. 2d 419, 343 N.Y.S.2d 944 (Sup. Ct. 1973).

109. *Id.* at 419, 343 N.Y.S.2d at 945.

110. *Id.* at 421-24, 343 N.Y.S.2d at 946-49.

111. See text accompanying note 49 *supra*.

112. 74 Misc. 2d at 424, 343 N.Y.S.2d at 949.

113. *Id.* at 424-25, 343 N.Y.S.2d at 949.

114. *Id.*

routine material and work product.¹¹⁵ For example, in *People v. Rice*,¹¹⁶ the defendant, indicted for murder, applied for an order seeking discovery of all police reports and records, including photographs, made in connection with the investigation of his case.¹¹⁷ The court granted the request and, citing the *Wright* and *Inness* cases, determined that exempt property as defined in section 240.10(3)(a) "should not, and does not, encompass routine police reports containing factual information."¹¹⁸ Such reports, the court said, were distinguishable from "actual" work product of the police or prosecution "consisting of legal opinions, theories, statements of witnesses and other nonfactual information" which the court considered to be "nondiscoverable as exempt property."¹¹⁹

In so holding, the court in *Rice* made a very strong argument in support of more open criminal discovery in New York. The court argued, first, that full disclosure prior to trial would help the judicial process achieve its ultimate goal of arriving at the truth and, second, that broad discovery would expedite the handling of cases because it would encourage defendants to plea bargain.¹²⁰ Discovery would also avoid delay at trial when material was given to the defense for impeachment purposes after a prosecution witness had testified.¹²¹ In this latter argument, the *Rice* court was actually recommending an acceleration of the timing of disclosure required in New York under the rule of *People v. Rosario*.¹²² The *Rosario* rule requires disclosure to the defendant after a prosecution witness testifies at trial of any prior statements made by the witness.¹²³ *Rosario* also mandates "the production at trial of any police reports, memoranda, etc. prepared by the testifying officer so that defense counsel may utilize the same for impeachment purposes."¹²⁴ In

115. See text accompanying note 49 *supra*.

116. 76 Misc. 2d 632, 351 N.Y.S.2d 888 (Suffolk County Ct. 1974).

117. *Id.* The court noted that these reports are required to be filed in the normal course of business by police department regulations. *Id.* at 634, 351 N.Y.S.2d at 891-92.

118. *Id.*

119. *Id.*

120. *Id.* at 633-34, 351 N.Y.S.2d at 890-91.

121. *Id.* at 633-34, 351 N.Y.S.2d at 891.

122. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 886 (1961).

123. *Id.* at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. Until *Rosario*, New York courts had permitted the defendant to examine a witness' prior statement only if it contained matter inconsistent with the testimony the witness gave on the stand. *Id.*

124. 76 Misc. 2d at 633, 351 N.Y.S.2d at 891.

practice, the *Rosario* rule causes delay at trial because effective impeachment of the witness requires that defense counsel have time to study the reports before cross-examination.¹²⁵ In order to avoid delay and to allow defense counsel to prepare his cross-examination, the *Rice* court favored making such reports available to defense counsel before trial.¹²⁶

In contrast to these cases, other courts refused to circumvent the exempt property definition contained in section 240.10(3). For example, in *People v. Hvizd*,¹²⁷ the defendant moved for discovery of "all investigative reports, statements of witnesses and other documents prepared and gathered during the investigation."¹²⁸ The motion was denied, without opinion, on the grounds that the requested reports were exempt property under section 240.10(3).¹²⁹ Similarly, in *People v. Lawrence*,¹³⁰ the court denied a defendant's discovery motion on the grounds that the requested material was exempt.¹³¹ The defendant in that case was charged with drunken driving. He moved for discovery of the alcoholic influence report of the arresting officer.¹³² Although the court held that under section 240.20(1)(b)¹³³ the defendant was entitled to discover those portions of the report which contained his answers to the officer's questions,¹³⁴ it also held that the defendant was not entitled to that part

125. *Id.* at 633-34, 351 N.Y.S.2d at 891.

126. *Id.* at 634, 351 N.Y.S.2d at 891. The decisions in *Inness*, *Wright* and *Rice* were followed in two subsequent cases, both of which reiterated the distinction between routine reports and work product. In *People v. Harrison*, 81 Misc. 2d 144, 364 N.Y.S.2d 760 (Just. Ct. 1975), the defendant moved for discovery of police reports. The prosecution claimed that such reports were exempt under section 240.10(3)(a). *Id.* at 147, 364 N.Y.S.2d at 765. The court held that the term exempt property did not include "routine police reports containing information and which are required to be filed in the normal course of business by a police agency's regulations." *Id.* In arriving at the same result, the court in *People v. Simone*, 92 Misc. 2d 306, 401 N.Y.S. 2d 130 (Sup. Ct. 1977), not only distinguished work product from routine reports, but also defined the term work product, which it admitted "eludes precise definition," to include "interviews with witnesses, police prosecution memoranda relating to the 'theory' of the crime, and other trial preparation materials consisting of more than mere factual data." *Id.* at 312-13, 401 N.Y.S.2d at 134.

127. 70 Misc. 2d 654, 334 N.Y.S.2d 534 (Westchester County Ct. 1972).

128. *Id.* at 655, 334 N.Y.S.2d at 536.

129. *Id.* at 657, 334 N.Y.S.2d at 538.

130. 74 Misc. 2d 1019, 346 N.Y.S.2d 330 (Suffolk County Dist. Ct. 1973).

131. *Id.* at 1021, 346 N.Y.S.2d at 333.

132. *Id.* at 1020, 346 N.Y.S.2d at 332.

133. See note 52 *supra* and accompanying text.

134. 74 Misc. 2d at 1021, 334 N.Y.S.2d at 333. The defendant was allowed discovery of the reports on the results of physical tests which he performed at the request of the arresting

of the report in which the officer's observations of the defendant were recorded.¹³⁵ These portions were found to constitute exempt property.¹³⁶

*People v. Privitera*¹³⁷ provides a further illustration of a court's refusal to stray from the provisions of the original article 240. In this case, the defendant moved for discovery of a wide range of police reports.¹³⁸ Unlike the previously discussed cases, the court inferred that the standard for discovery of this material was section 240.20(3).¹³⁹ This section required that the requested material not be exempt.¹⁴⁰ The court denied the motion on the grounds that the reports requested were exempt under section 240.10(3)(a).¹⁴¹ The court, seemingly criticizing the *Wright* and *Rice* decisions,¹⁴² stated: "To read into this statute that police reports should be discoverable is not consistent with the language [of section 240.10(3)] no matter how salutary and otherwise worthwhile the motive for so doing may seem. Our Legislature has considered what property should be discoverable and their determination should not be disturbed."¹⁴³

Two appellate division cases are consistent with this approach. In *People v. Freeland*,¹⁴⁴ the court held that police reports of a witness' identification were exempt property and, therefore, non-discoverable by the defense.¹⁴⁵ Similarly, in *Morgenthau v. Hopes*,¹⁴⁶ the court held that complaint follow-up reports relating to a police investigation were exempt property and, therefore, unavailable to the defense.¹⁴⁷

In sum, a split had developed among the courts in New York on

officer. *Id.*

135. *Id.*

136. *Id.*

137. 80 Misc. 2d 344, 363 N.Y.S.2d 226 (Monroe County Ct. 1974).

138. *Id.* at 345, 363 N.Y.S.2d at 228.

139. *Id.* at 346, 363 N.Y.S.2d at 229. See notes 60-62 & 98-100 *supra* and accompanying text.

140. CPL, *supra* note 33, sec. 1, § 240.20(3).

141. 80 Misc. 2d at 347, 363 N.Y.S.2d at 230.

142. See notes 108-26 *supra* and accompanying text.

143. 80 Misc. 2d at 346, 363 N.Y.S.2d at 229.

144. 45 A.D.2d 814, 356 N.Y.S.2d 912 (4th Dep't 1974), *reversed on other grounds*, 36 N.Y.2d 518, 330 N.E.2d 611, 369 N.Y.S.2d 649 (1975).

145. *Id.* at 815.

146. 55 A.D.2d 255, 390 N.Y.S.2d 109 (1st Dep't 1977).

147. *Id.* at 257, 390 N.Y.S.2d at 110.

the issue of whether police reports were exempt property under the original article 240. Some courts strictly adhered to the provisions of the original article, while others circumvented the statute to achieve the results they desired.

2. *Names and Addresses of Prospective Prosecution Witnesses*

The original article 240 exempted statements of prospective prosecution witnesses from discovery,¹⁴⁸ but did not expressly state whether names and addresses of witnesses were discoverable. This information was theoretically discoverable under section 240.20(3).¹⁴⁹ Most courts did not rely on this section, however, because a pre-CPL court of appeals case, *People v. Lynch*,¹⁵⁰ had held that pretrial disclosure of the names of witnesses was a matter resting in the trial court's discretion.¹⁵¹

The first post-CPL case to rely on this discretionary power to grant a motion for discovery of the names and addresses of all potential prosecution witnesses was *People v. Barnes*.¹⁵² Noting that article 240 was silent on this issue, the court stated:

[P]ermitting pretrial discovery of potential prosecution witnesses will enhance the possibility of satisfactory pretrial dispositions in that counsel will be in a better position to investigate his case and advise his client with regard to the possibilities of success at trial. In addition, pretrial disclosure of the names of witnesses will enable counsel to better prepare for trial, avoid undue surprises, adequately cross-examine witnesses, and avoid unnecessary

148. CPL, *supra* note 33, sec. 1, § 240.10(3)(b).

149. See notes 60-62 *supra* and accompanying text. From 1881 to 1936 prosecutors in New York were required under the old Code of Criminal Procedure to attach to the indictment the names of prosecution witnesses who testified before the grand jury. 1881 N.Y. Laws ch. 442, § 271 (McKinney). This section was repealed in 1936. 1936 N.Y. Laws ch. 22 (McKinney). There seems to be some conflict as to why this law was repealed. At the time, there were various racketeering investigations underway and the repeal of this requirement would ostensibly have protected prosecution witnesses from intimidation. It has also been pointed out that the practice of annexing witnesses' names to the indictment had resulted in many motions to dismiss the indictment, so that the repeal of the requirement was primarily to promote a more efficient administration of criminal justice. Compare *Discovery in New York*, *supra* note 3, at 100 with ABA Report, *supra* note 5, at 711.

150. 23 N.Y.2d 262, 244 N.E.2d 29, 296 N.Y.S.2d 327 (1968).

151. *Id.* at 271-72, 244 N.E.2d at 35, 296 N.Y.S.2d at 334-35. In *Lynch*, the court of appeals affirmed a trial court's denial of a motion for the names of witnesses, saying that "if, indeed, such discovery may be had in the trial court's discretion, the refusal of discovery in this case was not an abuse of that discretion." *Id.* at 272, 244 N.E.2d at 35, 296 N.Y.S.2d at 334-35.

152. 74 Misc. 2d 743, 344 N.Y.S.2d 475 (Suffolk County Ct. 1973).

delays caused by inadequate preparation.¹⁵³

In *People v. Bennett*,¹⁵⁴ the court used its discretionary power to deny discovery of the names and addresses of prospective prosecution witnesses.¹⁵⁵ This case involved a prison uprising and many of the government's witnesses were to be inmates.¹⁵⁶ The court held that "the risks inherent in disclosing the identity of these witnesses before trial far outweighed the advantage to be gained by the defense in the preparation of their case."¹⁵⁷ Similarly, in *People v. Hvizd*,¹⁵⁸ the court implied that to grant discovery of the names and addresses of prospective prosecution witnesses was beyond its discretionary powers by holding that such material was not subject to pretrial disclosure.¹⁵⁹ In what appears to be a contradictory statement, however, the court also noted that the defendant had

153. *Id.* at 744, 344 N.Y.S.2d at 476. The court provided for reargument of its discovery order if the prosecution felt that there were "compelling circumstances indicating that potential witnesses may be tampered with or threatened." *Id.* at 745, 344 N.Y.S.2d at 477. When the district attorney in the *Barnes* case commenced a proceeding pursuant to article 78 of the CPLR to prohibit the trial court judge from entering his order, the Appellate Division, Second Department, denied the application without opinion. *Aspland v. Judges of County Court of Suffolk County*, 42 A.D.2d 930 (2d Dep't), *motion for leave to appeal denied*, 33 N.Y.2d 515 (1973). A number of cases have followed the *Barnes* reasoning. For example, in *People v. Robinson*, 75 Misc. 2d 477, 347 N.Y.S.2d 860 (Mount Vernon City Ct. 1973), a city court judge granted a motion by the defendant for discovery of the names and addresses of prospective prosecution witnesses in a trial for harassment of a police officer. On reargument, 75 Misc. 2d 807, 349 N.Y.S.2d 259, the judge adhered to his original decision, citing the *Barnes* case as support, though he limited it to its facts. *Id.* at 807-08, 349 N.Y.S.2d at 260-61. The district attorney brought an article 78 proceeding for a judgment in the nature of a prohibition restraining the city court judge from proceeding with the order of discovery. The Supreme Court of Westchester County cited *Aspland*, as "reluctantly" inhibiting it from granting an order of prohibition as to the names and addresses of witnesses. *Vergari v. Kendall*, 76 Misc. 2d 848, 856, 352 N.Y.S.2d 383, 392 (Sup. Ct. Westchester County 1974), *aff'd* 46 A.D.2d 679, 360 N.Y.S.2d 1003 (2d Dep't 1974). Discovery and inspection of the names and addresses of witnesses was also granted in *People v. Wayman*, 82 Misc. 2d 959, 371 N.Y.S.2d 791 (Just. Ct. 1975). *People v. Harrison*, 81 Misc. 2d 144, 364 N.Y.S.2d 760 (Just. Ct. 1975).

154. 75 Misc. 2d 1040, 349 N.Y.S.2d 506 (Sup. Ct. 1973).

155. *Id.* at 1057, 349 N.Y.S.2d at 524.

156. *Id.* at 1044, 349 N.Y.S.2d at 512.

157. *Id.* at 1057, 349 N.Y.S.2d at 524-25. The court continued: "In any event, under the practice that presently prevails in this court, the names of prospective witnesses will be revealed at the time of jury selection upon opening of the trials." *Id.* (emphasis added). Apparently, no other court has explicitly stated that it adheres to such a policy. This practice, however, closely foreshadows the approach taken by the newly enacted article 240. See notes 300, 313-15 *infra* and accompanying text.

158. 70 Misc. 2d 654, 334 N.Y.S.2d 534 (Westchester County Ct. 1972).

159. *Id.* at 657, 334 N.Y.S.2d at 538.

failed to establish the materiality and reasonableness of his request.¹⁶⁰ This seems to be a reference to the requirements of section 240.20(3), which gives courts the discretion to grant motions for "other property."¹⁶¹ In *People v. Spencer*,¹⁶² however, the court left no room for contradiction when it held that names of witnesses were not discoverable prior to trial and stated that criminal discovery "is limited to those items listed in CPL 240.20."¹⁶³

In one case, *People v. Howard*,¹⁶⁴ the defense, after receiving the names and addresses of prosecution witnesses, requested the "rap sheets" of any witness whom the prosecutor intended to call at trial.¹⁶⁵ Although there was no provision in the original article 240 for discovery of the prior criminal record of prosecution witnesses, the court used its discretionary powers to grant the motion on the grounds that the "rap sheets" were critical to the defendant's effective cross-examination of the prosecution witnesses.¹⁶⁶ Thus, the request satisfied the requirements of materiality and reasonableness of section 240.20(3).¹⁶⁷

These cases show that the lower courts in New York were divided on the question of whether the names and addresses of prospective prosecution witnesses were subject to pretrial disclosure.

3. Grand Jury Testimony and Statements of Prospective Prosecution Witnesses

Prior to the enactment of the CPL in 1971, New York courts consistently held that defendants could not obtain discovery of the grand jury testimony or statements of prospective prosecution witnesses.¹⁶⁸ Although the original article 240 directed that a defendant be furnished with the record of his testimony before the grand

160. *Id.*

161. See notes 60-62 *supra* and accompanying text.

162. 79 Misc. 2d 72, 361 N.Y.S.2d 240 (Sup. Ct. 1974).

163. *Id.* at 73, 361 N.Y.S.2d at 242.

164. 89 Misc. 2d 911, 392 N.Y.S.2d 558 (Onondaga County Ct. 1977).

165. *Id.*

166. *Id.* at 912, 392 N.Y.S.2d at 559.

167. *Id.*

168. See, e.g., *People v. Lynch*, 23 N.Y.2d 262, 244 N.E.2d 29, 296 N.Y.S.2d 327 (1968); *People v. Johnston*, 55 Misc. 2d 185, 285 N.Y.S.2d 243 (Tioga County Ct. 1967); *People v. Graziano*, 46 Misc. 2d 936, 261 N.Y.S.2d 546 (Columbia County Ct. 1965); *People v. Giles*, 31 Misc. 2d 354, 220 N.Y.S.2d 905 (Erie County Ct. 1961). But see *People v. Catto*, 28 A.D.2d 1116, 285 N.Y.S.2d 247 (1st Dep't 1967); *People v. Powell*, 49 Misc. 2d 624, 268 N.Y.S.2d 380 (Sup. Ct. 1965).

jury,¹⁶⁹ it did not contain a provision for defense access to the grand jury testimony of prospective prosecution witnesses. Other statements made by potential prosecution witnesses, however, were specifically designated as exempt property in section 240.10(3)(b) and hence were non-discoverable.¹⁷⁰

Shortly after the original article 240 was enacted, one commentator, noting a trend toward relaxing the grand jury secrecy requirements, argued that the standards for a defense motion for discovery of a prosecution witness' grand jury testimony might be found in CPL section 240.20(3).¹⁷¹ This approach, however, was precluded in 1972 by the case of *Proskin v. County Court of Albany County*.¹⁷² In that case, the trial court had granted the defendant's motion to inspect the grand jury minutes on the grounds that it was necessary for the preparation of defendant's case and was in the interests of justice.¹⁷³ The court of appeals granted a writ of prohibition and held that the trial court had exceeded its authority in allowing the defendant to inspect the grand jury minutes for purposes of discovery.¹⁷⁴ The court stated:

The cloak of secrecy accorded Grand Jury proceedings for the protection of the public, witnesses, potential defendants, and others may not be lifted for purposes of general unilateral discovery before a criminal trial The nub of the matter is that the inspection of Grand Jury minutes in advance of trial is available only to attack the indictment, and may not be allowed only to assist the litigant in the trial which may ensue.¹⁷⁵

The holding in *Proskin* was not affected by the fact that portions of such testimony would probably be given to the defense at trial pursuant to the rules of *People v. Rosario*¹⁷⁶ and *Brady v. Maryland*.¹⁷⁷ As earlier explained,¹⁷⁸ *Rosario* gave the defense the right to examine all prior statements of a prosecution witness but only after that witness had testified at trial. It seems highly unlikely, how-

169. CPL, *supra* note 33, sec. 1, § 240.20(1)(a). See text accompanying note 52 *supra*.

170. See note 50 *supra* and accompanying text.

171. See *Discovery in New York*, *supra* note 3, at 102.

172. 30 N.Y.2d 15, 280 N.E.2d 875, 330 N.Y.S.2d 44 (1972).

173. *Id.* at 17, 280 N.E.2d at 876, 330 N.Y.S.2d at 46.

174. *Id.* at 19, 280 N.E.2d at 879, 330 N.Y.S.2d at 48.

175. *Id.* at 17-19, 280 N.E.2d at 876-79, 330 N.Y.S.2d at 46-48.

176. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 886 (1961).

177. 373 U.S. 83 (1963) (prosecution has duty to disclose all favorable evidence). See notes 195-200 *infra* and accompanying text.

178. See note 122-23 *supra* and accompanying text.

ever, that a defense attorney could effectively cross-examine a witness when he receives such vital impeachment information at this late stage in the trial.¹⁷⁹ In order to avoid this dilemma, defense attorneys often moved before trial for discovery of a potential prosecution witness' grand jury testimony and other prior statements. Despite the *Proskin* holding and the fact that statements of potential prosecution witnesses were specifically defined as exempt, defendants were sometimes granted such discovery.

In *People v. Nicolini*,¹⁸⁰ for example, the defendants, prior to the commencement of the *voir dire*, moved for an order directing the prosecution to furnish defense counsel with the transcripts of the grand jury testimony and the prior statements of prospective prosecution witnesses.¹⁸¹ In support of their motion, the defendants cited *People v. Rosario*.¹⁸² The district attorney opposed the motion on the grounds that the *Rosario* rule required disclosure only after the witness had testified at trial.¹⁸³ The court defined the issue as whether the *Rosario* rule was "to be construed as authorizing the turning over to the defense of the Grand Jury testimony and any other prior statements *only after* the prosecution witness has testified for the People."¹⁸⁴ The court decided that the *Rosario* rule should not be so restricted; rather, the court interpreted the rule to require only that the grand jury testimony and prior statements of witnesses be furnished to the defendant "at the trial."¹⁸⁵ Although the court stated that it was "not required" to order that the transcripts be furnished to defense counsel before the witness has testified, it granted the motion, adding that "it is within the Trial Judge's discretion to make the prior statements available, prior to such direct testimony, if the interests of the orderly conduct of the trial suggests [the] same."¹⁸⁶

The *Nicolini* court was in fact recommending an acceleration of the timing of disclosure under the *Rosario* rule on the grounds that

179. In addition, should the court recess in order for the defense attorney to quickly examine this material, the trial would be disrupted and the case disposed of inefficiently.

180. 76 Misc. 2d 47, 349 N.Y.S.2d 971 (Crim. Ct. N.Y. County 1973).

181. *Id.* at 48, 349 N.Y.S.2d at 972.

182. *Id.*

183. *Id.*

184. *Id.* at 49, 349 N.Y.S.2d at 973.

185. *Id.*, quoting *People ex rel. Cadogan v. McMann*, 24 N.Y.2d 233, 236, 247 N.E.2d 492, 493, 299 N.Y.S.2d 617, 619 (1969).

186. 76 Misc. 2d at 49-50, 349 N.Y.S.2d at 973-74.

this would make the disposition of cases more efficient by avoiding delay at trial. This is the same reasoning utilized by the court in *People v. Rice* in granting a motion for pretrial discovery of police reports to be used for impeachment purposes.¹⁸⁷ In the *Rice* case, subsequent to the request for discovery of the police reports, the defendants made an omnibus motion for discovery of all statements of potential prosecution witnesses, including testimony before the grand jury.¹⁸⁸ The court granted the motion, explaining that because such prior statements were required by *Rosario* to be "disclosed sometime during the trial, it would perhaps be the better practice to allow discovery immediately prior to trial in the interest of enabling counsel to better prepare his cross-examination and avoiding unnecessary delays and disjointed trials."¹⁸⁹

Although the courts in *Nicolini* and *Rice* ignored the fact that statements of witnesses were exempt property under section 240.10(3)(b),¹⁹⁰ other courts were more reluctant to stray from the strictures of article 240. In *People v. Bennett*,¹⁹¹ for example, a case which preceded *Nicolini* and *Rice*, the court set out the text of section 240.10(3)(b) and said that statements of prospective prosecution witnesses were obviously exempt property so that, "apart from any obligation upon the prosecutor arising out of the principles enunciated in *Brady v. Maryland* . . . the clear and unambiguous language of the statute excludes pretrial discovery of this material."¹⁹² Additionally, other courts denied defense discovery of witnesses' statements not because they were exempt property, but rather, because of a refusal to extend the *Rosario* rule to pretrial stages. As the court stated in *People v. Spencer*,¹⁹³ "[t]he right to

187. See notes 115-26 *supra* and accompanying text.

188. *People v. Rice*, 77 Misc. 2d 582, 353 N.Y.S.2d 863 (Suffolk County Ct. 1974).

189. *Id.* at 584, 351 N.Y.S.2d at 865.

190. See note 50 *supra* and accompanying text.

191. 75 Misc. 2d 1040, 349 N.Y.S.2d 506 (Sup. Ct. 1973).

192. *Id.* at 1054, 349 N.Y.S.2d at 522. The *Bennett* court also discussed the *Inness* and *Wright* cases wherein the question was raised whether police reports were exempt property under section 240.10(3)(a). See notes 104-14 *supra* and accompanying text. The court noted that although the *Wright* court had granted discovery of the police reports, it had denied "discovery of materials which reflected the results of interviews with prospective witnesses." 75 Misc. 2d at 1054, 349 N.Y.S.2d at 1042. The court also said that although the *Inness* and *Wright* cases had interpreted section 240.10(3)(a) liberally in allowing discovery of police reports, neither case supported the discovery of the statements of witnesses whom the prosecution intended to call at trial. *Id.*

193. 79 Misc. 2d 72, 361 N.Y.S.2d 240 (Sup. Ct. 1974).

obtain a prior statement of a witness accrues only after that witness has testified at trial."¹⁹⁴

These cases illustrate that the lower courts in New York were in conflict as to whether witnesses' statements could be discovered by the defense prior to trial despite the express provision in the original article 240 which made such material exempt.

4. *Exculpatory Evidence*

In *Brady v. Maryland*,¹⁹⁵ the Supreme Court established the prosecutorial duty to divulge favorable evidence to the defense. In *Brady*, the defendant, charged with murder, moved for discovery of all statements of his co-defendant.¹⁹⁶ The prosecutor showed him several of the co-defendant's statements but not the one in which the co-defendant admitted that he, and not the defendant, had actually killed the victim.¹⁹⁷ The defendant was convicted and the death penalty was imposed.¹⁹⁸ Upon learning of the co-defendant's admission, the defendant moved for a new trial alleging suppression of evidence.¹⁹⁹ The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violate[d] due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."²⁰⁰

The *Brady* case, and many of the subsequent cases in which the

194. *Id.* at 73, 361 N.Y.S.2d at 241. See also *People v. Landers*, 97 Misc. 2d 274, 276, 411 N.Y.S.2d 173, 175 (Crim. Ct. Bronx County 1978). But see *People v. Mono*, 96 Misc. 2d 382, 409 N.Y.S.2d 112 (Jefferson County Ct. 1978); *People v. Dash*, 95 Misc. 2d 1005, 1008, 409 N.Y.S.2d 181, 184 (Crim. Ct. N.Y. County 1978).

195. 373 U.S. 83 (1963).

196. *Id.* at 84.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 87. The defendant was awarded a new trial only on the issue of punishment, not on the issue of guilt. The co-defendant's admission to committing the murder did not mitigate the defendant's own guilt. *Id.* at 90. *Brady* seems to make a defense motion a mandatory requirement for discovery of favorable evidence by using the words "upon request." However, many cases pre-dating *Brady*, as well as more recent cases, have not required that the defense make a specific request or demand for *Brady* material. See *United States v. Agurs*, 427 U.S. 97 (1976); *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *People v. Simmons*, 36 N.Y.2d 126, 325 N.E.2d 139, 365 N.Y.S.2d 812 (1975); *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 159 N.Y.S.2d 885 (1956); *People v. Boone*, 49 A.D.2d 559, 370 N.Y.S.2d 613 (1st Dep't 1975); *People v. Player*, 80 Misc.2d 177, 362 N.Y.S.2d 773 (Suffolk County Ct. 1974).

Brady rule has been applied, involved post-trial motions for review of the prosecution's conduct as to alleged suppression of favorable evidence.²⁰¹ Many courts have therefore held that *Brady* "was never intended to create pretrial remedies."²⁰² One New York court offered two possible rationales for such holdings.²⁰³ The first was that the *Brady* rule forbids suppression of favorable evidence, which is "a standard of performance reviewable only against the background of a trial, and therefore did not create an affirmative obligation to turn over favorable material at any stage prior to the trial."²⁰⁴ The second was that favorable evidence is "not a class of information available to the defense under rules of pretrial discovery and is therefore unobtainable prior to trial."²⁰⁵ More recently some courts have recommended early disclosure of *Brady* material on the grounds that disclosure of exculpatory or favorable evidence for the first time during trial may be too late for the defendant to use it effectively.²⁰⁶

The question presented to New York courts, therefore, was whether the scope of defendants' pretrial discovery rights was broadened by the *Brady* doctrine.²⁰⁷ The original article 240 pro-

201. *E.g.*, *United States v. White*, 450 F.2d 264 (5th Cir. 1971); *see also* cases cited in *Giles v. Maryland*, 386 U.S. 66, 73 (1967).

202. *United States v. Moore*, 439 F.2d 1107, 1108 (6th Cir. 1971). *See United States ex rel. Lucas v. Regan*, 503 F.2d 1, 3 n.1 (2d Cir. 1974), *cert. denied*, 420 U.S. 939 (1975); *United States v. Zive*, 299 F. Supp. 1273, 1274 (S.D.N.Y. 1969); *People v. McMahan*, 72 Misc. 2d 1097, 1099, 341 N.Y.S.2d 318, 320 (Albany County Ct. 1972).

203. *People v. Bottom*, 76 Misc. 2d 525, 351 N.Y.S.2d 328 (Sup. Ct. 1974).

204. *Id.* at 527, 351 N.Y.S.2d at 332-33.

205. *Id.* at 527, 351 N.Y.S.2d at 333.

206. *United States v. Kaplan*, 554 F.2d 577 (3d Cir. 1977); *United States v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 924 (1976); *United States v. Deutsch*, 373 F. Supp. 289 (S.D.N.Y. 1974).

207. The section will focus only tangentially on what constitutes "*Brady* material" and what the sanctions are for the failure of the prosecution to disclose such material. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court clarified its holding in *Brady* by delineating three situations in which the rule applied, each involving the discovery, after trial, of information which had been known to the prosecutor but unknown to the defense. *Id.* at 103-07. In the first situation, the undisclosed evidence proves that the prosecution's case included perjured testimony about which the prosecution knew or should have known. In such circumstances, "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," the conviction must be set aside. *Id.* at 103. The next two situations are distinguished by whether there is a pretrial request for the specific favorable evidence in issue. Where a pretrial request for specific evidence is made and that evidence is suppressed by the prosecution, a conviction must be set aside if the evidence "might have affected the outcome of the trial." *Id.* at 104. Where there is no specific request,

vided no guidance on this issue because it made no reference to discovery of exculpatory or favorable evidence. The first New York case to decide a request for pretrial disclosure of alleged *Brady* material was *People v. McMahon*.²⁰⁸ The defendants made a broad discovery motion under section 240.20.²⁰⁹ The court held that "[p]ermissible discovery should be that which the statute now permits, the unpermissible is that which is not authorized by the rule or forbidden by it."²¹⁰ Because exculpatory or favorable evidence was not mentioned as discoverable in the original article 240, the court, interpreting the statute narrowly, denied the motion for discovery of exculpatory evidence simply on the grounds that it was not available under the statute.²¹¹ The *McMahon* court also said that a practicable rule of discovery of *Brady* material was impossible to construct and, therefore, the defendant and the courts had to rely on the conscience of the prosecutor in performance of his duty not to suppress favorable evidence.²¹²

In *People v. Bottom*,²¹³ however, the circumstances forced the court to intervene and analyze the significance of the *Brady* rule at the pretrial stage.²¹⁴ The defense had made the customary request for favorable evidence pursuant to the *Brady* rule; the district attorney's office made the customary reply that it was aware of and would comply with its obligation under *Brady*.²¹⁵ The court had also given the prosecution the routine direction to disclose all *Brady* material.²¹⁶ At that point, however, the prosecution submitted the following affidavit: "Two people, one of whom has recanted, and the other of whom has disappeared, once claimed they

the prosecution is deemed to have been without notice of what evidence the defense would like and although the duty to disclose arises, the evidence which must be disclosed is that which would have created a reasonable doubt. The conviction must be set aside if such evidence is not disclosed. *Id.* at 107-14.

208. 72 Misc. 2d 1097, 341 N.Y.S.2d 318 (Albany County Ct. 1972).

209. *Id.* at 1098, 341 N.Y.S.2d at 319.

210. *Id.* at 1099, 34 N.Y.S.2d at 320.

211. *Id.* at 1099-100, 341 N.Y.S.2d at 320-21. In a later case, the court granted a motion for discovery of all evidence favorable to the defendant. *People v. Wright*, 74 Misc. 2d 419, 424, 343 N.Y.S.2d 944, 949 (Sup. Ct. 1973).

212. 72 Misc. 2d at 1099-100, 341 N.Y.S.2d at 320-21.

213. 76 Misc. 2d 525, 351 N.Y.S.2d 328 (Sup. Ct. 1974).

214. *Id.* at 525-27, 351 N.Y.S.2d at 331-33.

215. *Id.* at 525, 351 N.Y.S.2d at 331.

216. *Id.* Such a scenario explains the fact that many cases under *Brady* are decided in a post trial context.

saw another man not one of these defendants near the scene of the killings with a pistol. This other man could not have been one of the killers.'"²¹⁷ The prosecution complied with the defendant's motion for the names of these two men.²¹⁸ Thereafter, the defendants made a motion for "[a]ll statements or police forms or reports which reflect the statements or investigation of the statements'" of the two men referred to in the affidavit.²¹⁹ The prosecution opposed this motion on the grounds that it had fully complied with its duties under *Brady* and that the material requested by the defendant was exempt property.²²⁰

By the very act of intervening to decide the defendant's motion, the *Bottom* court rejected the premise of the *McMahon* decision that a rule for discovery of *Brady* material was impracticable and that reliance had to be placed on the prosecutor.²²¹ Seemingly in response to that position, the court in *Bottom* held:

For pragmatic reasons the court cannot become involved in screening the prosecution's file in every case The result is that the prosecutor must of necessity have a great deal of initial discretion over what is to be disclosed But where, as here, there is a controversy in which the court has a factual basis for believing that the District Attorney may be in possession of exculpatory evidence, total reliance on the prosecutor is no longer necessary and may be unjustified. The trial court's supervision should then begin.²²²

Answering the prosecution's contention that the requested material was exempt property under section 240.10, the court in *Bottom* stated:

It is fallacious to deny pretrial disclosure of *Brady* material on the theory that it is not a category of permissible discovery. The fallacy is equating the *Brady* concept with pretrial discovery. Discovery concerns the pretrial disclosure of prosecution evidence. The procedure is statutory and largely discretionary. (CPL 240.20.) *Brady*, on the other hand, is a constitutional mandate which requires the disclosure of defense evidence in the possession of the prosecution.²²³

217. *Id.* at 525-26, 351 N.Y.S.2d at 331.

218. *Id.* at 526, 351 N.Y.S.2d at 332.

219. *Id.*

220. *Id.*

221. See text accompanying note 212 *supra*.

222. 76 Misc. 2d at 530, 351 N.Y.S.2d at 335-36 (citations omitted).

223. *Id.* at 531, 351 N.Y.S.2d at 336. The court ordered the district attorney to produce for *in camera* inspection all the requested material. *Id.*

The holding in *Bottom*²²⁴ was adopted by the New York Court of Appeals in *People v. Andre*.²²⁵ In *Andre*, the court of appeals held that where a request is made and there is "some basis" for believing that the prosecution is in possession of exculpatory material, the court and not the prosecutor must decide whether the material should be disclosed.²²⁶ In addition, many of New York's lower courts have followed the *Bottom* decision and have held that when evidence qualifies as *Brady* material this overrides concepts such as exempt property and mandates disclosure of evidence which would otherwise not be statutorily discoverable.²²⁷ Thus, New York courts unanimously concluded that the *Brady* rule superseded the statutory limitations on pretrial criminal discovery set forth in the original article 240.

C. Reciprocal Discovery

Under section 240.20(4) of the original article 240, a court in its discretion and upon granting a defense motion for discovery under either section 240.20(2) or (3) could condition the order by directing reciprocal discovery by the prosecution of the same kind of property.²²⁸ Although reciprocal discovery was a potentially helpful prosecutorial device, prosecutors were very skeptical of its usefulness in view of what has been termed "[a] major roadblock to the prosecutor's right of discovery" — the fifth amendment right against self-incrimination.²²⁹

Despite the apparent problems posed by the fifth amendment,²³⁰

224. See text accompanying note 222 *supra*.

225. 44 N.Y.2d 179, 375 N.E.2d 758, 404 N.Y.S.2d 578 (1978). See also *People v. Testa*, 40 N.Y.2d 1018, 359 N.E.2d 1367, 391 N.Y.S.2d 573 (1976); *People v. Consolazio*, 40 N.Y.2d 446, 453-54, 354 N.E.2d 801, 804-05, 387 N.Y.S.2d 62, 65-66 (1976), *cert. denied*, 433 U.S. 914 (1977).

226. 44 N.Y.2d at 184-85, 375 N.E.2d at 761, 404 N.Y.S.2d at 581.

227. *People v. Alamo*, 89 Misc. 2d 246, 391 N.Y.S.2d 314 (Sup. Ct. 1977) (witness testimony contained in grand jury minutes); *People v. Harrison*, 81 Misc. 2d 144, 364 N.Y.S.2d 760 (Just. Ct. 1975) (witnesses' statements, notes or memoranda of police officers of witnesses' statements, photographs of defendant and names and addresses of persons interviewed by prosecutor); *People v. Guzman*, 79 Misc. 2d 668, 361 N.Y.S.2d 238 (Sup. Ct. 1974) (statements of witnesses made to prosecution).

228. See notes 56-59 *supra* and accompanying text.

229. *Discovery Procedures*, *supra* note 29, at 177. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

230. The Supreme Court has traditionally been very strict in applying the protection of the fifth amendment. See, e.g., *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Gould v.*

New York courts have indicated that requiring reciprocal discovery prior to trial of material which the defendant intends to produce at trial in his own behalf²³¹ does not violate the privilege against self-incrimination.²³² In addition, the Supreme Court has accepted discovery by the prosecution as not inimical to the fifth amendment. In *Williams v. Florida*,²³³ the Court held that a state statute that required pretrial disclosure by the defense of the names of alibi witnesses was not in violation of the defendant's fifth amendment privilege.²³⁴ The Court reasoned that the statute required only that the defendant "accelerate the timing of his disclosure" of the identity of the alibi witnesses.²³⁵ In that same case, however, the Court left open the question of whether the constitutionality of alibi-notice statutes depended on the defendant enjoying reciprocal discovery against the state.²³⁶ This question was resolved in the affirmative by the Court in *Wardius v. Oregon*,²³⁷ wherein a state alibi-notice statute was struck down because it did not afford the defendant any right of reciprocal discovery.²³⁸

Aside from the fifth amendment objections, New York courts have found other problems under the original article 240 which have impeded the use of reciprocal discovery by the prosecution. One of these problems was whether the prosecution's reciprocal discovery motion had to be made at the same time the defendant's motion for discovery was made or whether the prosecution could wait to request reciprocal discovery at a later time. In *People v.*

United States, 255 U.S. 298, 305-06 (1921); *Boyd v. United States*, 116 U.S. 616, 631-33 (1886).

231. This was a requirement of the reciprocal discovery provision of the original article 240. See note 56 *supra* and accompanying text.

232. See *People v. Damon*, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830, (1969); *People v. Lacey*, 83 Misc. 2d 69, 368 N.Y.S.2d 655 (Suffolk County Ct. 1975). Cf. *People v. Green*, 83 Misc. 2d 583, 371 N.Y.S.2d 271 (Crim. Ct. N.Y. County 1975). See also *Lee v. County Ct. of Erie County*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971) (where defendant intends to raise the defense of insanity, he waives the privilege against self incrimination with respect to court-ordered psychiatric examinations); *People v. Gliewe*, 76 Misc. 2d 696, 351 N.Y.S.2d 912 (Monroe County Ct. 1974).

233. 399 U.S. 78 (1970).

234. *Id.* at 86.

235. *Id.* at 85.

236. *Id.* at 82 n.11.

237. 412 U.S. 470 (1973).

238. *Id.* at 478-79.

Rexhouse,²³⁹ the court granted two separate defense motions for discovery of prosecution evidence, one for the autopsy report performed on the victim and the other for all other scientific reports.²⁴⁰ Subsequently, the prosecution made a motion for reciprocal discovery of evidence of the same kind.²⁴¹ This motion was denied by the court on the grounds that the prosecution had not shown that the requested items were material to the preparation of their case or that the request was reasonable.²⁴² Notably, the court added that the prosecution's motion was untimely because the two prior orders of discovery had been granted without condition.²⁴³ Therefore, under *Rexhouse*, the prosecution was required to make its motion for reciprocal discovery at the same time as the defense made its discovery requests so that a granting of the defense requests would be conditional upon reciprocal discovery by the prosecution.

The opposite result was reached in *People v. Green*,²⁴⁴ wherein after a defense discovery motion was unconditionally granted the court, without discussion of the timeliness issue, granted a subsequent motion for reciprocal discovery by the prosecution.²⁴⁵ In the latest case on this issue, however, the court in *People v. Catti*²⁴⁶ denied as untimely the prosecution's motion for reciprocal discovery which was made four days after the defendant's motion was ruled upon.²⁴⁷ In interpreting section 240.20(4),²⁴⁸ the court said that "[a] motion for discovery by the People can only be made in response to defendant's motion for discovery" and must be made "during the pendency of the defense motion"²⁴⁹ That the reciprocal discovery provision of the original article 240 was interpreted in this way was an obvious deficiency in the statute since it

239. 77 Misc. 2d 386, 353 N.Y.S.2d 658 (Dutchess County Ct. 1974).

240. *Id.* at 386-87, 353 N.Y.S.2d at 659.

241. *Id.* at 386, 353 N.Y.S.2d at 659.

242. *Id.* at 388, 353 N.Y.S.2d at 660-61.

243. *Id.* at 387, 353 N.Y.S.2d at 660.

244. 83 Misc. 2d 583, 371 N.Y.S.2d 271 (Crim. Ct. N.Y. County 1975).

245. *Id.* at 598, 371 N.Y.S.2d at 286. In *Green*, the court had first granted discovery of both the statements, names, and addresses of the prosecution's witnesses. When the prosecution made its motion for reciprocal discovery for evidence of the same kind, the court modified its original discovery order, excluding from it statements of prosecution witnesses. *Id.*

246. 90 Misc. 2d 409, 394 N.Y.S.2d 1017 (Sup. Ct. 1977).

247. *Id.* at 413, 394 N.Y.S.2d at 1020.

248. See notes 56-59 *supra* and accompanying text.

249. 90 Misc. 2d at 411, 394 N.Y.S.2d at 1019.

inhibited the use of reciprocal discovery by the prosecution.

A second issue which arose under the original article 240 was whether the prosecution could obtain evidence from the defense despite the defense having made no prior motion for that type of evidence. In *People v. Traver*,²⁵⁰ the defendant notified the district attorney that he intended to rely upon the defense of insanity.²⁵¹ In response, the district attorney made a motion for an order requiring a psychiatric examination of the defendant and for discovery of reports concerning all previous physical and mental examinations of the defendant.²⁵² Although the court granted the motion for a psychiatric examination, it denied the motion for discovery of prior examinations on the grounds that section 240.20(4) allowed prosecutorial discovery only as a condition to a pending defense discovery motion.²⁵³

A later case, *People v. Blacknall*,²⁵⁴ came to a different conclusion. In that case, involving facts similar to those in *Traver*, the court pointed out that under *Lee v. County Court of Erie County*²⁵⁵ district attorneys were required to furnish defendants with copies of reports of psychiatric examinations conducted by the prosecution's psychiatrist.²⁵⁶ As a result, defendants obtained such reports without making a discovery motion.²⁵⁷ Under the *Traver* approach, therefore, the prosecution could not discover the defendant's psychiatrist's report because no defense motion need be made.²⁵⁸ The court in *Blacknall* commented on this dilemma by stating that "[i]t would seem that such technical procedural refinements should not be controlling in determining the issue of pretrial disclosure."²⁵⁹ In order "[t]o resolve the ambiguity and confusion in the present state of the law," the *Blacknall* court granted the prosecution's motion, explaining that the requirement that the prosecution furnish the defendant with a copy of its psychiatric report was equivalent

250. 70 Misc. 2d 162, 332 N.Y.S.2d 955 (Dutchess County Ct. 1972).

251. *Id.* at 163, 332 N.Y.S.2d at 956.

252. *Id.*

253. *Id.* at 164, 332 N.Y.S.2d at 957-58.

254. 82 Misc. 2d 646, 371 N.Y.S.2d 305 (Rockland County Ct. 1975).

255. 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971).

256. 82 Misc. 2d at 647-48, 371 N.Y.S.2d at 306-08.

257. *Id.*

258. *Id.*

259. *Id.* at 648, 371 N.Y.S.2d at 307.

to a pending defense discovery motion.²⁶⁰ The *Blacknall* court thus concluded that the prosecution was entitled to reciprocal discovery of the defendant's psychiatrist's report under section 240.20(4).²⁶¹

In conclusion, although reciprocal discovery seemed to be a promising prosecutorial discovery tool, it failed to fulfill that promise due to impediments arising out of the original article 240 and a refusal by many New York courts to be as liberal in granting discovery to the prosecution as they were in granting discovery to the defense.

IV. The Newly Enacted Article 240

The original article 240 did not always achieve its goals of liberality and consistency in the practice of criminal discovery in New York.²⁶² As one court stated:

Some courts grant disclosure of almost any item by the defendant, others have so strictly construed Article 240 as to disallow discovery for all material other than that expressly enumerated under subdivisions 1 and 2 of CPL 240.20, and still other courts have adopted an eclectic approach, depending on the circumstances of the case and the personal philosophy of the particular Trial Judge involved. Consequently, the result has frequently been an utter lack of consistency in the practice relating to pretrial disclosure.²⁶³

The original article needed to be revised or replaced. Since its enactment in 1971, various national study groups had recommended a more liberal approach to discovery in criminal cases and had issued model standards for implementing such an approach.²⁶⁴

260. *Id.* at 649, 371 N.Y.S.2d at 307-08.

261. *Id.*

262. See notes 33, 37-39 *supra* and accompanying text.

263. *People v. Green*, 83 Misc. 2d 583, 586, 371 N.Y.S.2d 271, 275-76 (Crim. Ct. N.Y. County 1975) (footnote omitted).

264. The most widely recognized study of pretrial discovery is ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (1970) [hereinafter cited as ABA STANDARDS]. See *Wardius v. Oregon*, 412 U.S. 470, 473-74 (1970). The ABA Standards, as put forth by a group comprised of judges, academics, prosecutors, and defense attorneys, recommend that the prosecution take the initiative in disclosing to the defendant the names and addresses of witnesses whom the prosecution plans to call at a hearing or trial, along with their written or recorded statements; statements of the defendant or co-defendant; those portions of the grand jury minutes containing the testimony of the defendant and of witnesses to be called at a hearing or trial; prior criminal convictions of prosecution witnesses; and real evidence. ABA STANDARDS, *supra*, § 2.1. Some reciprocal discovery is provided for the prosecution, but this does not include discovery of defense witnesses or their statements. *Id.* § 3.1-2.

Another oft-cited study in this area is the LAW ENFORCEMENT ASSISTANCE ADMINISTRATION'S NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973) [hereinaf-

Criminal discovery had become the subject of a "nationwide re-evaluation"²⁶⁵ and several states had enacted statutes opening up discovery in criminal cases.²⁶⁶ In New York, however, several legislative attempts to revise or replace the original article 240 failed, indicating a wide gap separating those who favored opening up criminal discovery in New York and those who did not.²⁶⁷ Finally, however, in 1979 the state legislature repealed the original article 240 and replaced it with a new discovery article, also entitled article 240, which became effective January 1, 1980.²⁶⁸

ter cited as NAC STANDARDS]. The NAC Standards provide for disclosure by the prosecution to the defense of names and addresses of witnesses and the written, recorded, or oral statements of witnesses, the defendant, or any co-defendant. *Id.* § 4.9. Unlike the ABA Standards, the NAC Standards provide for broad reciprocal discovery including the disclosure of names, addresses, and statements of defense witnesses. *Id.* § 4.9 & commentary at 91. (See *People v. Green*, 83 Misc. 2d 583, 371 N.Y.S.2d 271 (1975) for an extensive discussion and comparison of these two studies and the original article 240.).

A study made by the association of the Bar of the City of New York's Committee on Criminal Courts unanimously recommended that the original article 240 be amended to require pretrial disclosure to the accused of the names and addresses of prosecution witnesses, statements made by these witnesses to law enforcement agents, and their grand jury testimony. In addition, a majority of the committee, over "substantial minority opposition," recommended that the New York Criminal Procedure Law article 240 be amended to provide for reciprocal discovery by the prosecution of the names, addresses, and statements of witnesses whom the defendant intends to call at trial. ABA Report, *supra* note 5.

265. 83 Misc. 2d at 585, 371 N.Y.S.2d at 274.

266. McKenna, *supra* note 5, at 1868. See, e.g. ARIZ. R. CRIM. PROC. 15; ILL. ANN. STAT. ch. 110A §§ 411-415 (Smith-Hurd 1976 & Supp. 1979); TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).

267. In 1974 the Judicial Conference proposed an entirely new discovery article along with a memorandum written in support thereof. See 1974 N.Y. Laws 1860-76 (McKinney). The proposed bill provided for discovery by the defendant of oral statements, testimony of grand jury witnesses, wiretap conversations and transcripts intended to be introduced as prosecution evidence, reports containing the notes of oral statements of witnesses, oral depositions or written interrogatories of witnesses, prior criminal records of the prosecution witnesses, and any official records pertaining to the investigation leading to the defendant's indictment which were not exempt property the definition of which no longer included statements of witnesses made to authorities. The disclosure of any official records pertaining to the investigation which led to the indictment was provided, according to the memorandum, to "put teeth into the *Brady* . . . requirement that evidence favorable to the defendant be turned over to him." In addition, the proposed bill would have authorized discovery by the defendant by demand rather than motion. As to this provision, the memorandum stated that its purpose was "to divert as much discovery traffic as possible from the courts and place the burden on the prosecutor to invoke the court's protection if he wishes to resist the discovery." *Id.* From a prosecutorial standpoint, the proposed bill was probably viewed as an onerous attempt to institute total open file discovery. The proposed 1974 legislation never became law.

268. 1979 N.Y. Laws ch. 412 (McKinney).

Under the new article 240, discovery may be obtained pursuant to basically three different procedural mechanisms. First, certain material may be discovered *upon demand* by *both* the defense and the prosecution.²⁶⁹ Second, certain material may be discovered upon motion by either the defense or prosecution.²⁷⁰ Third, certain material may be discovered by the defendant *upon trial* and by the prosecutor *during trial*.²⁷¹

The first important innovation to be noted in the new article 240 is that it provides for discovery of certain items by demand rather than by motion.²⁷² The memorandum accompanying the new law explained:

The basic approach of the measure is to enlarge discovery, under its own name, and to permit both sides to obtain discovery of routine material upon demand, that is, without a court order. Much of the material that is now wrung from the other side through complex pretrial motion practice or at trial, with the attendant delays, would be discoverable upon demand, subject in later section to refusals or protective orders where the safety of witnesses, the confidentiality of informants, or other factors require them.²⁷³

Discovery on demand, as the memorandum points out, is an attempt to make the disposition of criminal cases more efficient.²⁷⁴ To achieve this goal the new article 240 allows a defendant to discover upon demand all of the material discoverable under the original article's section 240.20(1) and (2)²⁷⁵ as well as oral statements made by him and written, recorded or oral statements, including grand jury testimony, of a co-defendant to be tried jointly.²⁷⁶ This provision is designed to allow a defendant to "intelligently challenge, or

269. N.Y. CRIM. PROC. LAW §§ 240.20, .30 (McKinney Supp. 1979) [hereinafter cited as CPL Supp.].

270. *Id.* § 240.40.

271. *Id.* § 240.45.

272. *Id.* §§ 240.20, .30 " 'Demand to produce' means a written notice served by and on a party to a criminal action, *without leave of the Court*, demanding to inspect properly pursuant to this article and giving reasonable notice of the time at which the demanding party wishes to inspect the property designated." *Id.* § 240.10(1). (emphasis added).

273. 1979 N.Y. Laws 1888-89 (McKinney).

274. It should be noted that for discovery by demand to be effective in achieving this goal of efficiency, both prosecutors and defense attorneys must cooperate with each other in deciding upon a time at which the demanding party may inspect the property. For timetables for demands and refusals see CPL Supp., *supra* note 269, § 240.80.

275. See notes 51-54 *supra* and accompanying text.

276. CPL Supp., *supra* note 269, § 240.20(1)(a)-(b).

prepare for, a joint trial."²⁷⁷ A defendant is also entitled to discovery on demand of prosecution photographs or drawings relating to the crime, any other property obtained from him or a co-defendant, and tapes or other electronic recordings which the prosecutor intends to introduce at trial.²⁷⁸

The new article also provides for defense discovery on demand of "[a]nything 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."²⁷⁹ This is actually a codification of the rule of *Brady v. Maryland*,²⁸⁰ under which the prosecutor has a constitutional duty to disclose favorable evidence to the defendant.²⁸¹ By specifically including this duty in the new law, decisions like *People v. McMahan*, where a motion for exculpatory evidence was denied because discovery of such material was not provided for in the original article 240, will be eliminated.²⁸² Furthermore, those courts which held that the *Brady* doctrine took precedence over such concepts as exempt property now have statutory support.²⁸³

Under the new article the prosecution is entitled to discovery upon demand of reports of psychiatric examinations of a defendant by his own psychiatrist.²⁸⁴ This innovation is an attempt to promote mutuality of discovery. Indeed, discovery of this material on demand alleviates the problem exemplified by the *Traver* and *Blacknall* cases when prosecutors request discovery of reports of

277. 1979 N.Y. Laws 1889 (McKinney).

278. CPL Supp., *supra* note 269, § 240.20(1)(d)-(f). Discovery of all of this material was previously discretionary with the court. 1979 N.Y. Laws 1889 (McKinney). In regard to discovery by the defense of the defendant's tape recorded conversations, the requirement that the prosecutor intend to introduce the recordings at trial invites problems. Often a prosecutor will not know whether he will introduce such evidence until or during trial. If for some reason he believes prior to trial that he will not introduce tape recordings and then a trial changes his mind, defendants would have a strong argument that they should have been allowed pre-trial inspection of the recordings. It is uncertain how courts will determine whether the prosecutor genuinely did not know if he would introduce such recordings or purposely claimed that he did not intend to introduce them so that the recordings could not be discovered prior to trial.

279. CPL Supp., *supra* note 269, § 240.20(1)(g).

280. 373 U.S. 83 (1963).

281. 1979 N.Y. Laws 1889 (McKinney).

282. See notes 208-12 *supra* and accompanying text.

283. See notes 213-27 *supra* and accompanying text.

284. CPL Supp., *supra* note 269, § 240.30(1). On the fifth amendment issue, the supporting memorandum states that the section "affects only timing, and consequently the defendant's privilege against self-incrimination is not violated." 1979 N.Y. Laws 1889 (McKinney).

psychiatric examinations prepared by a defendant's psychiatrist.²⁸⁵ Under the new law no defense motion is needed for the prosecutor to obtain such reports.²⁸⁶ In addition, discovery of such reports by the prosecutor on demand effectively eliminates the issue concerning the timeliness of the prosecution's motion for reciprocal discovery.²⁸⁷ It should be noted, however, that under the section which provides for discovery by motion,²⁸⁸ the potential still exists for the timeliness issue to arise. This is because in affording the prosecution reciprocal discovery "[u]pon granting" the defendant's motion, the new law, as did the original article 240, fails to make clear whether the prosecutor must make a counter motion concurrently with the defendant's motion.²⁸⁹

A problem may arise under the section that authorizes prosecutorial discovery on demand because the prosecutor is only entitled to "written" reports concerning examinations or tests conducted at the defendant's request.²⁹⁰ This invites defense attorneys, though they may not admit it, to have the same tests conducted but to have the results conveyed to them orally so there would be no written report to be discovered. If this becomes the practice of defense attorneys, it will severely lessen the effectiveness of prosecutorial discovery on demand.²⁹¹ This procedural deficiency in the statute, which invites avoidance of the section's intended result, should not control the practice of criminal discovery. It could be eliminated simply by requiring that all reports concerning examinations or tests be put into writing.

A second important change instituted by the new article 240 is that the former definition of exempt property has been eliminated and is replaced by "attorney's work product."²⁹² This term is much more narrowly defined than was exempt property under the old article; it includes only "the opinions, theories or conclusions of the

285. See text accompanying notes 250-61 *supra*.

286. *Id.*

287. See notes 239-49 *supra* and accompanying text.

288. CPL Supp., *supra* note 269, § 240.40(1)(b).

289. *Id.*

290. *Id.* § 240.30(1).

291. Defense attorneys should note, however, that if they do not have such reports in writing they risk having a very limited file on the particular client, a situation which could come back to haunt them if later they should face a malpractice suit.

292. CPL Supp., *supra* note 269, § 240.10(2).

prosecutor, defense counsel or members of their legal staffs."²⁹³ In addition, the new article, unlike the original, specifically includes oral statements of the defendant as discoverable on demand.²⁹⁴ These two changes effectively eliminate the conflict which existed among New York trial courts over whether oral statements and notations of such statements contained in police reports were discoverable.²⁹⁵ Some litigation may still ensue, however, in relation to interpretative questions involving the definition of "attorney's work product."²⁹⁶

Police and other investigatory reports, although no longer exempt property, are not made discoverable on demand by the new article. Such reports are only discoverable by motion.²⁹⁷ In order for such a motion to be granted, the prosecution would have to intend to introduce them at trial and the defendant would have to show that they were material to the preparation of his case and that the request was reasonable.²⁹⁸ The case law dealing with the discovery of police reports should have a significant impact in future decisions in this area.²⁹⁹ The majority of those courts which did not allow discovery of police reports did so on the basis that they were exempt property under the original article 240.³⁰⁰ Because police reports are not within the definition of attorney's work product,³⁰¹ such reports should be discoverable by motion if defendants can meet the minimum requirements of materiality and reasonableness.

Perhaps the most liberal of all the changes introduced by the new article 240 are those relating to the discovery, upon trial, of the

293. *Id.*

294. *Id.* § 240.20(1)(a).

295. *See* pt. III (A) & (B)(1) *supra*.

296. For example, because the definition of "attorney's work product" refers only to attorneys and their "legal staffs," the "opinions, theories, or conclusions" of investigators and experts are not excluded from discovery by the definition. This may invite attorneys to put the opinions of investigators and experts in writing as their own opinions so that such material will not be discovered. Whether the definition of "attorney's work product" will protect such material is open to question and courts will have to come to their own conclusions as to what the demanding or moving party must show in order to discover such material.

297. CPL Supp., *supra* note 269, § 240.40(1)(b).

298. *Id.* Potential problems are posed by the requirement that the property discovered by motion be that which the prosecution intends to produce at trial. *See* note 278 *supra*.

299. *See* pt. III B(1) *supra*.

300. *See* text accompanying notes 127-47 *supra*.

301. *See* note 293 *supra* and accompanying text.

prior statements and criminal records of witnesses.³⁰² Here, the new law adopts the procedure recommended in the *Rice* and *Nicolini* cases.³⁰³ That is, the section codifies and accelerates to the pretrial stage the prosecutorial disclosure required under *People v. Rosario*, where prior statements of prosecution witnesses had to be furnished to the defendant at the close of the witnesses' direct testimony.³⁰⁴ Under the new article all prior statements of persons whom the prosecutor intends to call at trial, including grand jury testimony, must be made available to the defendant after the jury has been sworn and before the prosecutor's opening statement.³⁰⁵ In addition, this section promotes mutuality of discovery by providing that statements of defendant's witnesses are to be made available to the prosecutor after the presentation of the people's direct case and before presentation of the defendant's direct case.³⁰⁶

These new provisions adopt the approach taken by the more liberal New York courts which dealt with the issues of whether and when grand jury testimony and prior statements of potential prosecution witnesses could be discovered.³⁰⁷ In fact, the New York cases which followed the exempt property provision of the original article 240 to exclude prior statements of prosecution witnesses from discovery³⁰⁸ are now superseded by the enactment of the new article 240 which does not include such material in its definition of "attorney's work product."³⁰⁹ Indeed, the memorandum of law accompanying the legislation echoes the rationale of many of the more liberal cases by pointing out that "[p]rolonged, repeated interruptions of trial frequently occur under the present system [i.e., under the original article 240] while counsel examine these statements in preparation for cross-examination."³¹⁰

This same section also provides for defense discovery upon trial of a record of any judgment of conviction of or pending criminal action against any witness the prosecution intends to call at trial.³¹¹

302. CPL Supp., *supra* note 269, § 240.45.

303. See notes 116-26 & 180-89 *supra* and accompanying text.

304. CPL Supp., *supra* note 269, § 240.45(1)(a).

305. *Id.*

306. *Id.* § 240.45(2).

307. See pt. III(B)(2) - (3) *supra*.

308. See notes 191-94 *supra* and accompanying text.

309. See text accompanying note 293 *supra*.

310. 1979 N.Y. Laws 1890 (McKinney).

311. CPL Supp., *supra* note 269, § 240.45(1)(b)-(c). See text accompanying notes 144-47

A proviso to these subsections states, to the relief of prosecutors who foresaw problems in investigating their own witnesses, that prosecutors are not required to fingerprint a witness, or cause any law enforcement agency to issue a report concerning a witness.³¹²

The new law does not specifically provide for discovery of the names and addresses of prospective prosecution witnesses. Presumably the names of such witnesses would be discovered at the same time as their prior statements.³¹³ Whether names of prosecution witnesses can be discovered prior to this time and whether the addresses of prosecution witnesses can be discovered at all will depend on whether defendants can satisfy the requirements of the new law's section providing for discovery by motion.³¹⁴ As with discovery of police reports by motion, the case law dealing with the discovery of names and addresses of witnesses will have significant bearing on whether such information will be discoverable.³¹⁵ Because the case law on this issue has been inconsistent, discovery of the names and addresses of prosecution witnesses promises to be a continuing source of litigation.

Finally the new article 240 for the first time provides that upon the motion of the prosecutor the court may require the defendant to appear in a line-up, speak for identification, pose for photographs, be fingerprinted, provide handwriting, blood, hair or other materials from his body, and submit to a physical or medical examination.³¹⁶ Such discovery had heretofore been "haphazard and unregulated."³¹⁷ The supporting memorandum states that "[u]nder adequate court-imposed safeguards such orders will not violate the defendant's constitutional rights."³¹⁸

V. Conclusion

The newly enacted article 240, although resolving many of the case law problems that arose under the original article, is still not as liberal as it might have been. The new statute could have gone

supra.

312. *Id.*

313. See text accompanying note 305 *supra.*

314. CPL Supp., *supra* note 269, § 240.40(1)(b).

315. See pt. III B(2) *supra.*

316. CPL Supp., *supra* note 269, § 240.40(2).

317. 1979 N.Y. Laws 1889 (McKinney).

318. *Id.*

further in opening up criminal discovery in New York. For example, one fairly common defense discovery request which the new law does not specifically include as discoverable is that for the discovery and testing of drugs where the defendant has been charged with possession of drugs. Conceivably, such drugs can be discovered on demand under the section of the new law which provides for discovery of "any other property obtained from the defendant"³¹⁹ and the right to make tests on such drugs can be obtained by motion.³²⁰ It would have been more efficient, however, to have expressly included both of these items as discoverable on demand. Moreover, it would simply require a codification of a court of appeals ruling which allowed for such discovery.³²¹

Those who favor totally open criminal discovery will criticize the new law for not accelerating the time for disclosure of certain material to an even earlier stage. Most obviously the new law could have made the names, addresses, and *Rosario* statements of the prosecution's potential witnesses, along with all police reports, available to the defense upon demand. In addition, the prosecutor's entire file could have been made available to the defendant's counsel at some pretrial stage so that he could search it himself for any potential *Brady* material. If these changes were to be instituted, however, prosecutorial discovery on demand, a limited prosecutorial discovery tool under the new article 240, would have to be given wider scope in order for the concept of open discovery to have any validity at all. This could be done by making the names, addresses and prior statements of potential defense witnesses discoverable by the prosecution on demand.

In sum, the new law does not entail major substantive change in the law of criminal discovery. Nevertheless, it does represent another step toward a more open and efficient system of criminal discovery in the state of New York.³²²

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319. CPL Supp., *supra* note 269, § 240.20(1)(d).

320. *Id.* § 240.40(1)(b).

321. *People v. White*, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976). *See also* *People v. Spencer*, 79 Misc. 2d 72, 361 N.Y.S.2d 240 (Sup. Ct. 1974). *But see* *People v. Goetz*, 77 Misc. 2d 319, 352 N.Y.S.2d 829 (Dutchess County Ct. 1974).

322. In approving the new law Governor Carey wrote: "It is hoped that prosecutors and defense counsel, encouraged by the enactment of these bills, will experiment with even broader discovery on a voluntary basis and that further discovery legislation may be developed in the near future." 1979 N.Y. Laws 1801 (McKinney).

