New York State Senate Standing Committee on Codes
Implementation of Pretrial Discovery Reform
September 9, 2019

Good Morning Senators. My name is David Hoovler and I am the President of the District Attorneys Association of the State of New York (DAASNY) and the Orange County District Attorney. Thank you to you and your staff for facilitating this hearing. A special thank you to Senator Bailey for the ongoing dialogue with DAs over the summer months concerning the criminal justice reforms.

We can all agree that New York State needed criminal justice reform and when you arrived in Albany at the beginning of the last session you had the opportunity to craft some of the most innovative changes and improvements to public safety and criminal justice in generations and you did. New Yorkers deserve a criminal justice system that balances the rights of all New Yorkers. Now, we just want to make sure we all get it right and that we engage in the planning and the commitment of resources that these new laws deserve. We owe it to our residents, businesses and visitors to keep NY one of the safest states in the country, while also ensuring the rights of the accused.

Since this legislation was passed my fellow prosecutors and I have been busy trying to make sure we get this right. We have formed numerous committees consisting of prosecutors through out the state to unpack and interpret the legislation and make sure all of our offices understand what is expected. This has been no easy task.

Just like you, I am proud that New York is such a diverse state. We have distinct regional differences in each of our counties when it comes to so many things including the criminal justice system and how a criminal case is handled from start to finish. While your zip code should not determine the justice you receive we do have to take into consideration the realities that exist in our unique counties.

- There are counties with more financial resources than others.
- There are law enforcement offices with state of the art technology and others who are still using Windows 95.
- We have differences in population and government structure.
- We also have varying attitudes of local government and residents when it comes to investing in law enforcement.
- We have property tax caps that limit budgets for our agencies.

These laws will not succeed in creating a better criminal justice system in New York unless we all understand all of the impacts these laws will have… and most importantly we cannot skimp on funding. We are redefining the criminal justice system in our State and that deserves as much attention and resources as possible.

I'm from Orange County. Let me tell you a little bit about my county for those of you who don't know. We are less than 75 miles north of here in the Hudson Valley. We are close enough to New York City that many people commute daily to the City. But our

structure of government, court system and resources are vastly different than here in the City. In Orange County there are 22 towns, 19 villages and 3 cities with over 75 Judges, almost 40% are not lawyers and 65% of those courts meet at night after normal business hours. Unlike, one NYPD, we have over 40 different local law enforcement agencies that have 19 different computer operating systems, the nuts and bolts of which must be taken into account when we are engaging in earlier discovery in all cases. It also becomes very difficult to promote the transfer of discovery between law enforcement and the District Attorney's office, when many local town and village courts have antiquated systems and only meet once or twice a month.

My colleagues here are going to tell you about their counties but I just want to tell you a little about how some my fellow district attorneys are preparing for the implementation of these new laws and the challenges we are facing. A file for a single case includes police reports, medical records, 911 transcripts, insurance records, cell site data, body worn camera footage, surveillance camera footage and many other documents that have to be retrieved and reviewed before they can be turned over to the defense. And now, as you know, all discovery must be provided within 15 days and this new law applies to all cases including pleas.

- Medical records and x-rays have to be reviewed and redacted to protect social security numbers.
- Camera footage has to be reviewed to blur out license plate information or faces of bystanders.
- My colleague in Yates County recently told his legislature how he has to review and redact body worn camera footage because oftentimes a police officer does not turn off his body cam before entering a security code to gain entrance to a police department, sheriff's office or hospital after hours and the footage captures the pass code.
- It is estimated that for every 100 cameras on the street a District Attorney's office will need one additional staff member and that doesn't include costs related to storage.
- Even to redact portions of footage a prosecutor would have to apply for a protective order before being able to file a certificate of compliance and announcing ready.

All of this requires additional staff including attorneys, paralegals and analysts. Many of our offices are dealing with antiquated computer systems, or computer systems that cannot readily communicate with the systems our police departments are using.

- Cortland County has 16 local courts with 18 judges spread over 500 square miles. Most of the Town Justice Courts meet twice a month and two meet two to three times per week. They deal with 6 police agencies, 4 of which submit cases electronically. But, the Sheriff's Office and the Cortland City Police Department have case tracking systems that are not easily able to interface with the DA'S office. For some of those departments that are not submitting electronically, the

DA's office is getting information sometimes 6 weeks after an arrest, certainly not fast enough to comply with the new laws.

The solution to this could be- a new state wide case management system that would provide sharing capability between law enforcement and defense counsel. We all know the value in going paperless but it requires resources and staff. In addition, many courthouses do not have secure Wifi. Even though many City and County Courts have public Wifi, they might not necessarily have secure Wifi.

I cannot stress how important technology is to adequately satisfy these new discovery requirements and all of the incidentals that go along with up to date technology including software applications, mobile and secure connectivity and document management solutions.

Every single office that I spoke to has expressed a need for more money. This is money that they will devote to additional staff, additional computer systems, data storage and other items essential to efficiently meeting the new expedited discovery demands.

- For example, in a county with a little over 100,000 people, the proposed county budget includes an increase of $170,000 in the DA'S budget for two additional positions, a paralegal and a confidential investigator, software to share discovery information and related office supplies.
- In a similar sized county, the District Attorney's office is requesting $200,000 in additional resources to comply with this new law. This includes an additional ADA, an administrative assistant, extradition expenses, office equipment and grand jury and stenographer costs.
- In one medium sized county, they are requesting over $900,000 in additional staff resources as well as lab testing services, expert testimony, translators, additional court reporters and capital equipment needs.
- Some offices are requesting additional Crime Victims and Witness Advocates. The new law requires the disclosure of name and contact information for anyone who has information related to a case. This will increase the number of witnesses we will have to interview and many offices will need additional interpreters. In addition we will need more investigators to do work on cases where witnesses need to be relocated. Unfortunately, we anticipate that civilian witnesses are going to be more fearful to testify so Victim Witness Advocates will be needed to assist ADAS in maintaining contact with witnesses and noting when orders of protection are needed
- Some offices don't have multi-function printers or high-speed scanners.

The New York State Association of Counties, (NYSAC) estimates that the cost of these criminal justice measures could easily exceed $100 million.

In addition to multiple police departments in single counties, many police departments especially in towns and villages employ part time police officers who may only work a few days a month. This brings up further logistical issues when it comes to completing paper work and providing police reports within 15 days.

Emergency Management Departments will also be asking for extra staff because now 911 and radio calls will need to be disclosed in every case.

While, every office has a need for more personnel and the fortunate offices will get some or all of their requests, many upstate and western New York counties are cash strapped and very reluctant to add new positions or go over the property tax cap. Some counties are trying to close multi million dollar budget gaps. Even in the offices that do get extra staff, they will need more office space and furniture to accommodate the added staff.

Just about ever office will need to hire more court reporters because of the increase in Grand Jury transcripts.

The new discovery laws will also trigger additional discovery in all traffic matters. This could severely burden small offices. For example, Jefferson County, with a population of 120,000 people anticipates that they may have to open 5000 additional cases per year to comply with the discovery required in traffic matters alone. Some of my colleagues will speak more to this issue.

Unfortunately, some DAs have already been told that their requests for additional personnel have been denied or not fully funded. Many counties have not even presented a proposed budget yet so a lot of my colleagues are currently making their cases to their budget offices as to what their needs will be. Many are not hopeful.

We also want to provide our employees with an adequate work environment or we risk losing our staff. This is particularly a problem with legal staff. Many offices have a difficult time filling legal positions at salaries we are offering. Easing the residency requirements for the hiring of ADAs could greatly help this.

I'm going to let my colleagues give you their perspective. I thank you for this opportunity and I hope we can continue these discussions so that together we can find solutions to improve the criminal justice system for all New Yorkers.

OFFICE OF THE DISTRICT ATTORNEY
WESTCHESTER COUNTY
WESTCHESTER COUNTY COURTHOUSE
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601
(914) 995-4200

ANTHONY A. SCARPINO, JR.
DISTRICT ATTORNEY

September 9, 2019

Written Testimony by Westchester County District Attorney Anthony A. Scarpino, Jr.

for the New York State Senate Standing Committee on Codes

Hearing On Implementation of Pre-Trial Discovery Reform

Thank you for holding this hearing on implementation of the discovery reform legislation that was passed in the State Budget. I am pleased to be here along with other District Attorneys to discuss the impact of the new statute.

I support criminal justice reform and appreciate that in passing this bill the legislature sought to inject more transparency into the criminal justice process. We hope the end result will be a system that serves justice and earns the respect and confidence of all the people impacted by it. As a former Judge, and now as District Attorney in one of the state's largest offices, I have a unique perspective on the system and how this reform will impact the disposition of criminal cases. In Westchester County, we prosecute 30,000 cases a year–less than 4,000 of those are felonies.

Our county is unique, unlike our colleagues in New York City–where there are five district attorneys but only one police department–Westchester has 43 law enforcement organizations and 41 local courts served by our eight local branch offices.

Our prosecutors take our discovery obligations seriously. We have always complied with the law and are now in the process of gearing up to meet our new obligations come January 1st.
The obvious and most significant change affected by the new discovery law is a vast increase in the scope of the information and materials prosecutors must collect, assemble and disclose to the defense to meet our discovery obligations in the many thousands of cases prosecuted annually.

To meet this challenge, we created a series of working groups within the office to address the many ways we must adjust to the new requirements. These areas include external and internal education, technology, staffing and securing the resources necessary to adapt to this new reality. Here are the steps we have taken so far. Our internal Discovery Working Group is creating a plan for best practices overall and defining important resources we need going forward. The group is designing forms needed to comply, training materials for staff, planning and contracting for new support technology, holding discussions and educational meetings with law enforcement and other service providers like the County crime lab and medical examiner's office.

Education:

Senior staff have been meeting individually with each of Westchester's 43 police agencies and other law enforcement responsible for jurisdictions within the county – like New York State Police, MTA and SUNY police. Some are large departments, some are small. Each has different technology platforms and unique workflows. Because of this we are working closely with them to understand how, together, we will comply with the new law in turning over materials to our office in a timely manner, so we can make the 15-day deadline.

In the same manner, we are meeting with other service providers like the County crime lab and medical examiner's office which are also responsible for discovery materials.

We are meeting with our County Executive and County Legislators to brief them on the impact the new law will have on our budget and the need for additional staff to ensure that we keep Westchester safe.

Internally, we have focused on training our more than 120 attorneys and staff to comply with the law and we are committed to making sure they have enough experience to meet the requirements from Day One.

Technology:

New technology is key in expediting the collection of discovery materials. Technology is at the heart of the speed and efficiency needed to pool documents, video, photos and audio materials to comply with the 15-day discovery period.

Before the implementation of this legislation, we had contracted to build a new eDiscovery portal to provide discovery more quickly and efficiently to criminal defense attorneys. We are now pushing forward to have the solution ready for January and are expanding it to allow the transfer of materials from the 40+plus police agencies we work with. This too will require more training for everyone involved.

Staffing:
We are reviewing staffing levels to make sure caseloads remain manageable. We have run trials to assess staffing impacts and are pleased that our County Executive immediately added six positions to our office. Two ADAs and four paralegals will begin in our office later this month and will establish our Discovery Compliance Unit.

However, our test runs have revealed that six people are not nearly enough to successfully implement these reforms and fulfill our obligations to the Westchester community. We are asking for more prosecutors and other support staff in the 2020 budget.

Conclusion:
This legislation requires a complete overhaul in that we will be required to turn over vastly more materials, in more cases, in a shorter period of time. All of this results in increased demands on the resources of prosecutors' offices, but there was no funding allocated to implement the changes. Significant changes must be made in anticipation of January 1st.

As you are hearing from other counties, more funding would be critical in reducing the fiscal impacts of the new law. Increased costs for personnel, technology and equipment are just a few of the areas that will need to be addressed.

There is one change we might suggest: phasing in the requirements like you did with Raise the Age. It would give us more time to prepare. Delaying the misdemeanors one year would give us the breathing room to work out the system on the felonies and give the police agencies and labs more time to adapt.

I assure you that I am focused on successfully implementing the reforms in Westchester County and will meet the January start date. Again, I thank you for this time to discuss the discovery legislation and its impact on law enforcement in our County and throughout the state.

Senate Codes Committee Panel September 9, 2019

250 Broadway, NY, NY

Good Morning, Thank you for the opportunity to address this Committee.

My name is Patrick Swanson. I am the District Attorney for the Western most county in NYS; Chautauqua. I speak to you today as a prosecutor, but for the first five years I practiced law I was criminal defense lawyer, representing defendants accused of everything from petty crimes all the way up to murder.

Most of you have probably never heard of Chautauqua County, and if you can spell it I'd be thrilled. While I'm a Mets fan, the closest place to catch a MLB game is Cleveland…under a 2 hour drive.

Of the 62 counties in NYS, Chautauqua County is the 7th largest geographic county covering 1500 sq/mi. We have the 23rd largest population with approx. 128k people. We have two cities; Jamestown (30k) and Dunkirk (12k).

By all measurements we are a poor county. We have the second lowest median household income in the State at $43.2k. My office has a local budget is $1.7 million out of a total local budget of $61 million or 2.8%. ($254 million budget total). When looking at other similar-sized

counties with similar crime numbers, there is a substantial deficit in the resources my office is provided locally.

To give you a sense of the difficulty my office faces due to lack of funding and high caseloads, there is another county with nearly the same population as Chautauqua. They have about 500 more arrests and 300 more felonies annually. Their office has 24 assistant district attorneys; my budget only allows for 10.5 attorneys.

The past 5 years we have averaged 3500 arrests per year for criminal offenses, 1000 of them felonies; 2500 are misdemeanors, and there are also just under 1k violations charged that we handle. We also handle over 10k traffic tickets for 30 of the 32 jurisdictions in Chautauqua.

I sit here today with my colleague from Oswego County knowing that he and I preside over the two District Attorney's offices with the highest caseloads in the entire state. Our offices are both saddled with nearly 300 criminal cases per prosecutor per year. The state average is an absurdly high 178. I mentioned that other county nearly identical in population and crime numbers to mine, it has 157 cases per prosecutor. By every metric, my attorneys are overburdened. The new discovery rules will add substantially to the time required to manage each case. Rather than spending time performing lawyerly tasks, such as preparing

for hearings and trails, my ADAs will now be charged with ensuring compliance with the new mandates.

Right now my attorneys appear in 39 courts in 32 local jurisdictions. Most of those local jurisdictions have non-lawyer judges.

In any given month, there are 15 different weekdays out of 20where an attorney is handling a night court, most of which only have "attorney night" once a month.

We have 9 different law enforcement agencies that protect my county's citizens. Each has different procedures and processes when charging and investigating cases. All police agencies, except the State Troopers wear body cameras. The sheriff's department handles 911 calls and all radio traffic.

Our county does not have a forensic crime lab or medical examiner. We rely on out-of-county agencies to perform those duties. Our Closest Trauma center is in Erie, Pennsylvania.

We mostly border PA (west and south), Cattaraugus Co. (East) and Erie County (North and only 2 miles long). The rest of our border is Lake Erie.

Of the 21 total employees in my office (10.5 being attorneys), there are 5 legal secretaries, one executive assistant, one full-time and one part-time investigator. We also have three victim advocates to serve the hundreds of crime victims seeking justice.

Right now my county's public defender's office was awarded funding to hire 5 additional attorneys to add to the 16 they already have. Their budget is $1.3 million higher than mine. As you know, the prosecutor has the burden of proof.

My county legislature consists of 19 legislators for a population of 128k people. We have a county executive.

So talking about the new criminal justice changes, there is a great need for funding to make sure we can comply with these changes. In an office where the staff is already stretched thin, implementing these changes is no small task. The changes require mostly one thing; time. Time for police to organize their files ensuring that they provide to us all of their materials. Time for my support staff to manage the data, organize and input it to into the new case management system. Time for the attorneys to review everything in that file before making major decisions on how to best proceed with the case. And time for the

attorney to provide the file to defense counsel. What becomes evident is that at the current staffing levels of most offices, there is not that kind of time. Funding is needed to ensure there are enough personnel to handle these new obligations. Without appropriate funding, compliance with the new law seems improbable. Of course, in the rush to comply with the new arbitrary deadlines, we will make mistakes and disclose information that will put innocent victims, witnesses and civilians in danger.

My budget process involves me putting together a budget for my office that goes to the county executive for review. We then meet to discuss. The county executive then sends the changes to me that were made before the full budget is submitted to the legislature for further review. I then appear in front of the public safety and Audit & Control committees to discuss my portion of the budget as sent to them by the county executive. They then implement their changes and the budget is voted on. In essence, there are two reviews of my proposed budget, amendments are made that are outside of my control and then a vote on the budget in whole.

Right now, my budget has been done, sent to the county executive, he's cut my proposal and it is now on to the legislature for their review. I, of

course, am asking for more funding so that we can hire the staff needed to begin to implement the new discovery requirements.

In preparation for the new law and the effect it will have on my office, I proposed an increase of approximately $300k due in large part to adding 2.5 employees. I explained to the county executive that we already have the worst caseload in the state and that the new law requires much more and in a shorter amount of time. I have made efforts to educate both the county executive and the legislature of the requirements being placed upon prosecutors. The past three years I have also made efforts to educate the legislators about the negative impacts of prosecutors with unsustainably high caseloads.

Truthfully, I would be justified in asking for double my current budget. If that happened my budget would still be less than the other county that I mentioned that has 24 lawyers.

As of last week, the county executive has cut 1 of the 2.5 positions I requested to help manage our caseload and new laws. My suspicion is that the legislature will cut me as well. I have made my best effort to educate them on the sweeping changes coming to our criminal justice system.

My expectation is that I will not be awarded the funding to hire additional staff.

When the state budget passed with these sweeping criminal justice changes attached, the realization of just how much more will be required of police and prosecutors quickly set in. Figuring out how my office was going to implement these changes has since been a constant effort. We are having to completely change our case management, we are doing away with paper files, all the staff, lawyers to investigators have to be retrained on procedures and requirements. Police departments have to be educated on the new requirements because they have the information that we are obligated to turn over. Computers, data storage and backup are needed. Additional staff is absolutely necessary. There is only so much that can be done without adequate staffing.

There was no funding provided to make these changes. Realistically, my office needs $500k just because of the new law. That is in addition to the badly needed funding to hire more attorneys given our very high caseload. No money is going to be provided so I'm left with how to come up with a zero cost solution to the most sweeping criminal justice changes in decades. Given their high caseloads, my prosecutors do not have the extra time that is undoubtedly necessary to meet the new requirements.

My office is not alone. While having caseload levels where they are complicates many things, the new legislation will exacerbate an already untenable situation. The overarching concern is that my prosecutors will be unable to keep up with serious matters resulting in the suffering of victims and public safety. Simply put, we need the funding to put these changes in place.

Obviously, there will be many cases we can no longer prosecute because we will not be able to meet the imposed deadlines. I have yet to decide the best way to tell my constituent's I'm sorry but we can't handle that case.

PUBLIC SAFETY CENTER
39 CHURCHILL ROAD
OSWEGO, NEW YORK 13126

TELEPHONE: (315) 349-3200
FAX: (315) 349-3212

Office of the District Attorney

MARK M. MOODY
CHIEF ASSISTANT
DISTRICT ATTORNEY

GREGORY S. OAKES
DISTRICT ATTORNEY / CORONER

JASON R. DELANO
INVESTIGATOR

September 9, 2019

Hon. Jamaal T. Bailey, Chairman
NYS Standing Committee on Codes
Room 2034
New York, NY 1007

Dear Chairman Bailey:

Thank you for allowing me to speak today regarding the new Article 245 discovery statute that will take effect on January 1, 2020. As the District Attorney of Oswego County, I represent the People of the State of New York. It's my belief that the term, "The People," is expansive. It is inclusive. It encompasses victims, yes, but also defendants.

As a career prosecutor, I do not seek convictions. I seek justice. This objective is shared by prosecutors across this great state. Individually and collectively, we have a responsibility to do what is right, what is fair, and what is just.

My purpose today is not to defend the status quo. I acknowledge that the present discovery statute is not perfect. In fact, I share many of the same concerns of those who called for criminal justice reform.

I have long believed that the discovery statute should be amended to provide more information sooner. I believe that disclosure is fair and is conducive to reaching the right result. When both sides are working with the same information, they are more likely to resolve a case in a just and fair manner.

However, with the new Article 245, I believe the pendulum is swinging too far in the other direction. The new discovery statute requires prosecutors to provide too much, too quickly, too often. It places impractical and, I fear, unobtainable obligations on prosecutors

I fear that the new discovery statute will make it harder for prosecutors, particularly those in small understaffed offices, to achieve justice. We will be so consumed with collecting and distributing vast amounts information within a short 15-day timeframe that we will not have the time to analyze and evaluate what we're disclosing so that we can make informed decisions that are consistent with the ends of justice.

The prosecutors in this state, particularly those in Upstate counties, are carrying tremendous caseloads. Unfortunately, I am speaking from a position of experience and authority on this issue.

For the past few years, the prosecutors within the Oswego County DA's Office have had the single greatest caseload per attorney of any county in New York State. According to DCJS statistics, we had a combined total of 2,888 felony and misdemeanor arrests in our county last year (2018). We had the equivalent of 8 full-time attorney positions in the office, including me, which resulted in an average caseload of 361 criminal cases per attorney—almost one new case per day, every day of the year. We averaged 93 felonies per attorney.

To be clear, that statistic does not include the hundreds of violations that were charged, such as Disorderly Conduct and Harassment. Nor does it include the thousands of traffic tickets that my office prosecuted.

As stated above, the new discovery statute requires "too much, too soon, too often." I'd like to explain what I mean by that phrase.

I say "too much" because the new statute requires prosecutors to disclose every bit of information associated with the case, including data that has limited to no evidentiary value and does not assist the defense in evaluating a case. For instance, and perhaps most significantly, the statute will require prosecutors to disclose all 911 calls, computer aided dispatch (CAD) reports, and recordings of police radio transmissions. For the typical Wal-Mart petit larceny, the defense does not need to know what time officers were dispatched, when they arrived at the store, or when they cleared the scene.

In discussing the new requirements, defense attorneys have outright told me that they don't need or want this type of 911 information for every case. However, we will be obligated to provide that information, even though it will likely sit in a defense attorney's file and never be reviewed.

I say "too soon" because the new statute requires the prompt disclosure of all information within 15 days of arraignment. Given the volume of material that is being produced in each case, and given the overwhelming caseloads of most prosecutors, this time frame is simply unworkable, particularly in Upstate counties in which prosecutors are trying to gather information from multiple police agencies. In Oswego County, my office regularly deals with ten different police agencies (Sheriff's Office, two city and three village police departments, university police at two colleges, NYS DEC, and NYSP – 3 barracks), which are located across and spread out over 952 square miles.

I say "too often" because the new discovery statute now applies to every type of case, including vehicle and traffic matters, which have traditionally been excluded. Last year, police agencies issued approximately 18,000 traffic tickets in my county. If we had been operating under the new Article 245 discovery statute last year, each prosecutor would have been responsible for providing discovery on approximately 2,000 tickets. It is unreasonable to expect prosecutors to provide complete discovery on every V&T ticket within 15 days of arraignment, particularly since police officers do not file copies of the tickets with the DA's Office.

The new Article 245 discovery statute is overwhelming, and I do not know whether my office will be able to fully comply with all of the requirements for every case within the designated time frame. In January of this year, my county legislature allowed me to hire two additional full-

time ADAs. While this addition was welcome, it is insufficient to meet the anticipated needs of the office with the requirements imposed by Article 245, particularly given the additional demands that will be placed upon the office by the new Bail and Speedy Trial provisions that will also take effect on January 1, 2020. (Oswego County is also implementing a new Centralized Arraignment Part so that an attorney is present for all arraignments, in conformity with *Hurrell-Harring*.)

So that my office has any chance of complying with the new requirements and obligations that are facing us next year, I have met with command officers for most of the police agencies in my jurisdiction. If we have any chance of complying, my office will have to add personnel and equipment. To that end, I recently submitted my proposed budget for next year, which calls for a dramatic increase in spending.

In that proposed budget, I have asked my county legislature to hire three (3) additional full-time attorneys, two (2) part-time attorneys, one (1) paralegal, and one (1) additional secretary. The estimated salary for these positions is $270,000. Including benefits, the true cost of these positions will be closer to $445,000.

I have also requested an additional $45,000 for grand jury transcription services so that we can provide transcripts to the defense within 15 days. I have requested an additional $4,000 for a case management / digital evidence management system. I have requested approximately $5,000 in additional spending for digital media storage (e.g. thumb-drives, DVDs) and office supplies, as well as an additional $7,500 for postage.

The combined cost of the new budget items is approximately $506,500. This figure represents approximately 33% of the present operating budget for the prosecutorial functions of the District Attorney's Office.

(I have additional budget lines related to the county's drug task force. I also have additional spending associated with the coroner functions of my office, as I am one of three District Attorneys in the state who are also the County Coroner by virtue of being the DA.)

Sadly, even if my county legislature creates new ADA positions next year (which is unlikely, at least at the requested level), it's unlikely that I will be able to hire experienced, competent attorneys to fill the positions. Unfortunately, there is a shortage of attorneys who are willing to serve as prosecutors, and this issue is particularly acute in rural, Upstate communities due to residency requirements imposed by the Public Officers Law.

Recommendations / Requests

1. Delay the implementation of the new Article 245 discovery statute for one year.

It would be difficult for the District Attorney's Offices of this state to completely and timely comply with all aspects of the new discovery statute if it were the only change to the criminal justice system taking effect on January 1, 2020. However, it is not. On the same date, the state will also implement drastic changes to the Bail and Speedy Trial provisions.

Taken together, the Discovery, Bail, and Speedy Trial reforms represent a sea change in the way in which criminal cases will be handled. However, police, prosecutors, and the courts have been given less than a year to prepare for the implementation of these statutes. If we want these reforms to be successful, then we should stagger the implementation of the three policies.

I believe that the implementation of the new bail statute should proceed and take effect on January 1, 2020. I am requesting and recommending that we delay implementing the other two provisions so that the criminal justice system can adjust to the bail changes. We should then implement the discovery provisions on January 1, 2021. The speedy trial provision should take effect on January 1, 2022. This type of approach would provide sufficient time for necessary resources and adequate personnel to be put in place. This gradual approach has precedent in the recent past.

Governor Cuomo signed the Raise the Age bill on April 10, 2017. Although the law was necessary to address a shortcoming in the criminal justice system, the bill did not take effect until October 1, 2018. Even then, the changes applied only to 16-year old defendants. The law does not apply to 17-year old defendants until next month, on October 1, 2019. This type of delayed implementation provided the criminal justice system with time to put protocols, procedures, and resources in place. The slow phase-in provided greater assurance of success. A similar approach to the reforms passed this year makes sense.

2. Create a two-tiered system of discovery, making the prompt disclosure of certain evidence automatic, while making other items of discovery subject to demand by the defense (or due at a later time).

To address both the "too much" and "too soon" concerns referenced above, I recommend extending the initial time period for automatic disclosure from 15 days to 30 days while also reducing what information must be disclosed initially. It would be more reasonable to provide the defense with copies of all accusatory instruments, arrest reports, incident reports, photos, diagrams, witness statements (subject to protective orders), and any known Brady material within 30 days of arraignment. This type of disclosure would provide defendants with a sufficient quantum of information so that they may make a reasonable assessment of the case early on.

As to other items (e.g. 911 information, calibration records, criminal histories of witnesses, body camera footage), the statute should be revised to make those items discoverable upon a demand by the defense. That way, police and prosecutors are not wasting their time

gathering information that is not critical to resolving the case and which the defense attorney is never going to review. Alternatively, if the state wants to keep the remaining items subject to automatic discovery, at least extend the disclosure period for those items to 60 days after arraignment.

3. Revise statute so that traffic tickets (infractions) are not subject to automatic discovery.

To address the "too often" concern referenced above, Article 245 should be revised so that it does not apply to traffic infractions, consistent with the current discovery statute. Alternatively, perhaps the statute could be amended to allow for discovery on traffic tickets, but only upon demand. Police / prosecutors should have 30 days to provide a response, which is consistent with present time frame for officers to provide supporting depositions.

4. Remove Grand Jury transcripts from the automatic discovery provisions, or delay time for disclosure.

Unfortunately, the term "snitches get stitches" is well known in many neighborhoods. Too often victims and witnesses are understandably reluctant to testify due to a well-founded fear of retaliation, including physical harm. The only way that prosecutors can get some witnesses to cooperate is by explaining that Grand Jury proceedings are secret and that their cooperation / testimony will not be revealed unless the matter goes to trial. The new discovery statute removes the safety of anonymity and places a target on the backs of cooperating witnesses. Grand Jury testimony should not be subject to automatic disclosure within 15 days of arraignment on the indictment.

If Grand Jury testimony remains subject to automatic discovery, for public policy reasons, disclosure should be delayed as long as possible, unless the court finds that disclosure is necessary after reviewing the same *in camera*.

As written, Article 245 requires disclosure of Grand Jury transcripts within 15 days of arraignment on the indictment, which is impractical given the system-wide shortage of stenographers / court reporters. In Oswego County, grand jury transcripts are not ordered unless the defendant files omnibus motions and asks for court review of the proceedings. If the new provisions take effect as written, we will incur greater costs due to increased volume, in addition to the fact that we'll be charged expedited service fees.

5. Require defense counsel to file a certification with the court attesting that they have examined all discovery and have reviewed the same with defendant.

Under the new statute, prosecutors cannot announce readiness for trial until they file a certification with the court attesting that they have complied with the discovery requirements of Article 245. Further, if a prosecutor fails to provide all information in the specified time frame, we are subject to sanctions that impact the viability of the case, including adverse jury instructions, the preclusion of evidence, or outright dismissal. No similar obligation is imposed on defense counsel.

If we truly want to produce just outcomes in a timely manner, then the statute should be amended to require defense counsel to certify to the court that they have examined all discovery and reviewed it with the defendant within 30 days of receipt. Otherwise, there is no certainty

that defendants are being given a meaningful opportunity to examine the evidence against them, which is the primary reason for discovery reform.

Please know that I appreciate you providing this opportunity for me to share my concerns and recommendations with this committee. I am willing to continue this conversation so that we enhance this legislation, put the necessary resources and personnel in place, and develop an implementation schedule that will promote both justice and community safety. Thank you.

Very truly yours,

GREGORY S. OAKES
Oswego County District Attorney

TESTIMONY OF

JOHN M. RYAN

QUEENS COUNTY ACTING DISTRICT ATTORNEY

New York State Senate

Senate Standing Committee on Codes **September 9, 2019**

REMARKS TO THE NEW YORK STATE SENATE SENATE STANDING COMMITTEE ON CODES

Good Morning. My name is John M. Ryan. I am the Acting District Attorney of Queens County.

I would like to thank Senator Jamaal T. Bailey and members of the Committee for the opportunity to address you today regarding the Implementation of Pre-Trial Discovery Reform, especially as it relates to Queens County.

Let me start by making it unequivocally clear that despite our serious reservations and objections to this law we are totally committed to using our best efforts to carry it out. Commitment and effort alone however are no guarantee that the obstacles this law presents can be overcome. With due respect I must ask why wasn't this hearing held a year ago when our views could have perhaps helped shape more realistic legislation and still accomplished your basic objectives.

I intend to be brief. I doubt that my views are significantly different than many of the other prosecutors you have and will hear from. I was going to go through a litany of problems my office will face. I will identify some but by no means all. I shortened my list not solely due to time constraints but mainly because after having reviewed the situations of some of my colleagues from smaller counties I came to the realization that despite the enormity of the problems we will face they pale in comparison to what may well be a catastrophe elsewhere in the state.

As to what we are doing there is some good news ... and some bad news.

Let me start off with the good news – this shouldn't take too long. Our office, together with the NYPD and the Office of Court Administration have agreed on a procedure to process Desk Appearance Tickets (DATs) in order to comply with our obligations under the new legislation. Currently every DAT per NYPD Patrol Guidelines must be processed within five days of the arrest. Starting on or before January 1, 2020, each DAT will in most cases be handled as if it's an on-line arrest and will be processed on the same day as the arrest. This will give us a twenty-day window to obtain all discovery material associated with the arrest.

We have also developed a computer application which will enable us to send our discovery material electronically to the defense. Our application sends the material into the cloud and then sends a link to the defense attorney who must download it to obtain the materials. We have been utilizing this system over the

past year in our Criminal Court Bureau to send body worn camera footage to the defense and it has proven to be a valuable tool. This, however, will only work if and when we receive our discovery materials from the various city and state agencies.

This leads to our problem areas. We can only disclose what we have and the artificial presumption that certain material is deemed within our control when it clearly is not combined with what at best can be described as unrealistic time lines makes our ability to comply untenable.

Further once we have the material we must study it and evaluate it before just sending it off. In 2018, over 6,500 body worn camera videos were viewed post-arraignment by our ADA staff, at an average length of 20.7 minutes each. This number has grown significantly in 2019, as the NYPD's body worn camera initiative was just beginning to be implemented in Queens in 2018 and some precincts were not fully operational until later in the year. For example, in June 2019 alone, there were 2,368 arrests with body worn camera videos, with a total of 7,157 videos. In addition, in 2018, our ADAs also listened to an estimated 4,400 911 recordings, at an average length of 12 minutes, and 4,400 NYPD radio run recordings at an average length of 20 minutes. In addition, each of the thousands of body worn camera videos received each year will need to be viewed prior to being turned over to ascertain whether any audio and/or video portions have to be redacted prior to being given to the defense. Once that determination is made, additional hours will be spent filing motions for protective orders to redact the materials to obscure victims' faces, voices and addresses. Once that motion is decided, we have to spend additional hours actually reviewing and redacting the material. The same procedure must also be followed for 911 tapes and radio runs. This will make a tremendous impact on our current workload. For example, based on the 38,800 cases we estimate will survive arraignment in 2019, we anticipate 5 times the number of body worn camera videos that will need to be viewed and over 8 times the number of 911 calls and radio runs that will need to be listened to.

These new laws are drastically changing the scope, manner and timing of our discovery obligations. Our office in particular disposes of more than 70% of our felony complaints pre-indictment - by dismissal or misdemeanor or felony plea before any of our discovery obligations under current law are required. Under the new statute, we will have to give over an enormous amount of discovery on cases that under the old laws would have plead out pre-indictment, thereby tripling the number of felony cases for which we must provide discovery, and exponentially increasing the amount of discovery per case. . Whereas, in the past, these cases

plead out with minimal discovery, we must now turn over massive amounts of paperwork, videos, lab reports, interviews, witness information and other materials before a case can be plead out. If you believe that this is a good thing fine. Now you must give us the resources to implement what you believe to be a good thing.

Under the current law, we are able to protect the identity of our witnesses up until they were required to testify. Under the new law that will be difficult if not nearly impossible. We must seek protective orders to redact police reports and videos, and 911 calls that show or mention the witnesses' names. All of our materials must be scrubbed for identifying data and orders sought, all within 15 days. We will be required to turn over the names and information from witnesses who may have information relevant to the case, regardless of whether we intend to call them. In other words, eyewitnesses who may have seen or heard something relevant to the incident. Many witnesses give information to the police on condition of anonymity. They want the police to have the information but do not want to get involved. The law will require us to give over that information as well, or we must seek additional protective orders, even if we don't intend to call the witness. How long will it be before witnesses refuse to talk to the police in the first place?

Under the current law, we can promise a witness in good faith that we will keep their identity secret until the trial, assuring them that trials are very rare. Now what will we tell them? What do we tell a woman who lives on the 4th floor of a housing project, who views a gang shooting from her window about keeping her identity secret? Even if she cannot identify any suspects, she has information "relevant" to the shooting and her "contact information" must be turned over to the defense. What do we do to protect them? Our options are to move her out of her home and away from family and friends or see if she wants stay and leave her there to take her chances. Yes we can seek a protective order but we can't guarantee one at the point a witness is deciding whether to cooperate,

The biggest problem any DA's Office has in prosecuting cases is the reluctance of witnesses to cooperate - whether out of fear or disinterest. The fact that we will now have to tell witnesses that their identity will be known to the defendant early on will simply make that much more difficult. The internet is full of videos of people calling out people who spoke to the police. There are videos of people reading grand jury minutes of witnesses. We have had witnesses find police reports slid under their doors, on their car windshields, posted on lampposts in their neighborhoods. We have had court proceedings surreptitiously recorded and posted on the internet by supporters of defendants. This is why we have to

make applications for protective orders on these cases. This is why we are asking for so much additional resources - to make sure we can protect the lifeblood of our mission - our witnesses.

The People's discovery obligation under the new law is also tied to the speedy trial statute. We cannot answer ready for trial unless and until we can certify that we have complied with all of our discovery obligations under the new law. Thus, as we review hours and hours of videos, 911 recordings, and police reports, and gather expert proficiency exams and curriculum vitae, our speedy trial time runs. Our office is, essentially, acting as paralegals for the defendant - and the time is charged to us. The net result will an explosion in the number of speedy trial motions and lengthening the time it takes to dispose of cases - not the opposite.

Just a few notes here about the difficulty in implementing these new rules. We have made much progress over the years in our discovery procedures. We have, in Criminal Court, been giving early voluntary discovery on misdemeanor cases for several years. Our assistants now send discovery via email to defense attorneys, including a link to body worn camera videos. Originally, the link to the material was set to last for 15 days, which we thought was ample time for the defense to open and download it. Then, representatives from the LAS told us that 15 days was not enough time for their attorneys to open their email and download the discovery material we sent them and they asked us to keep the link open longer, We extended it to 30 days, which is the maximum time that DOIT will allow us to keep it open. Defense attorneys could not OPEN an email in two weeks, yet we will soon to be required to gather and review massive amounts of discovery material in 15 days.

This legislation–affecting discovery, speedy trial, bail, and DATs–requires a complete overhaul of our Office in an incredibly short period of time. Although the state legislature passed these measures as part of the state budget, it did not allocate a single dollar to DAs or cops or courts to implement these changes. We will do our best to make your law work but let there be no misunderstanding for better or worse it is your law.

New York County District Attorney's Office

Written Testimony of Cyrus R. Vance Jr., New York County District Attorney

New York State Senate Standing Committee on Codes

Public Hearing on

"Implementation of Pre-trial Discovery Reform"

Senator Bailey and members of the committee, thank you for holding this hearing on the implementation of pre-trial discovery reform. It is important to have this discussion to adequately prepare for the sweeping changes that will take effect on January 1, 2020.

I will start by saying that it gives me great pride that we live in a time of record-low crime and incarceration rates here in New York and that, as such, we are able to take this moment in history to now address long-needed criminal justice reform. I think I can safely say that everyone at the hearing wants the fairest criminal justice system possible for your constituents – the people we serve on behalf of the State of New York – that we all welcome changes aimed at achieving that goal, and that we appreciate that you recognize that passing reform legislation cannot be the end of the conversation if the reforms are going to have any chance at succeeding. Rather, for these reforms to be successful, District Attorney's offices need access to the resources necessary to implement these changes – resources that far exceed what we presently have.

Because this hearing is directed at the implementation of pre-trial discovery reform, I will cabin the bulk of my remarks to that topic. I would be remiss, however, not to mention that the bail reforms passed will also require the allocation of significant resources in order to succeed. For example, the statute eliminates the possibility of cash bail for a substantial percentage of cases and contemplates, instead, allowing the court to order release with non-monetary conditions. But no funding has been allocated to creating and expanding pre-trial services across the state,

despite the fact that significantly more cases will now be referred to such services and the services will need to provide much greater supports than they currently do. In Manhattan, for instance, of the 9,459 cases where bail was set last year, we estimate that the defendants in 6,735 (or 71 percent) of those cases would be released under the new law because they were not charged with a "qualifying offense." The remaining 2,724 (29 percent) of those defendants – those who were charged with qualifying offenses – would be eligible for bail or detention. A considerable proportion of cases in both categories – mandatory release and qualifying offenses – will have non-monetary conditions set by the court, and there needs to be capacity to appropriately supervise these defendants. Last year, there were 1,040 defendants placed on Supervised Release in Manhattan – it is likely that that figure will increase five-fold or more come January because of the large number of cases that will fall under mandatory release. Indeed, the Vera Institute of Justice, which has studied this issue extensively, estimates that across the state it will cost $75 million a year to roll-out pre-trial services and supervised release as contemplated by the statute.

Turning to discovery reform. Since 2009, I have advocated for legislative reform of New York's discovery rules, and I have significantly opened discovery practices in our office to the extent practicable with the resources we currently have. And, although we welcome legislative reform, we cannot implement changes successfully without adequate resources. The particular reforms passed require significant personnel and technology increases. So, too, in addition to necessitating additional resources for prosecutor's offices, the legislation necessarily requires additional resources for our police departments and other law enforcement partners, so that we can work together to meet our discovery obligations.

To that end, the pre-trial discovery reform significantly decreases the amount of time that prosecutors have to comply with our discovery obligations and it significantly increases the scope of discoverable materials as well as the number of cases for which full discovery is required. For most cases, the new legislation will require us to turn over discovery materials to the defendant within fifteen days. Such discoverable materials in a typical case in 2020 may encompass – in addition to the names of victims and witnesses – thousands of text messages, medical records including x-rays or other imaging, insurance records, financial records, historical cell site data, search warrants for computers and cell phones, photographs, hours of surveillance

videos from private businesses or police units, transcripts of various proceedings, recordings from police body cameras, and many other sources of evidence.

Importantly, the new discovery requirements apply to all cases, including those resolved by pleas, unless the defense waives. Currently, more than 97 percent of cases are resolved by guilty pleas, often to the benefit of defendants, and those cases do not require full discovery. Being mandated now, however, to provide such a significant quantity of information in most cases constitutes a seismic shift in the demands placed upon prosecutors – one that would render it impossible to comply without an increase in resources. In Manhattan alone, we estimate that these changes will require what amounts to full trial discovery on approximately 32,000 additional cases annually.

Each of the 62 District Attorney's offices in this state has a unique set of needs based on caseloads and current personnel and technology resources. The offices are working diligently to determine what those specific needs are and to prepare for the changes we will need to make. For example, in Manhattan, we conducted a pilot, focused on document acquisition and review, in which we asked each assistant district attorney to treat one newly acquired case as though discovery reform was already implemented – i.e., to, within fifteen days, attempt to gather all of the discoverable material, review it, analyze it, make necessary redactions, and turn it over. Through that exercise, it became evident that what we anticipated was true – the sheer volume of materials we need to gather, analyze, and deliver to the defense in that fifteen-day period is incredible and we need a significant increase in personnel and technology resources to successfully meet our new mandate.

Based in part on the data we gathered from that pilot, we estimate that we will need an increase in personnel and technology resources amounting to well over $20 million each year. That estimate encompasses our need to increase our litigation support unit from roughly 20 employees to roughly 70 employees to obtain the various documents the statute requires us to disclose within fifteen days. The figure also includes our need to add additional investigators, as well as dozens more analysts and paralegals to analyze, review, and redact sensitive information from the documents, audio materials, and video materials, within that fifteen-day period. We also

anticipate needing more assistant district attorneys to manage the workloads and navigate the ligation that the legislation will inevitably create.

Moreover, the most efficient – and indeed perhaps the only practical – way for our offices to meet these demands is to create an e-discovery platform that will allow us to promptly deliver discoverable materials to the defense. So, too, large-set data analysis tools, social media analysis tools, data storage, work stations, and scanners are all technological resources that will be vital to the success of these reforms. And all of that is not to mention the more basic technological resources that will be required in the less populated counties across the state – some of which have to coordinate with dozens of police departments to obtain discoverable materials, operate in several different county courts across large swaths of land, and may not even presently have the capacity to track or manage large portions of their caseloads.

Complying with the new discovery laws is not simply about resources. We must also ensure witness safety and the cooperation of witnesses. The new discovery statute mandates that the District Attorney provide the name and adequate contact information for <u>all</u> persons who have information <u>relevant</u> to any charge, within fifteen days of the defendant's first appearance in criminal court. As indicated, currently less than three percent of cases go to trial, so, historically, the identities and statements of victims and witnesses have been protected from disclosure. Now, the requirement that we hand over to defendants rosters of who has spoken out against them just fifteen days after their first appearance, absent a protective order, is a change that undoubtedly will dissuade witnesses who live in all neighborhoods from reporting crime or agreeing to testify as witnesses. For those witnesses whose identities we will know, the discovery reform poses additional logistical concerns. On that score, within this fifteen-day period, prosecutors will now have to interview any person who has case-related information (not just witnesses we intend to call at trial), inform them that we must turn over their names and contact information, address their safety and privacy concerns in hopes of helping them overcome their reluctance to cooperate, <u>and</u> in fact hand over their contact information to the defendant. All this will require substantial additional prosecutorial resources. And, indeed, several offices have been working on creating an electronic portal that allows defense attorneys to contact witnesses without displaying the witness's sensitive personal contact information to combat that chilling effect that the laws will

have on witness participation and to help ensure the safety of witnesses who do participate with law enforcement.

In short, we want these reforms to succeed and we intend to do everything possible to meet this new mandate. Without adequate resources, however, we simply will not be able to do so. I would like to thank the committee again for recognizing the importance of holding this hearing and continuing this conversation. I want the fairest criminal justice system possible for your constituents and ask that you do everything in your power to help us successfully implement these reforms, which will hopefully get us closer to achieving that goal.

Eric Gonzalez
District Attorney

Written Testimony of Brooklyn District Attorney Eric Gonzalez
Before the New York State Senate Codes Committee

"Implementation of Pre-trial Discovery Reform"
September 9, 2019

Thank you Chairman Bailey and members of the Senate Codes Committee for the opportunity to submit this written testimony and to hear from the state's district attorneys regarding what is required to fully implement the new discovery laws. As an Office committed to keeping our communities safe while reducing incarceration and increasing community trust, we support the overarching goal of the new legislation: to increase the fairness and transparency of our criminal justice system.

We look forward to fully and faithfully complying with the new law, and since the law's passage, we have dedicated substantial time and resources to studying and understanding our new obligations; identifying and researching potential legal questions; and training our prosecutors. Not only have we dedicated a substantial amount of time to internal planning meetings, but we have also been meeting regularly with the New York City Police Department, the New York City Mayor's Office of Criminal Justice, the City's other District Attorney's Offices, other law enforcement agencies, and other City agencies that typically possess discoverable materials to collectively prepare to implement the new discovery laws by January 1, 2020. The partnerships have been extremely helpful and informative to our planning individually

as agencies and collectively. Through this process, however, it remains clear to us that despite our diligent, good-faith efforts, we simply do not have the necessary resources to fully and effectively comply with the new law's mandates. As you know, starting on January 1st, we must turn over to the defense all materials that are relevant to the case within 15 days after arraignment. The practical effect of this is that, in addition to shortening the time period in which we must provide discovery, it vastly increases the number of cases and the types of materials for which we must provide discovery.

New York's prior discovery law called for discovery right before trial; strictly speaking, a defendant was not entitled to witness statements until after opening statements, although the general practice in New York State was production shortly before trial (days or perhaps a few weeks before trial). For decades, the Brooklyn District Attorney's Office has provided discovery earlier than that. Under a practice colloquially referred to as "Open File" discovery, we would typically provide discovery in a misdemeanor case on the court date after a misdemeanor case had been converted to an Information, and for felony cases, after the indictment and after Grand Jury minutes had been judicially approved. It is critical to understand that, for purposes of assessing our preparedness to practice under the new discovery statute, our production of open file discovery under the prior legislative framework for discovery occurred much earlier than was required by the law but it did not take place within 15 days after arraignment. This means that we will be required to provide discovery in *thousands* more cases than we currently do under our existing practice. Thus, we are not positioned differently than other DA's Offices that did not engage in early, voluntary or open file discovery.

We embrace the new discovery law, but we – just like the other offices – need the resources to implement it. Through our in-depth assessment of the requirements of the new

law—informed by internal meetings and interviews, discussions with other offices, and simulating the gathering of all discovery in a sample of our cases—we know that we do not currently have the human resources or the technical capabilities to fully comply with the law. We know that, for example, the ADAs who handle misdemeanors cannot carry average caseloads of 164 cases each (their current average caseload) and fully comply with the law's requirement to produce automatic discovery in 15 days. And since our Office has not yet been funded to support a vertical structure or prosecution, the ADAs in our Grand Jury bureaus, who previously were not tasked to engage in a discovery practice but now will be required to do so, also cannot maintain their current caseloads.

We have submitted a detailed memo and list of needs to the New York City Office of Management Budget that lists the human resources we will need to fully comply with the law, and they include funding for additional paralegals and attorneys who will be needed to handle the discovery in thousands more cases; technology experts to download, process, and review thousands of hours of electronic recordings, including police body-worn camera footage; investigators and analysts to review financial documents and other complex materials; victim advocates and interpreters to work with victims and witnesses whose contact information must be turned over; and grand jury reporters to turn over grand jury minutes much more quickly and in substantially more cases. And with additional staff comes the need for more physical space in our building, and more computers and other supplies for the new employees. Improving our technology infrastructure and capabilities, both hardware and software, will play an essential role in securing, tracking, and turning over discovery material in the volume contemplated by the new laws.

Throughout the debate earlier this year over criminal justice legislation, I strongly supported reforming our discovery laws, but I also made clear my concern that any new legislation must provide meaningful protection for victims and witnesses, and not create a chilling effect on their willingness to testify in prosecutions. If you speak to any Assistant District Attorney, they will tell you that the first questions they are asked by victims and witnesses are: "Will the defendant know who I am?" "Will they know where I live?" Currently we are able to reassure victims and witnesses that their personal contact information will not be divulged to the defendant.

The new discovery law requires us to turn over, within 15 days of a defendant's arraignment, the names and "adequate contact information" of anyone – not just witnesses testifying at trial – who has information that may be relevant to the case. As you can imagine, for a victim of a crime or a witness, being pulled into a criminal matter is anxiety-provoking at best, and at worst can be terrifying, even in non-violent cases. I do understand the defense's need to speak to witnesses in cases that are going to trial, and I believe that it can be appropriately balanced with witnesses' safety and right to privacy without their addresses, phone numbers, or other personal identifying information being turned over to the defense without their consent. We need a secure online portal through which the defense may contact witnesses in a manner that does not reveal their personal identifying information. This technology is currently available and could be used by all the DA's Offices, but resources are needed to create and maintain the system.

I thank you again for the opportunity to discuss these issues and for your partnership in criminal justice reform, and I ask for your support in securing funding so that we can effectively implement these important and necessary reforms.

Office of the District Attorney, Bronx County

Hearing on Implementation Of Pre-Trial Discovery Reform

NYS Senate Standing Committee on Codes

September 9, 2019

Pursuing Justice with Integrity

Darcel D. Clark

District Attorney

REMARKS FOR HEARING ON IMPLEMENTATION OF PRE-TRIAL DISCOVERY REFORM
NYS SENATE STANDING COMMITTEE ON CODES
250 BROADWAY
MONDAY SEPTEMBER 9, 2019, 10:15 AM

Good Morning Senator Bailey, and members of the Codes Committee. Thank you for the opportunity to speak at this hearing today.

Foremost, I want to say that I embrace the discovery reforms. Changes to our discovery laws were long overdue. Before this new legislation passed, I had been working in the Bronx to get cases ready for trial earlier, eliminating bail and turning over discovery sooner. Earlier discovery will improve the quality of prosecution and promote fairness within the criminal justice system.

However, I want to talk about some of the practical challenges of the discovery reform, not to obstruct change, but to provide insight into the process of turning over as much information as possible to the defense within 15 days. We are talking about an increase in the **speed** and the **volume** of discovery.
Starting in January, we must turn over **MORE** AND **FASTER**.

As a result, we need to upgrade Information and Technology (IT) and increase support staff. The voluminous requests to locate and gather information should be accessible through an IT system that supports the load of information and responds to data requests to provide transparency in our prosecutions.

Essentially, we are talking about software along with hardware upgrades for increased capacity. But, even if we have premier software and a data management system that can handle the increase in volume, we will still need the staff to review, redact and manage the transfer of information in compliance with the law.

Some of you may say, "You already have the discovery materials, why can't you just hand it over sooner?"

To answer, I will provide a glimpse into the discovery process using a recent Bronx case as an example.

There was a shooting with two victims. When the defendant was arraigned, we only had the arrest report, complaint, some detective paperwork called "DD5s", and some video.

Weeks later, after constant calls, we received more of the DD5s, which were brought to the office on a CD since there is no electronic method for sending this information.

Since numerous officers responded to the shooting, there was plenty of body worn camera footage to review. One officer, who filed the "incident report," uploaded his video right away, but other officers did not. As a result, we had to track down all the officers who were at the scene, get their video, review it and make it available.

The victims of the gun fire went to two different hospitals. We requested and received the medical records from both hospitals in about two weeks, which is unusually quick. We requested the ambulance call report, which required us to contact FDNY, and receiving this report takes quite some time as well.

Aside from bodycam footage, police acquired additional videos from nearby building cameras. We had to ask the police to go back to the scene get additional video so we could see what took place leading up to the crime.

We also collected information from social media, examined a cell phone, and the accompanying cell site information, which had to be analyzed in a digital forensic lab.

NYPD's Evidence Collection Team responded to the crime scene, so all their photos, logs and documents had to be retrieved and reviewed.

After presenting evidence and securing an indictment, we ordered the grand jury minutes. We received the grand jury minutes within a month from request.

At the complaint room phase, we ordered the 911 calls since they take weeks to produce.

No gun or ballistics were recovered, but if ballistics reports were available, that could take weeks to receive as well. In addition, in all cases where a gun is recovered, we request DNA. When these tests are done, it takes several months to get the results from the Office of the Chief Medical Examiner (OCME).

Two months after the arrest in this case, we still have not received the police paperwork called the "aided reports," which are generated by the arresting officer. This is a common occurrence. And, we are still waiting for bodycam footage from one of the responding officers.

This highlights the complexity of discovery in a routine case, and while the discovery acquisition was relatively quick, it still took **60 days.**

The legislation has made prosecution responsible for the flow discovery, which includes all police paperwork and video. Right now, there is no centralized system of police paperwork. Instead, we must contact every unit that responds to a crime scene.

We need more personnel to contact the local precincts, the NYPD Police Lab for narcotics and ballistic reports, OCME for autopsies and DNA reports, hospitals for medical records, and other law enforcement agencies to secure, analyze, redact, and turn over discovery within 15 days.

Again, we need an upgrade of our IT system to provide electronic discovery which will provide greater sharing capacity between my office, law enforcement, the defense bar, and the courts.

Without the cutting-edge technology of a case management system, redaction tools, and hardware to manage the transfer and flow of information, it is easy to see what hinders prosecutors from implementing the discovery reform right now.

I requested funding from the city to address this. I am now asking for funding from you on the state level as well.

The new statute expressly prohibits the taking of pleas before discovery has been turned over. So, we will need additional staff in the complaint room to copy, redact,

and turn over whatever discovery is immediately available if defendants choose to enter a plea at arraignments.

Under the current discovery law, we were able to redact identifying information of our witnesses. Under the new law, we will be required to seek a protective order from the Court.

In cases where protective orders are not granted, discovery will allow defendants to learn the identities of witnesses, where they live and work. We know that you join us in understanding that victim safety is a serious and paramount concern.

However, given the new legislation, we can no longer tell witnesses with certainty that their identities will be protected until they testify at trial. This will absolutely have a chilling effect on witness cooperation.

Thus, we will need enhanced security along with comprehensive victim services, including funding for relocation to temporary or permanent housing, so our community can feel confident to participate in the criminal justice system without fear of reprisal.

While providing discovery early is vital, remember there are people behind each case, and I don't want them to be lost among the discussion of paperwork, videos and technology.

In conclusion, discovery reform strives to protect the integrity of the criminal justice system by making it fairer for anyone who must be a part of it.
Still, no matter how willing we are to carry out the reforms, we will not be able to comply, if there are no additional resources.

I am asking that you, and all the stakeholders, understand that there are serious obstacles to providing so much more information in such a very short period of time without extending necessary resources.

Thank you for your time and consideration.

Michael E. McMahon

Richmond County District Attorney

Testimony before New York State Legislature on

Pre-trial Discovery Reform

September 9, 2019

Good afternoon and thank you for the opportunity to submit my testimony.

As we in the Richmond County District Attorney's office and our colleagues continue to process the full impact that New York's recently-enacted criminal justice reform legislation will have on our practices and day-to-day operations, it has become abundantly clear that many aspects of the new law – particularly in regards to pre-trial discovery – will simply create an untenable situation for prosecutors' offices across the State. Not only do these provisions threaten the safety of victims and witnesses, but significantly more time, resources, and, most importantly, funding will be required to ensure their protection throughout the criminal justice process – something the Legislature did not commit to our offices.

While I believe that the lawmakers who championed these reforms, along with Governor Cuomo, were doing what they believed to be right, Albany unfortunately neglected to request any of our input throughout the process. In fact, many of the requests to discuss these measures made by myself and the State's District Attorneys were rebuffed. Why didn't you hold a hearing before passing this massive legislation? It is regrettable that we are only gathered here now to

have this discussion, at a time when our offices have been left scrambling to fully comply with this sweeping package of reforms.

That being said, we are working diligently to implement this law when it takes effect on January 1, 2020, and it is our hope that the many issues raised here today will ultimately lead to the most comprehensive and thorough implementation of this legislation possible for the people of New York.

With respect to pre-trial discovery reform, RCDA will need to increase personnel and implement new technologies throughout the office to meet the requirements under the statute to turn over evidence in a much more expedited time frame, and also to ensure that the victims of crime and witnesses are protected throughout the criminal justice process. We are especially concerned about the vague language behind the new discovery provisions and our ability to meet our constitutional obligations under the law.

In particular, under the new law, prosecutors must provide discovery to the defense within 15 calendar days after a defendant's Criminal Court arraignment, with some exceptions. This seemingly arbitrary number places a great burden on our office to provide discoverable materials we may not even be in possession of at the time. Additionally, the provision is written in such a way that makes it unclear whether the 15-day window also applies to felony cases – within this short timeframe, it is possible the case would not have been fully presented before a Grand Jury, requiring us to turn over sensitive witness and victim information before a case is indicted and moved to Supreme Court. In order to avoid creating a dangerous situation for victims and witnesses, there needs to be greater clarification in the legislation's language and for prosecutors to have at least 15 days after the Supreme Court arraignment to turn over discoverable materials. Moreover, expanding the timeline to a 45-day period rather than 15-day would be a more common sense approach and consistent with the current legislative framework found in the Civil Procedure Law and Rules and the Criminal Procedure Law as it currently exists.

Our greatest concerns, however, have to do with the serious consequences that the pre-trial discovery reform, as written, would have on witnesses and

victims. Some of the most troubling provisions include that every witness to a crime and every victim of a crime will now have their name and contact information disclosed to the defense, and can also be interviewed by the defense.

Yet another troubling aspect of this legislation undoes a decades old, bedrock criminal justice principle, designed to encourage citizens who have relevant evidence to provide testimony before a Grand Jury without fear that their testimony would be disclosed to the defendant, unless that witness were to testify at a hearing or trial. As of January 1, 2020, disclosure of a witness' Grand Jury testimony must presumptively turned over to the defense within 15 days after his arraignment.

Additionally, the defense may now move for a court order to access a crime scene or other premises, including a victim or witnesses' home. It is hard to imagine a victim of a crime willing to move forward with the prosecution of a criminal case while at the same time being forced to comply with these dangerous measures. Moreover, it is unclear how these victim or witness interviews or scene inspections will be structured and supervised.

We are rightfully concerned that the above-described provisions will impact a witnesses' willingness to cooperate, which in turn would affect our ability to successfully prosecute a case and keep the public safe.

After reviewing the new discovery law, it has become obvious that victims of crime will suffer unless swift action is taken by lawmakers to improve and expand victim protections and victim advocacy within our office, including investing in new technologies, software, and increasing staff to assist with redaction and masking of sensitive information that could potentially become exposed under the new discovery statutes. I urge you to amend these sections of the new law before January 1, 2020.

Given the package of reforms that we are mandated to implement as of January 1, 2020, funding is needed well in advance of this date because hiring and training takes time – it doesn't happen instantaneously. New systems must be up and running and functioning on that date. This massive overhaul of our system will

require a significant increase in overall personnel, including additional Assistant District Attorneys, increased paralegal and support staff, more Grand Jury personnel, additional Detective Investigators, and adequate technology infrastructure and capabilities.

While we have many concerns, in no way are we opposed to the idea of criminal justice reform. In fact, my office has already implemented early discovery on Staten Island and we have always striven to build a fairer justice system for all.

Although we agree that some reform was needed, the package passed by the Legislature was done so hastily and unilaterally, with no regard for those individuals we are sworn to protect. It was also passed without the funding required to actually carry out such major changes to our daily operations. Unless the Legislature takes our requests today seriously, we fear that victims of crime and their loved ones, public safety, and the incredible gains we have made in keeping crime at its lowest levels in decades, will be at serious risk.

MADELINE SINGAS
DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY
NASSAU COUNTY

TESTIMONY OF NASSAU COUNTY DISTRICT ATTORNEY MADELINE SINGAS

Implementation of Pre-Trial Discovery Reform
New York State Senate Standing Committee on Codes

New York, New York
September 9, 2019

I thank the Committee for this opportunity to submit testimony as my colleagues and I work to implement the reforms that will become effective on January 1, 2020. With just an eight-month timeline and with no state funding, this legislation presents an incredible challenge that my staff and I are working every day to prepare for in collaboration with our courts, police agencies, the defense bar, and our community partners.

I have always supported the noble goals the legislature sought to advance with this legislation- to remedy the inequities of our current bail system, to open and expedite discovery, and to create a faster, more fair and efficient system. I appreciate the legislature's right to require such changes expeditiously. But without funding and additional time, many jurisdictions throughout New York will be unable to fully comply when these laws take effect. In Nassau, we are working diligently to prepare, but at great cost to our already overburdened county taxpayers, and with risks to victim, witness, and public safety that we are working to mitigate.

While this hearing's focus is the implementation of pre-trial discovery reform, bail and speedy trial reforms are inextricable because they raise concurrent challenges of technology, systems integration, interagency communication and collaboration, and the significant funding needed-- but not provided-- to address them.

As criminal justice stakeholders statewide have prepared to implement these new laws, it has become clear that changes will be necessary to clarify certain provisions, to address unintended risks, and to remedy drafting errors. Moreover, expeditious financial support from the state is critical to the success of these reforms.

Insufficient Time to Prepare

This legislation has given municipalities throughout New York State eight months to prepare for a seismic change in the criminal justice system.

In response to calls by defense attorneys and advocates to immediately implement reforms, without the infrastructure in place to do so, New York State Courts spokesman

Lucien Chalfen told the Daily News "Anyone who knows how an extremely diverse statewide branch of government covering all 57 counties and New York City in 350 courthouses with 1,300 judges and justices operates, wouldn't have suggested it."[1] He's right. While I appreciate that the financial, technical, and logistical challenges this legislation presents to prosecutors, police, county leaders, victim advocates, and courts may be of little concern to defendants and their attorneys, as colleagues in government, committed to fairness and public safety, I hope the legislature will appreciate the difficulties we face and work with us to address them.

The necessity to create a new, compliant, pretrial service agency, acceleration of discovery, combined with the universalization of discovery, presents incredible technical hurdles. To ensure the timely collection of materials from many disparate sources – a multiplicity of police agencies, public and private crime labs, Silicon Valley data servers, auto mechanics, state agencies (e.g. DMV), citizens, and satellites – police and prosecutors must purchase, install, harmonize and train staff on software solutions that will acquire, induct, deduct, and insulate the universe of data on even the simplest cases.

While there are many software solutions that can perform the necessary functions– state- and local procurement rules, prudently enacted to prevent corruption, impose significant delays by requiring the issuance of requests for proposals and sufficient time for competitive biding and the evaluation of prospective contractors. The procurement and contracting processes of most counties are not amenable to an eight-month turnaround on such significant and complex purchases, which even after they are complete, require time to integrate data systems, and to hire and train staff to operate them. Further complicating this transition is the need for systems integration with the multiple law enforcement agencies operating in each jurisdiction, each with independent case management systems, technological needs, and purchasing processes. In Nassau County, we are simultaneously handling several dozen systems integrations processes.

Accelerated discovery also imposes an enhanced burden on prosecutors to carefully review all materials-- which can include voluminous paperwork and increasingly body-worn camera footage-- prior to disclosure to ensure that protective orders are sought whenever appropriate and sensitive records are protected. This is not just a technical challenge, but requires a huge investment of skilled staff resources. When we last attempted to implement an electronic discovery process in Nassau County several years ago, our public defender's office rebuffed us. Now, with the great volume of information that will necessarily be stored digitally, electronic discovery is a dormant mandate of the reforms.

As enacted, new laws will end prosecutors' ability to reduce caseloads through plea offers. The construct of the legislation is such that, if a non-criminal disposition on a case is not reached within 15 days, a full suite of enhance discovery will be due. As there is no guarantee that offers – even if extended – will be accepted, this forces prosecutors' offices to prepare each and every case for discovery. The labor investment required to

do so is enormous in a system that has traditionally seen 97% of cases disposed of pre-trial.

Insufficient Funding

Aside from technological purchases and labor costs to install, train, and maintain new information technology systems, data storage will pose yet another challenge. With an expanded universe of discovery, materials stored digitally increase exponentially. The Judiciary Law requires District Attorneys to retain records for 25 years or more. This means that digital cloud storage costs will explode as District Attorneys comply with all state mandates. There is the additional peril that municipalities – if unable to cooperatively purchase given the short time to prepare – will pay duplicative storage costs as a police agency will generate and store one copy of a case file while the prosecutor's office will acquire and store an additional copy of the police work product. This is an inefficiency that can be avoided only through cooperative agreements as to choices in technological platforms – an impossibility in the near term due to time constraints.

Furthermore, an increased labor investment by prosecutors will be required to comply with the New York Code of Professional Responsibility. Prosecutors, as lawyers, have codified responsibilities of competency and diligence. As many bar association studies have shown, a case load cap is paramount to achieving these responsibilities. In the new system of expeditious review, prosecutors' case loads must be carefully managed necessitating additional staff. These personnel costs will be extreme.

My office is proceeding with both labor and technological investment. We necessarily requested a 10% increase in our budget to account for technology, equipment, labor, and space requirements. We secured the provisional title of "discovery expediter" and hired nine additional Crime Victim Advocates. We are seeking to grow our information technology department and line ADA staff. Ancillary issues, such as upgrading our Grand Jury stenographer contracts for expedited minutes production and the purchase of scanners, are forthcoming. This is also at a time when, due to the concurrent reforms that restrict the collection of asset forfeiture funds through civil processes, less funding will be available for overtime, equipment purchases, and rental spaces. Nassau County's finances remain subject to a state financial control board and a tax cap, compounding the budgetary challenge.

Additional Financing Issues

Municipal revenue will drop further as traffic tickets are likely to be dismissed en masse on discovery violation and speedy trial grounds. The local justice courts and traffic violations bureaus are ill-equipped to handle the enhanced discovery burdens, which, for the first time apply to even simplified traffic information prosecutions.

Crime laboratory backlogs will force prosecutors to make the dangerous choice between ignoring forensic evidence and proceeding on less reliable forms for fear of outright case dismissals on speedy trial grounds. No additional funding was allocated for crime lab

staffing, but even if it was, hiring and training staff in this highly-technical field would be impossible on such a short timeline.

Unfunded Mandate to Establish a Pre-Trial Services Agency

Reform legislation requires each county to establish, either in-house or via contract with a non-profit organization, a pre-trial service agency. Mandating the establishment of an entire county department with all attendant functionality and responsibility required by the statute, in just eight months and with no funding, presents an incredible challenge for many jurisdictions. Washington D.C. spends over $70 million annually on such a department that services their jurisdiction of 650,000 residents (five million in the metro-area). By comparison, Nassau County has 1.4 million static residents as part of a metro area of more than 10 million. The reformation of our bail system without funding for bail alternatives presents an extreme burden to local taxpayers. While some have suggested that savings realized by a smaller jail population will offset the costs of pretrial services, most jail costs are fixed, and immediate savings will be minimal.

Impact on Immigrant Victims and Witnesses

Because a prosecutor must now run a criminal history check on every potential prosecution witness for disclosure, this legislation creates additional peril for already vulnerable immigrant communities. Prior to the implementation of new reform legislation, disclosure of criminal convictions was required only "if known" and nothing compelled a prosecutor to conduct a search. New law will necessarily subject victims and witnesses to searches that may reveal warrant history, ICE detainers, or undocumented status. While we will work to protect witnesses and victims in any way we can, this exposure will further deter the cooperation of immigrants, many of whom are, in the current climate, apprehensive about interactions with government. I know the Senate Majority is sensitive to the plight of our immigrant neighbors, and I encourage your committee to take action to address this unnecessary exposure created by this legislation.

Victim Shock

Absent a protective order – which law enforcement can never guarantee an apprehensive victim – the District Attorney will need to provide witness names and adequate contact information for every potential prosecution witness within 15 days of arraignment. The prospect of this disclosure will chill witness cooperation and lead to dismissals that can imperil public safety. In cases where victims and witnesses are deterred from cooperation after they learn of these required disclosures, prosecutors are already bound by the duty to disclose by the arrest, and the only means to prevent disclosure is dismissal of charges (a plea offer will not suffice). The trepidation will be compounded by the fact that more defendants will be at liberty pending trial. In some cases, such as stalking and residential burglary, this can be terrifying to victims. Moreover, victims who may have been relatively anonymous before, such as those

victimized by mass identify theft, a larceny from an auto, or a phone scam, will now be further victimized by the disclosure of their name by virtue of that invasion.

Conclusion

I appreciate the noble goals the Legislature is seeking to advance with these reforms and I share them. My colleagues in Nassau County government, and fellow District Attorneys statewide are committed to complying with the mandates of this new legislation as expeditiously as possible, and we have made significant progress in our efforts to prepare. The extremely short timeline and lack of state financial support complicate our ability to do so, but victims should know that we will continue to do everything we can to seek justice, defendants should be reassured that we will be fair and ethical, and the public should have confidence that we are dedicated to continuing the progress we have made to keep our communities safe.

Once again, I thank the Committee for the opportunity to submit this testimony, and I look forward to our continued collaboration as we move forward.

COUNTY OF SUFFOLK
OFFICE OF THE DISTRICT ATTORNEY

TIMOTHY D. SINI
District Attorney

TRUTH · JUSTICE · INTEGRITY

September 9, 2019

Franci Schwartz, Legislative Associate
Senate Standing Committee on Codes
Room 2034
New York, NY 10007
Email: Schwartz@nysenate.gov
Fax: (212) 298-5686

Re: Public Hearing

Dear Mr. Schwartz:

I am the District Attorney of Suffolk County and respectfully request that this letter be submitted on my behalf as part of the record in connection with the public hearing regarding the new discovery laws to take effect this coming January 2020. I submit this letter with the hope that State lawmakers come to appreciate the costs and practical challenges faced by my Office and our sister District Attorney Offices around the State in connection with implementation of the new discovery laws.

The Office of the Suffolk County District Attorney is one of the largest offices in the State of New York. It prosecutes all violations and criminal offenses under local and state laws occurring in the County of Suffolk, which has a population of approximately 1.5 million people. In 2018, my Office handled the prosecution of approximately 50,000 cases.

Since the passage of the new discovery laws, my Office has been working tirelessly to ensure effective implementation, devoting hundreds of hours analyzing the new laws, developing implementation plans internally and in partnership with our sister District Attorney Offices, creating training programs, and collaborating with all of the criminal justice stakeholders in Suffolk County. What has become clear is that it will not only require a herculean effort in an extremely short timetable to effectively implement the new laws, but it will cost millions of dollars in personnel and technology. After a thorough analysis, I estimate conservatively that the Office will require an approximate increase of 10% of its 2019 budget to effectuate implementation.

One of the many challenges in preparing for implementation is the fact that there are a multitude of law enforcement agencies and courts impacted by the passage of the new laws. In Suffolk County, there are approximately twenty-three different courts and approximately thirty police agencies. Each one of these entities has different protocols and record management systems, which makes implementation of the new laws particularly challenging.

Despite the many challenges, I am extremely proud of the work that members of my Office and my partner agencies have done to prepare for the implementation of the new laws. In short, we have analyzed the new laws and their impact on each area of criminal law, developed policies to guide our prosecutors in the enforcement of the new laws, created training programs to ensure that our personnel are positioned to implement the new laws, explored technology solutions to assist the Office and our partners in complying with the laws, and collaborated with all of the stakeholders in the criminal justice system, including but not limited to the multitude of police agencies, the crime laboratory, the courts and the defense bar. We are currently preparing a budget that includes the fiscal costs created by the new laws, including additional personnel costs and investments in technology.

Most notably, the new discovery law requires that the prosecution disclose to the defense an expanded amount of material in an extremely short time period. This will require the immediate transmission of discoverable material from the police to the prosecution – essentially in real time. The only way to effectively comply with this provision is through the use of technology, which does not presently exist in Suffolk County. In order to effectively comply with the new laws, the County and local governments will be required to invest in record management systems in each police department that are able to interface with a case management system in the District Attorney's Office so that the police can provide discoverable information to the Office within the new expedited timeframe.

Based on a review of the number of arrests made on a daily basis, the amount of material now discoverable, the time in which it is due and the number of police agencies with which the Office works, it is essential that the Office create a centralized Arrest Intake Bureau, which must be operational twenty-four hours a day, seven days a week. Each arrest intake requires, at a minimum: (a) a review of the charges being filed for legal sufficiency; (b) police documentation of information required under the expanded discovery provisions; (c) transmission to the District Attorney's Office of all case-related information for disclosure to the defense; (d) creation of the case file for arraignment, including the drafting of CPL 710.30 notices and orders of protection; and (e) communication with the assigned bureau/assistant district attorney who will prosecute the case. An Arrest Intake Bureau will require the hiring of additional assistant district attorneys, paralegals, and detective investigators in order to comply with the expanded discovery requirements and within the new time constraints.

As set forth above, the significant changes to the discovery statute will require large amounts of information to be gathered on essentially every case and turned over to the defense within fifteen days from the defendant's arraignment. Even where the law allows for additional time, the current protocols and technology used will not be sufficient to comply with the new law. As a result, the Office will have to invest significantly in technology to ensure compliance. Two areas where the Office must invest are forensic analysis and case management.

As for case management, the Office will be required to transition to a new case management system that will interface with the record management systems of the thirty different police agencies in order to upload discoverable material as soon as practicable. Although the Office has partnered with the Suffolk County Police Department's technology section to assist in obtaining required discovery, there are numerous other police departments that do not have the same level of technology to provide the Office with the required discovery. In reviewing our eDiscovery requirements, we have determined that our existing case management system would be costly and inadequate to meet the enhanced discovery mandates. Based on an extensive review of available platforms, we have decided to partner with the New York Prosecutors' Training Institute to implement the eDiscovery component of NYPTI called the Digital Evidence Management System and the case management component of the system called Prosecutor's Case Management System. With appropriate programming and customization, this software tool will replace our present case management system and provide a modern, cloud-based case management system that will work seamlessly with an available eDiscovery system. The transition to, and the continuous operation of these platforms will cost the Office hundreds of thousands of dollars per year and require the retention of additional information technology personnel.

As for forensic analysis, in this age of electronic communication, the majority of our cases now require some form of forensic analysis of electronic devices or media. In order to comply with the new discovery obligations as it relates to electronic evidence, the Office will be required to invest in new equipment, including a new Forensic Recovery Evidence Device, which would allow for faster acquisition of electronic evidence and reduce processing time for producing forensic copies of electronic evidence in discovery to the defense. The purchase of essential equipment will cost the Office hundreds of thousands of dollars in technology costs.

In short, the steps needed to ensure that the District Attorney's Office is prepared to implement the discovery obligations require substantial additional funding for hiring assistant district attorneys, paralegals, investigators and support staff to operate an Arrest Intake Bureau, and purchasing the necessary hardware and software to ensure the timely flow of information from police departments and crime laboratory to the District Attorney's Office, and then to disclose discovery to defendants and their attorneys within the time required by the statute.

The new discovery laws also impose other costs on the Office. For example, the new law requires disclosure of all grand jury testimony within fifteen days. This new burden will require funding for expedited minutes. Additionally, the new discovery law requires the production of a broad array of material falling into twenty-one categories, much of which is extremely sensitive, including the transcripts of all grand jury witnesses, the identity and contact information of witnesses and victims and much more. This will inevitably require our prosecutors to seek protective orders in a larger percentage of cases, which will require increased personnel hours and litigation costs for the Office. Finally, the new laws will require a significant amount of training for members of the Office, as well as for all the police agencies, the crime laboratory and other stakeholders in the criminal justice system. Training is necessary not to merely provide education on the new laws, but to effectively implement the new protocols and policies that will inevitably be developed.

In conclusion, my Office is working diligently and collaboratively to ensure compliance with the new laws. But my administration, and my partners, cannot do this alone. We need the financial funding from New York State. To be clear, without State funding, effective implementation throughout the State may be compromised.

Respectfully submitted,

Timothy D. Sini
District Attorney, Suffolk County

Testimony of

Bridget G. Brennan
Special Narcotics Prosecutor for the City of New York

Before

Senate Standing Committee on Codes

Public Hearing:
Implementation of Discovery Reform
S1509 – Part 3

On

September 9, 2019

Thank you for the opportunity to describe the fiscal implications of the challenges we face implementing S1509 – Part 3.

I am submitting this testimony on behalf of the New York City Office of the Special Narcotics Prosecutor, which investigates high level narcotics trafficking organizations throughout New York City. New York City is a major narcotics importation hub and the center of heroin, fentanyl and cocaine distribution rings which supply drugs throughout New York State, the East Coast and Mid-Atlantic region. In 2018 alone, the Office of the Special Narcotics Prosecutor oversaw investigations netting more than 1500 pounds of narcotics. Most of the heroin and fentanyl was seized in Bronx County, the hub for narcotics importations rings, and the borough with the city's highest rate of overdose deaths.

Discovery Reform presents significant challenges to our ability to effectively prosecute major narcotics trafficking operations, and protect those who have information which assists our investigations. It imposes broad, ill-defined new disclosure responsibilities on all prosecutorial agencies. Millions of dollars will be required to comply with new obligations, and to assure the safety and security of all civilians whose identities and contact information must now be hurriedly disclosed under expansive provisions of the new Discovery Law.

In a little discussed but highly significant departure from prior law, personal contact information regarding civilians who have provided information related to "the subject matter" of a crime must be disclosed to defendants within 15 days of initial court appearance. This is required even though the civilians may not be witnesses expected to be called at trial.

District Attorneys' testimony today will address the fiscal implications of other aspects of Discovery Reform. The Office of the Special Narcotics Prosecutors joins in the application for substantial budget increases to enable us to comply with all aspects of the new law. My testimony will focus on the unique challenges and fiscal implications of new requirements of early and expanded disclosure of civilians' personal identifying information and statements, regardless of whether the civilians are witnesses expected to testify at trial.

New Law Requires Early Turnover of Identity and Contact Information for Expanded Number of Civilians

New CPL Sec. 245.20 states that "[t]he prosecution shall disclose to the defendant all items and information that relate to the subject matter of the case." There is no similar pronouncement in the old statute, nor any analogous language to be found in the Criminal Procedure Law. Currently applicable CPL Sec. 240.20 (1) states, "upon a demand to produce by defendant ... the prosecutor shall disclose to the defendant ... the

following property...", then lists out specific categories of information, giving guidance as to what should be disclosed.

Under the new statute, not only must information be turned over about civilian witnesses who may testify, the new law requires disclosure of the names and contact information for the significantly expanded and ill-defined category of "all persons" with evidence or information "relevant" to an offense charged or to a defense that may be asserted.

The new law allows a prosecutor to apply for a protective order to withhold information about an individual if safety may be jeopardized. But it lays out a complex procedure, requires the application for a protective order within three days, and provides for a new intermediate appellate procedure. The number of applications will increase exponentially, as will the complexity of the process.

Narcotics investigations rely on confidential information, and civilians who provide information "relevant" to an offense charged may be at risk, if their identity is compromised. Many law enforcement operations are initiated based upon civilian complaints about criminal activity. "Information relevant to an offense" may come from grandmothers who sit at the window watching drug activity in their courtyards, store owners who tell the police what is happening on the corner, supers who provide video surveillance from hallway camera, and families who identify the dealer who sold the lethal drug to a loved one who overdosed and died.

Under the vague and expansive language of the new law, we expect to bring many more requests for protective orders to prevent disclosure of personal contact information of not only of witnesses and confidential informants, but building supers and bereaved relatives. This will consume substantial resources for hearings before trial and appellate courts, and for protection of safety and security of confidential sources. We will need additional staff to enable us to effectively protect civilians who provide information, including those whom we would never expect to call as witnesses.

Timing Challenges

Beyond the increase in volume, the requirement that disclosure be made within the first 15 days of a case will substantially increase the need for prosecutorial resources. Analyzing the need for a protective order as well as drafting and litigating such orders will be exceedingly time-consuming.

The disclosure of identity and contact information in the earliest stages of the case, when the prosecution is unlikely to have sufficient information about a defendant's background and associations to enable a preliminary assessment of risk, represents an enormous challenge. It is important to realize that, in the average

criminal case, the prosecutor's focus early on is not on learning all there is to know about the defendant; it is on learning all there is to know about his involvement in the particular crime of which he stands accused.

Thus, a prosecutor's time in the first two weeks would include interviewing police personnel who responded to the scene; contacting and interviewing civilian witnesses; locating, retrieving (sometimes by subpoena) and reviewing any video of the events in question, including police body camera video; and weighing the results of scientific testing such as ballistics and fingerprint evidence. I note in this regard that the process of reviewing video, perhaps hours' worth, and then deciding if a protective order for any of it is warranted is a significant and resource-intensive undertaking.

The notion that protective orders can adequately safeguard witnesses rests on the assumption that prosecutors and judges can accurately predict which defendants are likely to intimidate, threaten, harm, or kill the witnesses against them, or harm a person with evidence *or information* "relevant" to an offense charged or to a defense that may be asserted. Common sense and history teach us that such predictive powers are limited. The type of defendant who might threaten or harm a witness, and the type of charge that might inspire such behavior, cannot be readily predicted or categorized.

Under the new discovery laws, civilian safety will rely on the ability of the prosecutor, at the earliest stage of the case, to thoroughly investigate and attempt to learn factors about the defendant that might support the issuance of a protective order – a time consuming investigative task.

Protecting Civilians

The new law will tax prosecutorial resources by requiring prosecutors to devote substantial time to meeting with witnesses in the earliest stage to not only assess their information, but to secure their cooperation and ensure their safety. Even under current law, which does not require disclosure of a witness's identity until shortly before trial, it is difficult to secure cooperation, particularly in neighborhoods hardest hit by crime. Rightly or wrongly, truthful witnesses believe they are providing information about a criminal, and are understandably frightened by the impossibility of predicting what that criminal or his friends may do to retaliate.

Witnesses, and those offering information tangentially related to a crime, whose early interviews now focus on obtaining a complete and accurate account will require far more time and attention devoted to their personal security before such disclosures are made. They will have to be informed of our discovery obligations concerning their identity.

Fears, privacy concerns, and a heightened reluctance to become involved will have to be addressed. Safety issues will have to be explored, particularly in narcotics, violent crime and gang cases, in order to develop trust and assure their personal safety. People whose identity might, under current law, never become known, or would not be revealed until a trial was imminent, may have to be relocated.

Conclusion

All civilians affected by the disclosure provisions in the new statute will need to be contacted and notified of the law's impact on them. Once aware that their name and contact information will be turned over within days of cooperating with the police, it is hard to imagine that anyone from any neighborhood, would feel secure in stepping forward with information which may be "relevant" to the "items and information that is the subject matter" of a narcotics case.

It is fair to predict that the average citizens will be frightened by the notion that a defendant or defendant's attorney will know not only who they are, but how to contact them is early in the criminal proceedings. They will fear that a defendant can easily discover where they or their loved ones live and work. It is not a stretch to think that many individuals will simply opt for silence unless prosecutors can promise to keep them and their identifying information secure. Accomplishing this will require an infusion of personnel and financial resources.