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The New York State Senate
Standing Committee on Codes
Hearing on the Implementation of Pre-Trial Reform
September 9, 2019

Testimony of Scott D. Levy, Chief Policy Counsel
THE BRONX DEFENDERS

Chairman Bailey and members of the Standing Committee on Codes, my name is Scott Levy and I am Chief Policy Counsel at The Bronx Defenders. The Bronx Defenders ("BxD") has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 21,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

Introduction

This spring, New York passed historic comprehensive discovery reform. BxD applauds the New York State Assembly, Senate, and the Governor — Senator Bailey and Assembly Member Lentol, in particular — for their commitment to get this piece of landmark legislation passed. The Discovery for Justice Reform Act (DFJRA) repealed one of the most regressive discovery laws in the country and replaced it with a system of open, early, and automatic discovery for all New Yorkers. With the enactment of the Act, New York went from the bottom of the pile to the top of the heap. The reform was made possible by the work over many years of a broad coalition of people directly impacted by the criminal legal system, public defenders, grassroots organizations, and criminal justice advocates from across New York.

As we look forward to implementation of the new law, it is important to remember what brought us to this point. For years, our clients — overwhelmingly people of color — have had to make one of the biggest decisions of their lives, whether to go to trial or plead guilty, in the dark. They have had to

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make this decision without knowing who the witnesses in their case are, what the evidence is against them is, and whether there is evidence that helps prove their innocence. Still, as we sit here now, prosecutors in New York are not even required to turn over basic police reports and witness statements until the day of trial, if at all. New York's discovery rules have acted more as a blindfold than a guarantor of justice.

Because of the work of the people in this room, however, on January 1, 2020 all of that will change. Our clients will finally have access to early, open, and automatic discovery in their cases. The DFJRA codifies core principles of a fair and just system of discovery:

- **Discovery must be shared before guilty pleas:** Only a tiny fraction of cases in the criminal justice system end with a trial. The vast majority of cases are resolved by guilty pleas. Under current law, New York's discovery rules do nothing to guarantee transparency, and as a result, hundreds of thousands of New Yorkers serve jail and prison sentences and/or are subjected to collateral consequences such as deportation, loss of employment, ineligibility for student loans, and eviction, without ever seeing the evidence in their cases. The DFJRA remedies this by requiring prosecutors to turn over information before any guilty plea so that the accused can make an informed decision about whether to plead guilty or go to trial.

- **Discovery must be early and automatic:** Discovery must be disclosed early in the court process. Under New York's current discovery law, a prosecutor may wait until after the trial begins to turn over most of their evidence, including witness names, their statements, and their criminal records. People accused of crimes and and their counsel need discovery early enough to make informed decisions, investigate their cases, and prepare for trial. Prosecutors begin assembling a case against the accused before they have even filed charges; they use the material in their possession to make key decisions, such as whether to make plea offers, within the first few days of the case. Those facing criminal charges need that same discovery at the first court appearance so that they, too, can make the essential decisions which will affect the rest of their case and, possibly, the rest of their lives. The DFJRA ensures that people accused of crimes receive all relevant information within 15 days of initial arraignment.

- **Discovery must be open:** Open discovery means complete discovery; in other words, if it is in the prosecutor's file, it should be turned over to the defense. Under the DFJRA, prosecutors must share all relevant evidence with the defense, including names and contact information of all witnesses, not just those who will be called by the prosecution to testify; all witness statements; all police reports; videos; photographs; and test results. These materials must be unredacted unless the material is protected by privilege or court order. Incomplete discovery undermines transparency and trust in the criminal justice system, leads to wrongful convictions, and prevents defense attorneys from fulfilling our core duties — investigating the case, giving clients meaningful advice on the merits of a plea bargain, and preparing for trial.

As we have already seen, this historic victory is already under attack. There is a steady drip of op-eds and other pieces in the media, coming primarily from law enforcement, warning of the chaos that will ensue when the DFJRA goes into effect next year. The primary target of the criticism has been the

DFJRA's requirement that prosecutors share witness contact information with defense counsel. This type of fear mongering is not new. Throughout the years-long debate on discovery reform in New York, opponents have attempted to thwart meaningful change through scare tactics. And every time, these objections have been shown to be baseless. This hearing is no different. We are here today to celebrate an important victory for our clients, their families, and their communities, but also to implore you to protect these hard-fought gains. Looking forward, the Legislature should:

- Encourage prosecutors to honor the spirit and letter of the law and reject the use of "witness portals"; and
- Reject calls to re-open or renegotiate the provisions of the DFJRA.

New York is poised to become the national leader in criminal justice reform nationwide. We thank you for this opportunity to talk about how to ensure that the promise of the DFJRA becomes a reality for our clients.

The Legislature Must Be Vigilant for Efforts to Undermine the Spirit and Letter of the Law

For decades, New York has operated under a "trial by ambush" model of criminal discovery. Prosecutors were not required to turn over even basic police paperwork to people accused of crimes and facing trial, and what little information they were required to provide did not need to be turned over until the eve of trial. Our clients were regularly forced to choose between plea bargains — some resulting in years of incarceration — and facing trial without any real understanding of the evidence against them. The blindfolding of our clients led to a deeply unjust power imbalance in the criminal courts, giving prosecutors immense and illegitimate leverage in plea negotiations.

Full Transparency in Criminal Cases

The DFJRA represents a sea change in the way information is shared in the criminal legal system, requiring prosecutors to engage in early, open, and automatic discovery in every case. The plain language of the statute makes clear that the aim of discovery reform was leveling the playing field and full transparency. Section 245.20(1) of the new law requires prosecutors to disclose "all items and information that relate to the subject matter of the case" in the possession of law enforcement within 15 days of criminal court arraignment. Section 245.20(7) also requires judges to apply a "presumption in favor of disclosure" when interpreting the statute. Together, these provisions create a framework for full transparency in criminal cases.

Predictably, however, prosecutors have already begun to strategize ways to undermine these provisions and thwart the intent of the new law. The New York Prosecutors Training Institute (NYPTI) — created by the District Attorneys Association of New York (DAASNY) to educate and train New York

prosecutors — recently issued a manual on the 2019 criminal justice reforms. The manual's purported objective is "to identify practical, procedural, and technical 'gaps' in the legislation and provide equally practical solutions to those gaps." These "solutions" are presented in the form of practice tips and recommendations on how to delay the provision of discovery, withhold certain types of evidence, and circumvent the spirit of the DFJRA.

For instance, the NYPTI manual suggests that prosecutors designate civilian witnesses as "confidential informants" in order to withhold the provision of their contact information to defense counsel. It notes that the term "confidential informant" has no current definition under the law, and urges prosecutors to interpret it as broadly as possible. In addition, the manual urges prosecutors to strategically file motions in order to stop the speedy trial clock and delay handing discovery over in a timely manner. It notes that when a motion to extend the time to provide discovery due to "exceptional circumstances" is filed, the time to decide the motion will be excluded from the speedy trial calculation whether or not the motion has any merit. These so-called "solutions" are simply efforts to avoid providing full and fair discovery and should be seen as an effort to thwart the implementation of discovery reform. The Legislature should monitor these efforts to subvert the intent of discovery reform and should use its oversight powers to hold prosecutors accountable.

Disclosure of Witness Contact Information

Critically, the DFJRA also requires prosecutors to disclose the "names and adequate contact information" for all non-law enforcement witnesses. Contact information for witnesses enables the accused and their counsel to fully and properly investigate the criminal allegations, evaluate the strength of the prosecutor's case, weigh plea bargain offers, and prepare for trial and effective cross-examination. The DFJRA's witness contact information provisions are in line with the recommendations of the American Bar Association, The New York State Bar Association, and the New York State Justice Task Force. And, importantly, the DFJRA provides straightforward and commonsense protections for witnesses in the form of lenient standards for protective orders whenever a judge determine that disclosure of contact information would threaten witness safety.

Prosecutors across New York have tried to stoke irrational fears to undermine these provisions. There has been a steady stream of op-eds from district attorneys deploying scare tactics.[1] And, as noted above, the NYPTI manual suggests that prosecutors broadly interpret the term "confidential informant" in order to withhold the provision of witness contact information under that exception. In addition, some prosecutors have indicated that they will "paper the courts" by filing motions for protective orders to withhold witness contact information in nearly every case, despite the fact that the

[1] *See, e.g.*, Michael E.McMahon, "State Reforms Would Give Thugs Keys to this City," SI Live, May 15, 2019, *available at* https://www.silive.com/news/2019/05/state-reforms-would-give-thugs-keys-to-this-city-commentary.html.

law only allows for an order when there is "good cause" to issue one. These efforts undermine the DFJRA before it even goes into effect.

Contrary to this fearmongering, the DFJRA's witness contact information provisions strike the proper balance between the need for full transparency and fairness and the need to protect potential witnesses. Indeed, the substance of the DFJRA's witness information provisions has been endorsed by prosecutors from other jurisdictions with similar provisions as well as crime survivor advocates here in New York. Under the DFJRA, judges and prosecutors will have ample tools at their disposal to protect witnesses and complainants whenever the circumstances call for it.

Moreover, contrary to the claims of many prosecutors, the new statute will not result in a flood of litigation over the necessity of protective orders (unless prosecutors opt to file frivolous motions to obstruct discovery). As the experience of numerous other jurisdictions shows, judicial intervention is almost never required. Instead, in the vast majority of cases prosecutors and defense attorneys are able to resolve conflicts over the disclosure of witness information without the involvement of a judge. As one Texas judge put it,

> Prosecutors who oppose discovery reform often set forth a concern for the safety of victims and witnesses if their identification and contact information were to be disclosed early in the discovery process. Our experience in Texas is that if there is a realistic threat to a victim or witness, the prosecutor and defense attorney are generally able to agree to disclosure terms safeguarding the person's identity or contact information. In the rare case when the prosecutor and defense attorney are unable to agree, the prosecutor retains the option to seek judicial intervention and request a protective order from the presiding judge to shield the victim or witness from intimidation or harm. In five years working with open file discovery, I have never seen this system jeopardize the safety of a victim or witness.[2]

Claims that the new law will put witnesses at risk or inundate the courts with litigation over protective orders are simply unfounded.

Electronic "Witness Portal" Applications Are an End-Run Around the New Statute

In response to the DFJRA, New York City prosecutors have indicated that starting on January 1, 2020 they intend to start using a digital application — a "witness portal" — through which criminal defense attorneys can contact witnesses in their respective cases as an alternative to providing adequate contact information. According to prosecutors, the witness portal will be operated by a third party vendor and will provide a list of names of all witnesses associated with a particular case without any additional contact information. Instead, the witness portal will give defense counsel an option to contact each

[2] Letter from the Honorable Beckie Palomo, District Court Judge, 341st State District Court, Texas, Feb. 7, 2018.

witness either via a telephone call or text message. Once defense counsel makes a selection as to which method they wish to use, the application will contact the witness. Defense counsel is never provided with the witness's direct contact information. Separately, law enforcement will notify the witness in advance of this call or text that a "defense attorney" will try to contact them, but that their contact information will be hidden. The witness can either choose to answer or ignore defense counsel's attempt to communicate. If the call or text is answered, defense counsel will have no way of verifying that the person answering the call or text is in fact a witness in the case. If the call or text is ignored, defense counsel will have no way of knowing if it was ever received. It is our understanding that this portal will be used even when there is no need for any kind of protective order — even a *limited* protective order — as envisioned by the new law.

The witness portal is an obvious attempt to subvert the intent of one of the most important and fully negotiated parts of the new discovery law. Rather than comply with the clear intent of the law — full transparency and a level playing field — prosecutors are now trying to maintain control over critical pieces of information and to regulate defense attorneys' investigation of their clients' cases. The Legislature, however, has already rejected language allowing for the use of such a portal as a method of communicating with witnesses. DAASNY vigorously opposed disclosing any witness contact information to defense attorneys. In an effort to reach a compromise,prosecutors proposed using a secure online portal in lieu of providing contact information. This proposal was submitted to the Executive and shared with the Assembly and Senate at the end of February 2019. The Legislature rejected that proposal and instead adopted the language in the final bill that requires prosecutors to provide "adequate contact information" but not a physical address absent a court order. The ultimate compromise reflected the Legislature's intent to ensure defense counsel's ability to properly investigate cases without inappropriate intervention from prosecutors.

Discovery Reform Was Exhaustively Vetted and Should Not Be Renegotiated After-the-Fact

There is no reason to revisit the DFJRA. It is critical to remember that the DFJRA did not just appear overnight. Prior to the passage of the DFJRA, New York's discovery laws had not been meaningfully changed since 1979. In the 40 years following, there was a constant drumbeat for reform from impacted people, defense attorneys, and the broader criminal justice advocacy community. The passage of the DFJRA was not an aberration or hasty last-minute addition to the State budget; it was the product of a rigorous and exhaustive years-long debate involving prosecutors, law enforcement, the defense bar, the judiciary, academics, victim advocates, and politicians, during which the core provisions were well-known and vigorously debated. The result was a statute that follows the lead of the majority of states and sets the gold standard for discovery reform in this country.

The New York State Bar Association Embraced Comprehensive Discovery Reform

In 2015, the New York State Bar Association convened a Task Force on Discovery comprised of some of the most prominent members of New York's legal community, including judges, prosecutors, defefenders, and academics. After an exhaustive process, the NYSBA Task Force issued a report and recommended "large-scale changes" to the existing discovery law, focusing on "early and broad"

discovery.[3] Notably, the NYSBA Task Force also recognized that discovery of witness information is critical to ensuring a fair and transparent system, noting that "several dozen States with modern discovery rules have recognized that it is critical that both parties receive enough information through discovery to locate witnesses as necessary (baring circumstances that justify a protective order). This means exchanging names and addresses."[4] In fact, the NYSBA Task Force ultimately recommended that prosecutors be allowed to provide "adequate alternative contact information" in lieu of a person's address — almost precisely the standard ultimately adopted by the DFJRA.

New York's prosecutors voiced their objections to the discovery of witness contact information in the NYSBA process, and in the end a minority of the Task Force members dissented from the Report's recommendations, opposing the provision of discovery early in the criminal process and arguing that disclosure of witness information would endanger potential witnesses and discourage cooperation with law enforcement, despite ample evidence to the contrary from dozens of jurisdictions across the country (see below). The Task Force majority dismissed these objections as "baseless" and characterized some of the dissenters' arguments — many of them the same arguments being advanced here today — as "misleading."[5] Indeed, the majority found that the dissenters "fundamentally oppose meaningful discovery reform" and called their opposition to the provision of early discovery "embarrassingly simplistic."[6]

As a result of the Task Force's work, NYSBA ultimately supported legislation introduced by Assembly Member Lentol in that fully embraced comprehensive discovery reform, including early disclosure of evidence and discovery of witness information.

Experience of Other States

Prior to the passage of the DFJRA, New York was one of four states — along with Wyoming, South Carolina, and Louisiana — that allowed the prosecution to hide almost all information until the day of trial. Forty-six states mandate disclosure of the prosecution's witnesses with reasonable exceptions for commonsense security measures — such as protective orders issued by judges. No state has ever repealed a broad discovery statute or replaced it with a more restrictive one. Early adopters, such as New Jersey (enacted in 1973) and Florida (enacted in 1968), have operated under liberal, expedited discovery statutes for over 40 years. Other states, seeing the results, have followed suit as recently as 2004 (North Carolina), 2010 (Ohio), and 2014 (Texas). If broad discovery resulted in waves of witness intimidation, as some opponents of discovery reform in New York claim, surely some of these states — or even one of them — would have restricted discovery in response. No state ever has.

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[3] New York State Bar Association, "Report of the Task Force on Criminal Discovery," Jan. 30, 2015, pp. 7-8, *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.
[4] *Id.* at 9.
[5] *Id.* at 124-25.
[6] *Id.* at 127.

Legislative Vetting

The DFJRA was not the product of "uninformed legislators" "tripping over each other" to pass a hastily crafted bill.[7] Over the course of the last two legislative sessions, the merits of various discovery reform proposals were considered. None of the provisions that were ultimately included in the final version of the bill were novel or a surprise. The building blocks of the law passed in the spring have been known and debated for years. Indeed, provisions adapted from the bill supported by NYSBA served as the backbone of the legislation. Other critical provisions were drawn from Senator Bailey's proposal from the 2018 legislative session. At every step in the long road to discovery reform, opponents of reform raised the same objections, and each time they were considered and rejected. And that is because of the straightforward and obvious need for transparency and fundamental fairness in our criminal legal system. For the same reasons these objections were rejected in 2015 and again in 2019, the Legislature should reject calls to renegotiate a law that was exhaustively debated and vetted and that has yet to go into effect.

The Legislature should take pride in making New York a leader in criminal justice reform. The DFJRA is the new gold standard for discovery reform nationwide. The Legislature must stand strong to protect these critical hard-fought gains.

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[7] *See* Michael E.McMahon, "State Reforms Would Give Thugs Keys to this City," SI Live, May 15, 2019, *available at* https://www.silive.com/news/2019/05/state-reforms-would-give-thugs-keys-to-this-city-commentary.html.

BROOKLYN DEFENDER SERVICES

TESTIMONY OF:

Yung-Mi Lee – Supervising Trial Attorney

Criminal Defense Practice

BROOKLYN DEFENDER SERVICES

Presented before

The New York State Senate

Standing Committee on Codes

Hearing on the Implementation of Pre-Trial Discovery Reform

September 9, 2019

My name is Yung-Mi Lee. I am a Supervising Trial Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS), one of the largest legal service providers in Brooklyn. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and tools for self-advocacy for over 30,000 clients in Brooklyn every year. I thank the New York State Senate Committee on Codes and, in particular, Chair Jamaal T. Bailey, for holding this oversight hearing on preparations for the implementation discovery reform.

BDS commends the New York State Assembly, Senate and Governor for the transformative criminal justice reforms included in the budget. These reforms go a long way towards correcting the unfair pre-trial justice system that currently exists, in which people languish in jail because they cannot afford bail, awaiting trial or considering a plea offer without access to police reports, witness statements, and other basic information needed to defend themselves. Senator Bailey, in particular,

deserves praise for his deliberate consideration of the important details of the criminal discovery process and his successful efforts for real reform. I also want to recognize the tremendous work of countless public defenders, people impacted by the criminal legal system, their families, and many other advocates, all of whom organized and advocated across the state for several years to make these reforms a reality.

With these amendments to the bail, discovery, and speedy trial laws, most people who are arrested will be guaranteed release rather than incarceration and will have all the evidence and information related to their case. An important provision in these reforms requires police to provide appearance tickets as opposed to immediately incarcerating people alleged to have committed low-level offenses. Now, many more of the people we represent should never set foot in a jail cell, a vast departure from today's reality. Given the devastating and even deadly impact that even 24 hours in jail can have on a person, particularly a young person or someone with a health condition, this change exemplifies the profound improvements to justice in New York that will begin on January 1, 2020. All that said, the efficacy of these reforms will depend on implementation and, for that reason, I am grateful to the Senate for its oversight of this process.

Why New York Reformed It's Discovery Laws

Under the outgoing discovery statute, in New York, unlike most of the rest of the country, prosecutors and police are not required to provide police reports and other crucial evidence, or "discovery," to people facing criminal allegations or their attorneys until trial begins – months or years after an arrest. More than 95% of cases never make it to trial; they either end in plea deals or dismissals. That means nearly everybody who is charged with a crime might never see all the evidence collected by police and prosecutors. In short, they were blindfolded. This "blindfold law" contributes to mass incarceration, wrongful convictions and court delays. This injustice has hugely disproportionate impacts on Black and Latinx New Yorkers, who are far more likely to be arrested and to be jailed on unaffordable bail. The pre-trial legal system effectively operates as a tool of coercion to plead guilty, regardless of guilt or innocence. However, earlier this year, led by reform champions like Senator Bailey and Assembly Member Joseph Lentol, New York followed in the footsteps of every other major jurisdiction and enacted landmark legislation to require open, early and automatic discovery, ushering in a new chapter in our state.

Implementing Discovery Reform

The criminal discovery reform legislation included in this year's New York State budget generally requires all evidence and information in a criminal case to be turned over as soon as is practicable, and no later than 15 days after a criminal case begins and on an ongoing basis, It also mandates that prosecutors make these disclosures prior to the expiration of any plea offer. Early and complete disclosure promotes fairness in the criminal justice system. As such, the law does not limit discovery to the specified list of discoverable items. A party can request and a court can order disclosure even if it is not specified within the law as long as it is relevant to the case. This landmark reform also allows for the defense to adequately investigate a case so that even if items

are not within the control or possession of the prosecutor, the defense can still move to preserve evidence or a crime scene and the defense can subpoena any additional items that are not in the prosecutor's control.

Importantly, the law also includes special provisions requiring sanctions and remedies for non-compliance. These remedies or sanctions include adjournments, reopened hearings, adverse inferences, excluded or precluded evidence, mistrials, or dismissal, depending on the possible impact of the discovery violation. Without a certification of compliance (i.e., that discovery is complete), the prosecutor will not be able to announce ready for trial and thus stop the statutory speedy trial clock under CPL §30.30.

Witness and Victim Safety

Prosecutors throughout the state and, except for Brooklyn, across New York City have long withheld discovery claiming public safety or witness safety concerns. While witness safety concerns are valid in a relatively small number of cases, the new law allows prosecutors to move for protective orders in those extreme cases. In Brooklyn, unlike most of the rest of the state, the Kings County District Attorney's has a longstanding policy to provide discovery to the defense on an ongoing basis in most cases, thus debunking the myth that most cases raise witness safety or intimidation concerns. This policy has improved outcomes and streamlined cases.

The new discovery law protects witness safety and incorporates safeguards recommended by the New York State Bar Association's Task Force on Discovery. The Task Force specifically endorsed exchanging names and addresses at an early stage. This Task Force included prosecutors, defense attorneys, judges and academics and addressed the need for both safety and disclosure of evidence. Here are five key points to remember: (1) In the vast majority of cases, there are no risks to witnesses -- and often there are no civilian witnesses at all. The new law empowers judges to order that any and all evidence be withheld from people facing criminal allegations and their attorneys in the rare cases in which witness safety may be at risk. (2) Prosecutors from other states have endorsed reform, as have crime survivor advocates here in New York. (3) Judges already have tools to protect crime victims and other witnesses, including orders of protection, which prohibit all contact between defendants and any other party. (4) Prosecutors already have tools to protect crime victims and other witnesses, including felony charges for violating orders of protection or intimidating witnesses. (5) Discovery reform is NOT an experiment. The vast majority of other states have enacted legislation that both requires the timely disclosure of evidence, including witness information, and keeps survivors and witnesses safe.

Proposed Witness Portal as a Circumvention of the Law

The new law thereby balances the defense need to investigate competently – by requiring the disclosure of witness names and adequate contact information – with the need to protect witnesses in those rare cases where safety issues arise. However, in response to the enactment of reforms, the New York City District Attorneys (collectively, the "DAs") have informed us that starting on

January 1, 2020, defense attorneys will not receive any contact information and instead a portal application would be required to contact witnesses in their respective cases (the "witness portal" or the "application"). Such a portal would be the "default" regardless of whether witness safety concerns are ever an issue. It is designed to hide the witness' contact information and to allow the DA and the witness sole control over how they should be contacted.

This portal fails to comply with the statutory requirements of the new C.P.L. § 245.20(1)(c) and 245.20(7) because it does not provide "adequate contact information" for witnesses as will be required. It also runs afoul of the state and federal constitutions because it will prevent adequate investigations in many cases in violation of the right to effective assistance of counsel; it violates due process reciprocity requirements because the defense is still required to disclose "addresses" for all of its intended witnesses; and it will be an inadequate method for disclosing Brady witnesses. For these reasons, we adamantly object to the use of the witness portal and we are asking the State to intervene in the DAs' use of the application in violation of the discovery statute, the Constitution, and ethical rules.

Additionally, the Legislature has already rejected a statutory proposal allowing for the use of such a portal as a method of communicating with witnesses. Throughout the legislative process, the District Attorneys Association of New York ("DAASNY") vigorously opposed timely disclosing any witness contact information to defense attorneys. In an effort to reach a compromise, the New York County District Attorney's Office proposed using a secure online portal — like the one proposed here — as the means for the defense to contact witnesses. This proposal was submitted to the Executive and shared with the Assembly and Senate at the end of February 2019. The Legislature rejected that proposal and instead mandated that prosecutors disclose the "names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense." This mandate can only be interpreted to mean that prosecutors are required to give defense attorneys adequate information to contact witnesses directly, without an intermediary. The witness portal flagrantly contravenes the legislative intent to provide counsel with direct access to witnesses.

Timely Discovery

The first day of a criminal prosecution can derail a person's life, discovery at the earliest possible moment is critical. The statute directs prosecutors to turn over all evidence as soon as is practicable, but *no later than* 15 days after arraignment. In other words, prosecutors should turn over all documents and reports in their file at the first appearance, also known as criminal court arraignments, including police reports, complaint room screening sheets (also known as Early Case Assessment Bureau reports), photographs, video recordings and witness and complainant statements. Most of these documents are immediately available to the Assistant District Attorney assigned to the case and, as discussed below, the new law requires interagency cooperation, so there is absolutely no excuse for withholding this evidence.

Discovery & Informed Plea Decisions

The statute also recognizes that people should make decisions about guilty pleas not only voluntarily, but also knowingly. That means that, at least seven days (or three in pre-indictment cases) prior to the expiration of a plea offer, prosecutors must turn over, in addition to the aforementioned items, any written or record defendants' statements, grand jury testimony, names and contact information for law enforcement personnel involved in the case, names and contact information for witnesses, expert opinion and scientific reports and evidence, electronic recordings, exculpatory evidence, evidence that tends to negate guilt, evidence that reduces the seriousness of the charged crime or might reduce a sentence, summaries of all promises or inducements offered to people who may be called as witnesses, and more. I cannot overstate the importance of having early access to these items to review them with our clients and advise them on plea offers that may fundamentally impact them for the rest of their lives, whether with a period of incarceration, a permanent criminal record, a risk of deportation, or otherwise.

Interagency Coordination

Many of these items will require the NYPD and OCME to provide evidence to prosecutors that, under existing discovery practices, would often never actually be made available to the defense. Prosecutors will now be required to make efforts to communicate with NYPD and OCME to preserve and obtain documents and physical evidence. There is a due diligence requirement built into the statute. This free flow of information between the prosecutor, law enforcement, and other agencies is essential for discovery reform and compliance. The State Legislature and the New York City Council must ensure that NYPD, OCME, and other agencies providing discoverable material to the District Attorneys Office are compliant and assist the prosecution with this process.

Implementation by Defense Attorneys

Public defenders are actively preparing for the new era of criminal discovery. We are conducting training within our own organizations to ensure that follow-up investigations are consistent, communications with clients are timely, and plea offer deadlines are met. We are also enhancing our technological capacity to receive and store discovery electronically, which we will receive en masse.

Conclusion

Brooklyn Defender Services recognizes that the new discovery law requires fundamental change throughout the state of New York. It is important to remember why New York State took on this task. Change of this magnitude is going to improve the way the legal system operates as a whole across the state. It means more transparency and accountability in criminal cases, particularly in prosecution. In this era of broad support for ending mass incarceration, this law effectively sets a higher standard for criminal prosecution and the deprivation of liberty, particularly because it was coupled with meaningful bail reform. Overhauling the system was exactly what the legislature and

Governor intended, and we urge the State Legislators not to allow prosecutors and law enforcement to shirk their new responsibilities under the law.

Thank you for your consideration of our comments. If you have any questions, please contact Jacqueline Caruana *at* jcaruana@bds.org *or (718) 254-0700 Ext. 388.*

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New York County Defender Services

Before the

Senate Standing Committee on Codes

Public Hearing on the Implementation of Pre-trial Discovery Reform

September 9, 2019

My name is Sergio De La Pava and I am the Legal Director at New York County Defender Services (NYCDS). We are a public defense office that represents around New Yorkers in 20,000 cases in Manhattan's Criminal and Supreme Courts every year. I have been representing clients accused of crimes in this city for more than twenty years. Thank you to Senator Bailey for holding this hearing today and inviting us to testify about the implementation of pre-trial discovery reform passed during the state budget process.

NYCDS, along with other defenders and community groups from across the state, advocated for years for the comprehensive reforms that were written into the budget this year. We know that the new reforms to our discovery statute will have a significant impact on our clients' lives and improve fairness in our courts. We are in conversation with other New York City defender offices to strategize training our supervisors and staff on the new laws, which is our key priority in ensuring that the new laws achieve their stated goals on day one.

Decarceration should be at the center of all of our implementation goals moving forward. The legislature made clear during their discussion of these bills on the floor that they voted in favor of bail, discovery and speedy trial reform in a concerted effort to roll back some of the harm created

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by stop and frisk and mass incarceration of communities of color. We hope the Senate remains as committed as public defenders and our grassroots partners are in staying true to this intent.

Implementation is Eminently Feasible

As one of the very last states to adopt broad criminal discovery requirements, New York has the benefit of learning from the dozens of other states that have employed systems of broad access to discovery at an early stage of criminal cases for many years. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark.[1] There is no reason that New York State officials should not be able to create a system that works for our communities and complies with the law.

We have advocated before the New York City Council and the Mayor's Office of Criminal Justice for the adoption of an electronic discovery system that will allow all parties to easily upload discovery materials with timestamps so that all parties know when exactly discovery obligations were fulfilled. The system must be straightforward to use, so that all of the parties required to upload documents can use the system with minor training and technical support. Training thousands of system actors could become very costly, unless the technology is straightforward so that existing IT staff can easily explain the process and support employees. The more difficult the system is to use, the less likely people will be able to upload information expeditiously, and it will be our clients who suffer.

North Carolina courts began rolling out a criminal court e-discovery platform more than a decade ago.[2] The state's Discovery Automation System (DAS) is generally well regarded by defense counsel, law enforcement and ADAs alike.[3] The system allows prosecutors and law enforcement agencies to upload files directly to the system, where the evidence is timestamped, Bates stamped, and saved as a text-searchable PDF. Audio and video files can also be uploaded. Defense counsel and prosecutors can then download and/or print out the materials for their own files. The whole process also facilitates judicial oversight, allowing judges to see what evidence was turned over, by whom, and when. Most importantly, the system allows defense attorneys to easily share evidence with the accused to help them make a timely informed decision on how best to proceed in their case. We are not advocating any particular system, including the North Carolina Discovery Automation System (DAS). Rather, we urge New York City officials and stakeholders to act quickly to ascertain what are the best options for our courts, knowing that this is one potential model.

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[1] New York State Bar Association, *Report on the Task Force of Discovery* (2015), available at http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.

[2] North Carolina Courts, *Discovery Automation System*, available at https://www.nccourts.gov/assets/documents/publications/Technology_DAS_Facts.pdf?o70KpOvf9FhgDOSuSaU36Iz0vRQt4TFn.

[3] *See, e.g.,* North Carolina Commission on the Administration of Law and Justice, Technology Committee, *Summary of Public Comments on Interim Report* (2016), available at https://nccalj.org/wp-content/uploads/2016/09/Tech-Public-Comments-Overview.pdf.

Discovery Should Be Disclosed Immediately for Pending Cases

We urge the State Senate to call on prosecutors to begin turning over discovery in existing cases immediately, whether an electronic discovery portal exists yet or not, to ensure that all of our current clients have the discovery they are entitled to under CPL Article 245 on January 1, 2020. We worry that if they wait to turn over discovery, the first few weeks of January will be a logistical nightmare, especially if we are forced to continuously go to court to compel prosecutors to turn over the evidence in ongoing cases. This can be avoided if prosecutors begin turning over everything they have now.

The Costs of Implementation

Because discovery reform has a substantial technological component, we anticipate that there will be significant new costs for defender offices. We were disappointed to learn that last year the legislature did not allocate any funding for the pre-trial reforms passed in the budget.[4] We hope that next year you will consider funding technology upgrades along with increased staffing to meet our ongoing technology needs. In New York City we are hopeful that the City will contribute all or most of the funds necessary to implement discovery reform. This unfunded mandate will be even more challenging for smaller counties and cities to meet, and we worry that accused people will be the ones to suffer if the reform does not receive fiscal support from the state in the next budget.

Our funding concerns fall largely into three categories: technology, equipment, and staffing.

1) Technology

We need to increase our server capacity to hold the enormous amounts of information that we anticipate receiving beginning January 1, 2020. Unlike other parts of the state, New York County prosecutors have one of the worst track records in terms of providing pre-trial discovery. That means that even today we receive only a small amount of the discovery in each case that we anticipate receiving next year. When we do receive discovery now, most of it is hard copy, or printed on disks, and so is not uploaded to a cloud. Where we currently might receive a burned DVD of surveillance footage, we anticipate that next year it will be uploaded to an e-discovery system and we will be required to download it on to our internal servers.

We also expect to see an uptick in the use of police body cameras. Those files can be extremely large. If multiple officers respond to a scene, we may receive multiple large, high-definition video files.

Upgrading our current server capacity will be a significant portion of our discovery-related costs in the new year.

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[4] *See, e.g.*, David Lombardo, "No new funding for NY's criminal justice overhaul," *Times Union*, April 14, 2019, available at https://www.timesunion.com/news/article/No-new-funding-for-NY-s-criminal-justice-overhaul-13760065.php.

2) Equipment

The state passed comprehensive discovery reform to ensure that people accused of crimes have the opportunity to view and assess the evidence against them. This requires not only downloading the prosecution's discovery from an e-discovery system to our own internal servers, but then making that discovery available to our clients. This will likely require us to print and/or photocopy every piece of discovery to share with our clients, or downloading evidence such as videos or photos onto tablets or laptops that we can take to the courthouse or jails, if our clients are detained pre-trial. We anticipate that we will need to purchase a large amount of new equipment to ensure that every client has the opportunity to review their discovery.

3) Staffing

Discovery reform means that our attorneys will now be reviewing, analyzing and potentially challenging a significant amount of evidence that was previously denied to our clients. We anticipate that this means that they will spend more time on their cases, and particular on complex cases that involve large amounts of discovery. We will also have to be photocopying and downloading all of this data, organizing and maintaining it, and ensuring that we meet our new reciprocal discovery timelines. All of this will require additional staffing to ensure that every client receives the highest quality defense.

We are currently putting together a comprehensive training program for our attorneys and other relevant staff to get them up to speed on the new law and prepare them for the transition. We have already made a significant commitment of supervisor time to ensure that our staff receives the training they need and that our clients deserve.

Finally, if prosecutors intend to use the court system to stall these reforms and keep evidence away from our clients, as they have so far indicated, we are prepared to litigate and fight to protect the rights of our clients under the new law. This will also require the investment on our part of attorney and staff hours to litigate protective orders and discovery timelines.

In short, we anticipate that our staffing needs will be significant, but that with access to all of the evidence in the case, we will be better equipped to fight for the best possible outcome for our clients and defend their rights.

<u>Concerns about Plea Bargaining</u>

One major concern we have at NYCDS is proactively countering the danger that prosecutors will stop offering fair plea deals once the new discovery requirements go into effect. A large portion of our cases are resolved early to the benefit of all parties involved. This frequently occurs prior to a felony indictment or before the prosecutor has expended many resources on the case.

We advocated vigorously for comprehensive discovery reform. But we also fear it may result in the unintended consequence of prosecutors no longer offering the kinds of pleas that benefit everyone. The reason is that prosecutors will now be required to do the work of reviewing and turning over discovery prior to any plea agreement. Inappositely this obligation may actually

disincentivize them from seeking a speedy and fair resolution on the theory that an early resolution no longer results in less prosecutorial effort. This would be a harmful and unjust result of reforms intended to promote justice and fairness.

The situation is especially dangerous given the well-established and excessive power prosecutors have in shaping plea bargaining. One important way to counteract this danger is to make the discovery disclosure process extremely simple, as is done in North Carolina. Another is to monitor and hold prosecutor offices accountable if they start to offer fewer or worse plea bargains because of the new reforms. A prosecutor's duty is to do justice, not to penalize accused people for law reform enacted by state legislators. We will carefully monitor this issue to ensure that such unintended consequences do not occur.

Court Capacity

In New York County, we already experience a shortage of trial parts when both the defense and the prosecution are ready for trial. We anticipate that as an outcome of the reforms passed this session, we may see more trials than we did in the past. But our courts are not currently equipped with sufficient personnel for all the trials we have now, much less increased volume.

The Office of Court Administration should ascertain how many court parts, judge and personnel are available in each borough and what the deficits, if any, currently exist in expeditiously bringing cases to trial. It is our understanding that this is already a problem in Queens, where they have even fewer judges and courtrooms than in Manhattan.[5] We hope that the State Senate and Assembly will ensure that OCA has the funding they need to ensure that the people we represent are not denied their right to a speedy trial.

Conclusion

Discovery reform is eminently feasible and long overdue. We are doing our part to fight for the resources we need to implement CPL 245 and protect the rights of our clients. NYCDS looks forward to working with the State Senate and Assembly and other system stakeholders to ensure that we quickly put into place the necessary technology and requisite funding in advance of January 2020.

If you have any questions about my testimony, please contact me at sdelapava@nycds.org.

[5] Christina Carrega, *Staff Shortage Grinds Wheels of Justice to a Halt*, QUEENS DAILY EAGLE, Nov. 13, 2018, available at https://queenseagle.com/all/2018/11/13/understaffing-grinds-wheels-of-justice-to-a-halt.

NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | Founded in 1986

NYSACDL Testimony
Senate Standing Committee on Codes
Public Hearing – September 9, 2019

Good morning Senate Codes Chair Bailey and all the other senators present at this hearing. Thank you with providing me with an opportunity to testify on this important issue.

My name is Lori Cohen, I am the current president of The New York State Association of Criminal Defense Lawyers (NYSACDL). NYSACDL was formed in 1986 by a group of defense attorneys who felt it was time to speak in a unified voice about criminal defense issues in New York State. We are a statewide organization with over 1000 members, responsive to the needs of both private practitioners and public defenders and dedicated to assuring the protection of individual rights and liberties for all.

NYSACDL is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Our guiding principle is that vigorous defense is the strongest bulwark against error and injustice in the criminal justice system. In an era when the United States has the highest incarceration rate in the world, we expand on the question most often posed to our members and ask "how can we defend those people most effectively?"

To achieve these goals, NYSACDL has actively lobbied lawmakers for change in state laws. For the past several years, discovery reform has been our top legislative goal. For too long, New York State lagged behind when other states recognized that the only way to make the criminal justice system fair is to afford those accused of crimes a timely opportunity to review all of the evidence against them. Prior to the passage of the new law, NYS ranked 4th from the bottom when it came to discovery rules. The old rules made it impossible for the defense to interview witnesses or conduct background investigations to determine credibility or potential errors in future testimony. The old laws fostered a system where vital pieces of discovery were withheld from the defense until days before a trial. Indeed, prior to the passage of the new discovery laws, a defendant in a civil lawsuit over $25,000 would get far more discovery before a trial than a person facing life imprisonment.

Thankfully, the new discovery reform laws will end trial by ambush.

The new discovery laws laid out a framework that would provide open, early and automatic discovery to the defense. This framework was imperative to stop the

landslide of wrongful convictions plaguing our state – many due to the failure of prosecutors to provide full discovery.

Since the passage of the new discovery laws the only refrain we have heard from prosecutors is how they cannot possibly get this done – these changes are too onerous. I have been a criminal defense attorney for over thirty-five years and the reality the prosecutors don't want you to know is that it is possible to provide open, early and automatic discovery. Most cases in the criminal justice system simply do not have that much paperwork – an arrest report, a complaint report, maybe some notes in police officer's memobook, maybe a lineup report. Most cases are simply not that complicated.

But prosecutors have had total and utter control of the discovery process for too long. Indeed, discovery reform became necessary because of the failures of a process where one party in an adversarial proceeding controlled the spigot of information. Wrongful convictions in which innocent people spent years and decades in jail because information was not provided to the defense had become too frequent. Prosecutors have simply forgotten that their primary duty is to seek justice. As representatives of the State, they have the utmost obligation to insure the fairness of the process for all of its citizens.

In Albany, prosecutors claimed to accept that changes needed to be made. Since the passage of the new law, however, all we have heard from prosecutors is fear mongering and foot dragging. The realization that the law, and not the prosecutors, would control what information should be produced and when had sunk in, and prosecutors would now begin their campaign to minimize the law as much as possible.

Instead of embracing changes to make the process fairer – for it would seem they would have an interest in making the process as fair as possible – they have sought ways to impede the early, open and automatic discovery changes enacted by the NYS Legislature. Some prosecutors have openly stated that they will seek protective orders on all cases. The newest materials from New York Prosecutors Training Institute, which was created by the District Attorneys Association of New York State to educate and train New York prosecutors, provides practice tips and recommendations on ways to circumvent discovery obligations, extend time to provide discovery and advises prosecutors to file motions for additional time to provide discovery as that also stops the speedy trial clock. For instance, the NYPTI manual suggests:

1. Upon the voting of an indictment, a felony complaint is superseded and a new action commences in superior court with an independent clock for discovery. That clock commences on the arraignment of the indictment; not on the filing. **Accordingly, any lag in the arraignment set-up on an indictment also assists in the preparation of discovery on that particular case.**

2. Recall that "pre-trial motions" – without limitation – are protected from the speedy trial clock under section 30.30(4)(a). Therefore, upon the filing of a 245.70 motion for an extension of discovery – the clock stops until a determination is made.

Instead of embracing change, welcoming a roadmap to a criminal justice system we can all be proud of, prosecutors have devised ways to circumvent the rules. The creation of a portal that they control, the extension of time by suggesting a delay in processing indictments and the urging of frivolous motions to extend the time to prosecute are simply the new ways that the prosecution will seek to blindfold the defense.

The discovery laws passed by this body are not only historic, they are tried and tested. Other states have enacted similar legislation and the criminal justice system has not collapsed, witnesses have not been harmed – instead, the process has become fairer, and justice more clear.

Thank you.

THE LEGAL AID SOCIETY

The New York State Senate
Standing Committee on Codes

Implementation of Pretrial Discovery Reform Hearing
September 9, 2019

Written Testimony by: Christopher Pisciotta, Attorney in Charge, Richmond County Criminal Defense Practice & John Schoeffel, Special Litigation Unit

Oral Testimony: Christopher Pisciotta, Attorney in Charge, Richmond County Criminal Defense Practice

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Expertise And Perspective of The Legal Aid Society

The Legal Aid Society, the nation's oldest and largest legal services and social justice organization and is an indispensable component of the legal, social and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal reform. The Society has performed this role in City, State and federal courts since 1876. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's law reform/social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 2,000, including more than 1,100 lawyers working with over 700 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. The Legal Aid Society operates three major practices – Criminal, Civil and Juvenile Rights – and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program.

The Society's Criminal Practice is the citywide public defender in the City of New York. During the last year, our Criminal Practice represented over 200,000 low-income New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice the Society represents people accused of crimes from their initial arrest through the post-conviction process.

The Society's Civil Practice provides comprehensive legal assistance in legal matters involving housing, foreclosure and homelessness; family law and domestic violence; income and economic security assistance (such as unemployment insurance benefits, federal disability benefits, food stamps, and public assistance); health law; immigration; HIV/AIDS and chronic diseases; elder law for senior citizens; low-wage worker problems; tax law; consumer law; education law; community development opportunities to help clients move out of poverty; prisoners' rights, and reentry and reintegration matters for clients returning to the community from correctional facilities.

The Legal Aid Society's Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect,

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juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our staff represented some 34,000 children, including approximately 4,000 who were arrested by the NYPD and charged in Family Court with juvenile delinquency. In addition to representing many thousands of children, youth, and adults each year in trial and appellate courts, The Legal Aid Society also pursues impact litigation and other law reform initiatives on behalf of our clients.

The breadth of The Legal Aid Society's representation places us in a unique position to address the issue before you today. Our perspective comes from our daily contact with people who can experience life altering consequences of having contact with our criminal legal system.

Pretrial Reforms Implementation Testimony

The Legal Aid Society would like to thank the New York State Senate, Standing Committee on Codes and Senator Jamaal Bailey, Chair of the Committee on Codes, for the opportunity to present testimony on implementation of the pretrial discovery reform recently enacted to come into effect January 2020. For far too long New Yorkers have suffered under the weight of an unbalanced and unfair criminal legal system long skewed in favor of prosecutors. The scales of justice are so unbalanced that innocent New Yorkers plead guilty to felony crimes with upstate prison sentences as we recently saw in the case of indicted NYPD Detective Franco.[1] Put plainly, our unjust speedy trial, discovery, and bail laws create an environment where prosecutors can easily coerce guilty pleas and secure harsh sentences, ultimately leading to our current mass incarceration crisis.

On April 1, 2019, New York said "no more." After decades of advocacy from legal defense organizations and communities directly impacted by these unjust laws, Albany passed sweeping reforms to our bail, discovery and speedy trial laws. The legislation eliminates money bail for most misdemeanors and nonviolent felonies; provides pretrial supports and court notifications to help people return to court; requires prosecutors to disclose evidence earlier in a case, and before the accused enters into a plea agreement; and expands speedy trial rights. These reforms represent a critical first step in undoing New York's oppressive pretrial ecosystem and bringing balance to our criminal legal system.

[1] Sean Poccoli, *Detective's Lies Sent Three People to Prison, Prosecutors Charge,* The New York Times, Apr. 24, 2019 https://www.nytimes.com/2019/04/24/nyregion/nyc-detective-perjury-franco.html.

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Discovery Reform

Discovery is the process by which the law requires the parties in court cases to disclose their evidence to each other prior to a trial. Currently New York is one of the four states with the most restrictive discovery rules in criminal cases – alongside Louisiana, South Carolina, and Wyoming. Our Legislature enacted a new law, 2019 Discovery for Justice Act that will require "open file" discovery from the District Attorney early in the case. This new law is Criminal Procedure Law Article 245. This newfound transparency will usher in a new era of pretrial justice that has never been experienced in New York State. Article 245 will govern to provide early, automatic and complete discovery to people accused of crimes, finally removing the blindfold, and hopefully lessening coercive pleas and wrongful convictions.

Other states, including North Carolina (2004) and Texas (2014), have implemented comparable "open file" discovery statutes in recent decades. Their experiences prove that these rules are fully workable, fairer, and can be adopted successfully. For example, a 2016 study examined prosecutors' attitudes toward open file discovery in North Carolina, which since 2004 has been the state with the broadest discovery rules in the country. It found that 90% of North Carolina prosecutors approved of the system, citing increased efficiency, protection against inadvertent non-disclosure of exculpatory evidence, facilitating guilty pleas, and fairness and trust. It also found that "prosecutors in North Carolina tend not to see witness safety as a significant problem with open-file discovery," and that there is "little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice." *See* Jenia I. Turner and Allison D. Redlich, "Two Models Of Pre-Plea Discovery In Criminal Cases: An Empirical Comparison," 73 Wash. & Lee L. Rev. 285 (Winter 2016). Likewise, prominent Texas District Attorneys and judges wrote memos of support for New York's discovery reforms in 2019, attesting that the rules can be successfully implemented and will benefit all parties in the criminal justice system.

But these are monumental reforms. Switching to a system of early and open discovery will require significant changes by New York's prosecutors, police and court system. Currently, across the City, prosecutors, defense providers, and representatives of the Mayor's Office and Courts are meeting to discuss the implementation of the long sought reforms in order to fully

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comply with the new law. During these meetings, it has become apparent that prosecutors are still fighting to withhold the most critical discovery: witness names and contacts.[2]

Well Vetted and Well Tested Necessary Reforms

Our discovery laws were untouched since 1979. Several efforts at reform to provide transparency and disclosure were thwarted by prosecutors counter efforts in the past. Discovery reform, 2019 Discovery for Justice Act, stems from the years of fact gathering, analysis and debate by a broad array of esteemed members of the NY State Justice Task Force from prosecutors, defense attorneys, judges, police, scholars, victim advocates and representatives from the legislature and executive branches.[3] These are well vetted recommendations that have been adopted by the legislature into our new Criminal Procedure Law Article 245, including the disclosure of witness names and contact information.

These well vetted provisions follow similar open file discovery statutes from other states all across the Nation. New York is moving forward to join the Nation in early and full discovery including witness names and contact information.[4] To fully advise New Yorkers brought before our Courts, counsel must have with the opportunity to properly investigate allegations, to speak with people who hold information vital to the case. And, for people who then knowingly choose to exercise their rights to proceed to trial, we then will be able to provide full and effective representation as the law and ethics demand.

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[2] One NYC District Attorney penned an op-ed positing that "uninformed legislators" were "tripping over each other" in a "mad dash" to push through reforms. These changes, the piece continued, "will sweep us back to the dark ages of criminality of the 70's and 80's and give the wild gangs, violent thugs, death-dealing pushers and violators of women and children the keys to the city." *See* Michael E. McMahon, *State Reforms Would Give Thugs Keys to This City,* Staten Island Advance, May 15, 2019, https://www.silive.com/news/2019/05/state-reforms-would-give-thugs-keys-to-this-city-commentary.html. And he does not stand alone in prosecutors' harsh criticism to long awaited end to our blindfold laws. *See* David Brand, *To Queens Prosecutors, Discovery Reform Is a "God Damn Disgrace" and Danger,* Queens Daily Eagle, May 30, 2019, https://queenseagle.com/all/discovery-reform-disgrace-prosecutors-queens; Seth Barron and Ralf Mangual, *Big Risks in Discovery Reform; N.Y.'s New Law Tips the Balance Way Too Far in Favor of Defendants,* NY Daily News, Jun 3, 2019, https://www.nydailynews.com/opinion/ny-oped-discovering-huge-holes-in-discovery-reform-20190603-7dcz026lu5fc7e46wvny4chfyy-story.html.

[3] *See* Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform, July 2014, http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf

[4] *See* New York State Bar Association Report of the Task Force on Criminal Discovery, at 9 fn 16 (Jan. 30, 2015).

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The counter argument highlights the sensational and posits that no civilian will ever wish to aid in the prosecution of a case if those accused know who they are. But experience tells us otherwise. Criminal cases are still prosecuted to trial across the Nation where witness name and contact information has been shared. Right here in New York, we know this to be true for not every charge involves strangers. We know all too well that our criminal justice system touches intimate partners, family members, members of shared neighborhoods, employment and schools. And yet, even when the parties are known to each other, witness tampering and intimidation is a rarity. As the institutional defense provider for Richmond County, over the course of three different District Attorney administrations, we have seen those charges (tampering or intimidation) alleged 16 times since 2011 while we handled about 70 thousand cases before our Courts. The sensational and impassioned fears that witnesses will not cooperate with prosecutions as communicated by DA Offices are not supported in fact.

DA Offices Seek to Continue to Withhold Critical Witness Information

And yet, in these meetings across the City, one issue keeps rearing its head. Prosecutors will work to withhold critical witness information. First, prosecutors will seek to submit protective orders swamping the Courts with requests not to disclose witness names and contact information.[5] We need to provide the Courts the support and resources they need to handle these requests appropriately and speedily from hearing through review. Moreover, we need to be mindful that the protections established in the statute to carve out a good cause exception are not used by prosecutors to evade completely the clear mission and mandate of our laws.

Second, prosecutors seek to use a portal application to deny completely access to witness contact information. In meetings across the City, DA Offices stated that they intend to implement an application through which criminal defense attorneys will be required to use to contact witnesses in their respective cases. The application will list the names of all witnesses associated with the accused's case without indicating how the person listed is associated with the case (eyewitness, complainant, a *Brady* witness, or 911 caller, for example). Defense counsel chooses whether to text or call the witness through the application. Defense counsel is never provided with the witness' direct contact information. The witness, shielded from counsel, can

[5] Under the new discovery statute, CPL Article 245, prosecutors and defense lawyers may make far more applications to courts for "protective orders" to withhold or delay disclosure of certain kinds of sensitive information from discovery materials. *See* CPL 245.70, 245.10(1), 245.20(5). The court has three business days to conduct a hearing on a protective order application and should rule expeditiously. CPL 245.70(3). In addition, either party can obtain expedited review by a single appellate justice of a ruling that grants or denies a protective order relating to the name, contact information or statements of a person. CPL 245.70(5).

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ignore, decline or reply as they choose without counsel necessary knowing whether the witness received the communication nor whether the reply is indeed from the witness.

The witness portal fails to comply with the new law. CPL 245.20(1)(c) requires the prosecution to disclose witness names and adequate contact information. With the portal, the prosecution evades the statute requirements providing no contact information.[6] Moreover, the failure to provide any contact information violates the heart of the statute and the presumption in favor of disclosure. CPL 245.20(7).

Moreover, the witness portal also impedes defense counsel in their constitutional obligation to conduct an investigation. All individuals accused of a crime have a constitutional right to effective assistance of counsel, including adequate investigation.[7] The prosecution-created process shields the witness from defense counsel sending a clear message not to communicate with counsel. Indeed, it is unethical for law enforcement or prosecution to discourage a witness, express or implied, from speaking with counsel as a witness belongs to neither side. But, the witness portal sends a message that defense counsel cannot be trusted and witnesses are then less inclined to speak.

Due Process is also violated as the witness portal establishes a means for prosecution to withhold witness names and contact information while mandating such disclosure from defense. CPL 245.20(4)(a) mandates that the defense must provide addresses for all witnesses the defense intends to call at trial. A prosecutor's intended witnesses cannot be treated differently

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[6] Indeed, a proposal to use witness portals was considered and rejected by the Legislature during the drafting of the new discovery reforms. New York County District Attorney's Office proposed using a witness portal for the defense to contact witnesses. This proposal was submitted to the Executive in February 2019 and considered and rejected by the Legislature. Instead, the Legislature adopted the mandate to disclose "names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense. . . .".

[7] *See* U.S. Const 6th Amend; N.Y. Const, art I, § 6; *see also*, *People v. Oliveras*, 21 N.Y.3d 339, 346 (2013) ("[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case") (citing *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984)); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) ("A defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial"); OCA, Order to Counsel in Criminal Cases (providing that defense counsel has an obligation to conduct "a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, e.g., visiting the scene, interviewing witnesses . . . etc.")).

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from defense witnesses.[8] The portal application, however, would shield witnesses the prosecution seeks to call at trial while removing such barriers from intended defense witnesses.

The portal application may also lead to constitutional *Brady* violations as an inadequate means to disclose information that may be exculpatory for the defendant. Prosecutors intend on using the application for all witnesses without disclosing how the witness is associated with the case. Witnesses who may hold *Brady* information exculpating the defendant will also be reachable only through use of the application which risks that counsel will not be able to communicate with the critical witness.[9] This may result in *Brady* violations.

Finally, the witness application may deny defense counsel an opportunity to impeach or otherwise confront witnesses against the defense. By shielding a witness from the defense, counsel may lack an evidentiary foundation to confront a witness who may provide statement in Court inconsistent with an anonymous text via the application. Impeaching a witness — part of a defendant's fundamental rights under the Confrontation Clause — with a prior statement that may or may not have been made to defense counsel will be impossible.

Thus, the DA Offices signal now an intent to evade the long sought reforms to provide disclosure, especially of the most essential: witness names and contact information. Through protective orders and portal applications, prosecutors are preparing to contest disclosure rather than follow the mandates and intent of our reforms.

Improved Electronic Information-Sharing Systems

Perhaps the most important part of successful transition to open file discovery laws will be the adoption of new and improved electronic information-sharing technologies to facilitate transmission of materials and information from Police Departments to District Attorneys' Offices, and finally to defense counsel.

In meetings with DA Offices and defender organizations in New York City, short term compliance is sought at the cost of long term technological savings. Each party within the criminal justice system from police, to prosecution to defense seeks to duplicate the process of

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[8] See *Wardius v. Oregon*, 412 U.S. 470 (1973)(prohibits requiring discovery from the defense that the prosecution does not also have to provide).

[9] *See generally, e.g., Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (inadequate disclosure of *Brady* witness); *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011) (discoverability of contact information for *Brady* witnesses); *People v. Garcia*, 46 A.D.3d 461, 463 (1st Dept. 2007); *People v. Roberts*, 203 A.D.2d 600, 601-02 (2d Dept. 1994); *People v. Robinson*, 34 Misc.3d 1217(A) (Crim Ct., Queens Co. 2011) (requiring timely disclosure of a 911 caller's name, address and telephone number to the defense).

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saving and storing discovery data. New York City Police Department is examining and investing in technology to compile and provide the necessary discovery materials to our five District Attorneys. Our District Attorneys are investing in similar technologies to store and provide a portal to disclose such materials to defense counsel. Defense providers too are investing in technology to connect with District Attorneys to download, save and store again the same discovery data. Each party is creating their own bank of servers or cloud space to save and store copies of the same data. We need to examine how to simplify and centralize and save costs long term in creating and implementing an online discovery portal. Such online portals would allow prosecutors to access materials directly from the police department, and they also allow registered defense lawyers to log onto the system and obtain available discoverable materials in the case in an efficient way. District Attorneys, police officials, and court and city administrators should survey the alternative technologies being used in other jurisdictions and invest in the optimal new system.

Notably, the Legislature recognized the central importance of information-sharing between police and prosecutors in the new discovery statute. Two specific provisions address this matter, and they make clear that police departments must open their complete files to prosecutors for compliance with the new rules. First, CPL 245.55(2) states that (with certain exceptions), ". . . upon request by the prosecution, each New York state and local law enforcement agency shall make available to the prosecution a complete copy of its complete records and files related to the investigation of the case or the prosecution of the defendant for compliance with this article. . . ." Second, CPL 245.55(1) provides: "The district attorney and the assistant responsible for the case . . . shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offenses charged. . . ."

In addition, seamless information sharing between the parties (prosecutors and defense counsel) is of equal importance. The Council must ensure that any resources provided to the DA's offices and police departments to procure and maintain said system are also provided to the City's public defender offices. None of these reforms can be effectively implemented if the public defender offices are not properly funded for technology and staffing capacity to receive, review and store discovery.

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We believe that implementation of improved electronic information-sharing technologies will be the single most important step for the successful transition to "open file" discovery. It should be an immediate priority of all parties.

Training of Police Officers on Discovery

Another key step towards successful implementation of open file discovery will be training police officers on the need for timely disclosure of all materials to the District Attorney. Steps should be taken to develop and begin trainings as soon as possible. Practitioners in other "open file" discovery states have warned that officers' unfamiliarity with discovery law is a persistent problem that leads to frequent non-compliance and failures to make materials available to prosecutors early in the case. Police officials must be sure to prevent these misunderstandings in New York. *See also NYPD Patrol Guide*, Procedure 211-18 (stating that it is "imperative" that the prosecution be given "all" reports, notes, memoranda, test results, or any forms prepared by police officers in connection with the facts and circumstances of a case, "no matter how insignificant the member feels the notes or memoranda might be"). Effective training of police officers for timely disclosures is a necessity for open file discovery.

Conclusion

On behalf of our approximately 300,000 clients, the Society thanks you for the opportunity to provide testimony on the implementation of recently enacted pretrial discovery reforms. The Legislature has removed the blindfold and provided transparently and disclosure to people before our Courts. This long sought reform allows people accused of crimes to know the nature of the charges and evidence and make informed decisions critical to their lives. By removing pretrial jail and providing pretrial discovery, people will no longer be forced to choose between freedom and the right to trial. These are well-vetted, well-tested, mainstream reforms that work. All states comparable to New York have long used broad and early discovery. No state that has enacted more open discovery rules has later gone back to impose restrictive ones. This is no mad dash law giving the keys to the City to wild gangs and violent thugs. We are coming to the light of transparency and openness in our discovery laws providing fairness and justice to New Yorkers.

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NYPD

Monday, Septemb er 9, 2019

STATEMENT OF OLEG CHERNYAVSKY
ASSISTANT DEPUTY COMMISSIONER, LEGAL MATTERS
NEW YORK CITY POLICE DEPARTMENT

NEW YORK STATE SENATE
STANDING COMMITTEE ON CODES
250 BROADWAY
SEPTEMBER 9, 2019

Good morning Chair Bailey and members of the Senate. I am Oleg Chernyavsky, the Assistant Deputy Commissioner of Legal Matters for the New York City Police Department (NYPD). On behalf of Police Commissioner James P. O'Neill, I am pleased to testify and discuss the steps the NYPD has taken and is taking to implement the new pre-trial discovery law that takes effect in January 2020.

The NYPD recognizes that reforms in the criminal justice system are necessary, and in recent years, the NYPD has been at the forefront of many of these changes. Working with our partners in the City Council and many advocacy groups, we have dramatically altered our practices to help establish a fairer and more just criminal justice system. The results of our shared work have been dramatic. We have reduced arrests from 387,805 in 2014 to 246,773 last year, a 36.4% decrease, and reduced criminal court summons from 359,537 in 2014 to 89,913 last year, a 75% decrease. This decrease has been accompanied by historic lows in crime. The numbers are stunning: the fewest index crimes since 1958, the fewest murders since 1951, the fewest burglaries and auto thefts since 1950, the fewest robberies since at least 1965, and last year we logged the fewest shootings on record. These numbers cannot be brushed aside. The Department has demonstrated that it can continue to control and decrease crime with a much smaller enforcement footprint. By carefully balancing fairness for those we encounter violating the law with the interests of the vast majority of New Yorkers who seek to live their lives free of crime, the NYPD has changed the long-held law enforcement paradigm in New York City.

Ensuring that defendants have all of the relevant information before them prior to accepting a plea is a laudable goal, but it is our contention that there can be real reform to the criminal justice system while also addressing the safety of victims and witnesses, and the legitimate concerns of law enforcement. It is our contention that the discovery laws could have been amended without jeopardizing the safety of victims and witnesses. And it is our contention that any criminal justice reform must entail support for victims, not just the accused.

Not only do these laws threaten the safety of victims and witnesses, but they will also require significantly more resources, time, and most importantly, funding to ensure their protection throughout the criminal justice process – resources and funding that, at this time, the Legislature has not committed to our agency.

The impact of the discovery law on the NYPD cannot be understated. The law, which mandates that case materials and evidence be made available to the defense within 15 days of arraignment, requires a mammoth allocation of resources and equipment. The NYPD has over 55,000 employees of varying ranks and titles assigned to at least twenty-five bureaus, which consist of

hundreds of precincts, transit districts, police service areas, specialized and investigative units, and administrative commands and sub-commands. Like any large government agency, the NYPD utilizes, maintains, and stores documents through a complex mix of both electronic records, paper documents, and files maintained throughout 230 police facilities and many databases. While arrests have consistently declined over the last several years, even the reduced number of arrests still generate records that span a catalogue of over one-hundred unique record types from myriad sources, ranging from paper command logs and memo-book entries or handwritten notes to records stored in our electronic systems.

Put plainly, the law entails a massive retooling of Department practices to process a vast amount of material on cases within only a few days. The law requires disclosure by prosecutors to the defense within 15 days of arraignment, but in practice, the Department must produce these materials to the prosecution well before this deadline. While we continue to work with the City's Office of Management and Budget on securing funding to fully comply with the new discovery law, as well as all the other recently-enacted criminal justice laws, the NYPD estimates a budget need of nearly $100 million to meet these laws' requirements. These expansive laws will require hundreds of additional uniformed and civilian personnel stretched across various commands, including our Patrol, Housing, and Transit Bureaus, our Police Laboratory, our Communications Division, and our Legal Bureau.

Given the serious consequences of noncompliance, including possible dismissal of charges, the Police Department has taken a number of steps to begin implementing these laws. First, the NYPD has engaged in a number of working groups with our five local District Attorneys and the Special Narcotics Prosecutor to address discovery-related concerns. These working groups have focused on topics such as NYPD Police Laboratory issues, DWI prosecutions, information management and sharing, and the production of *Brady/Giglio* material. Additionally, the Police Department has been an active participant in the Mayor's Office of Criminal Justice Reform Implementation Task Force, which has facilitated productive inter-agency communication regarding all of the recently enacted criminal justice reforms.

In order to facilitate the timely production of investigative case materials to the various prosecutors' offices, the Department has developed an information-sharing portal for its Enterprise Case Management System (ECMS). ECMS serves as a repository of all investigative case materials utilized by our detectives. This portal has been developed to provide the rapid sharing of case documents to the prosecutors once an arrest has been effected. A pilot test of this new portal is currently taking place in Staten Island; and if the pilot is successful, the Department intends to launch the portal city-wide. The Department is also conducting a comprehensive staffing review to identify key personnel in each command who will be responsible for collecting discoverable material and ensuring its timely disclosure to prosecutors.

More importantly, there are other issues with the new discovery law that go far beyond dollars and cents. Tough questions should have been asked during legislative deliberation. Have instances of victim and witness intimidation increased in the states that have open discovery laws? Has open discovery led to more criminal cases going to trial? Has plea-bargaining increased or decreased? Have fewer victims and witnesses cooperated with law enforcement, resulting in fewer perpetrators being held accountable for their actions?

No such debate, or compromise resulting from such debate, was entertained. As a result, the criminal justice system is now comprised of laws that, in their most pernicious applications, will disrupt the lives of those who seek the protection of law enforcement – many of whom are among our state's most vulnerable citizens.

At its most basic level, the discovery law, as written, exhibits a profound lack of compassion and regard for crime victims and witnesses. In one of the most troubling provisions of the law, every witness to a crime and every victim of a crime will now have their name and contact information disclosed to the defense. These new discovery rules, combined with new bail reform provisions, will increase the challenge of securing victim and witness testimony. While the Department realizes that protective orders are available, it is unclear that these orders will be issued with regularity. The law only permits their issuance for "good cause" – perhaps indicating that protective orders will be the exception and not the rule. Handing defendants what amounts to a roster of those who have spoken out against them, a mere 15 days after their first appearance, absent a protective order, is a sea-change in the criminal justice system. It will predictably dissuade victims and witnesses from reporting crime. That should give every legislator pause. More distressingly, without knowing in advance whether protective orders can or will be secured, police and prosecutors will not be able to assure witnesses at the inception of a case that their identity will be protected.

Much of the success the NYPD has experienced over the last several years is attributable to our Neighborhood and Precision Policing models. Together they have constituted a complete overhaul of the NYPD's crime-fighting philosophy. Our investigations are more focused, with patrol officers and detectives playing an expanded role in gathering evidence and intelligence, while also partnering with the community to combat crime, improve quality of life, and develop better long-term cases. Victims of crime deserve the full attention and empathy of law enforcement and the criminal justice system. Each and every day, the NYPD stands ready to support survivors of crime, hold offenders accountable, and prevent future acts of violence.

This new package of laws run the risk of impeding the good work we have done and the supportive in-roads we have achieved in our communities. As part of the 2020 state budget, the New York State Legislature has eliminated cash bail for a wide array of offenses without making any provision for the detention of dangerous persons or for the perpetual recidivists who make up a significant portion of the city's criminal actors. Next year, a judge will be able to set bail or remand only for certain qualifying offenses, with no consideration of the defendant's criminal history or dangerousness to the community.

The serious consequences of these changes are multifold. Robberies committed with others, burglaries of residences, and weapons possession will not be bail-eligible crimes, and persons committing these acts will be released on their own recognizance back into our communities, except in a few exceptional cases defined by the new law. Fentanyl and drug traffickers can be released back on our streets, giving them the chance to flee our state or even the country. In addition, the new legislation requires the police to issue desk appearance tickets (DATs) for class E felonies and all misdemeanors, with some exceptions. Recipients of DATs, which could amount to as many as 90,000 next year, will include persons charged with weapons possession as well as

public lewdness and masturbation on the subways. DAT recipients will not be held for arraignment and will be released, usually from precinct station houses within hours of arrest. Approximately one quarter of people released with DATs never appear for their scheduled court dates, and DATs have a negligible deterrent effect on chronic offenders. The NYPD is anticipating an increase in the number of arrest and bench warrants issued for people who do not appear for scheduled court dates and will thus require a significant staffing increase for our borough warrant squads.

These recent laws also conflict with other laws that have been passed by the Legislature. For example, the state recently passed a sexual assault bill of rights that requires prosecutors and police agencies to adopt victim-centric policies and procedures. Such laws, however, are rendered meaningless once defense attorneys, zealously advocating for their clients, begin contacting survivors of sexual violence, running the risk of re-traumatizing them in as few as 15 days after the attack. Likewise, the state has passed laws that require police departments to video record interrogations of defendants for serious offenses. This is done to ensure that police do not coerce confessions. Yet, in another example of inconsistency within these laws, no such obligation is present for defense attorneys to ensure witnesses are not coerced into recanting their testimony.

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 the dangerous provisions in these new laws. The same can be said of confidential informants. Simply put, law enforcement agencies would be unable to penetrate organized crime syndicates, terrorist groups, street gangs, K2 and other major drug trafficking operations, white-collar crime, and public corruption without the use of confidential informants. The informants' lives will be put in danger by this law. Victims, witnesses, and informants often live in the neighborhoods, and sometimes in the very buildings, where crimes occur. Under these new laws, dangerous defendants are likely to be free, pending the adjudication of their cases, and aware of those who are testifying against them. This new reality will undoubtedly increase workloads on cases when victims and witnesses step forward and help. In many cases, the NYPD will have to provide temporary lodging, protection, and transportation in anticipation of intimidation, threats, and potential retaliation. The costs will be substantial; but these safety provisions are what people who seek the protection of the police deserve. We are not going to dodge our responsibilities to those who seek our assistance. The Legislature should take a hard look at reconsidering these provisions of the discovery law before January of next year.

The law also creates a statutory right for defendants to move for a court order to access a crime scene or other premises, including a victim's or witness' home. Law enforcement officers must establish probable cause to obtain a warrant to search a defendant's home, yet the law is silent on the standard to inspect a complainant's home or other property. As other law enforcement partners have observed, the law creates an absurd situation in which a defendant arrested for burglary, for example, now has the right to come into a complainant's home to inspect and take pictures. This is yet another example of the new law failing to take a victim-centric approach, and these legal inconsistencies should be addressed by the Legislature.

Moreover, identifying and building cases against unapprehended co-defendants will also become more challenging under this law. Immediate discovery will provide an opportunity for an apprehended defendant to access materials from a case that also involves their unapprehended co-defendants. While the Department is working toward developing a strong case and probable cause,

an apprehended defendant will gain access to sensitive case material and be given the opportunity to undermine investigative techniques used by the NYPD or other law enforcement to eventually arrest their co-defendants. Low-level subjects of a larger investigation will gain pertinent information on high-level targets – including transcripts that could identify confidential informants and undercover officers. Such a situation also provides an opportunity for a co-defendant to harm or intimidate victims and witnesses or simply flee before justice can be served.

It is the Department's position that these changes to the law, however well intentioned, will have a damaging effect on the NYPD's ability to protect the city. We respectfully ask that the legislature consider the following proposals.

- **Revise the Discovery Law including Amending the Effective Date to Beyond January 2020:** As stated earlier, this new legislation will needlessly place victims and witnesses in harm's way and have a massive impact on the law enforcement community. The consequence of failing to comply with these new laws range from warning and admonishment to outright dismissal of criminal cases. The timelines for provision of case-related documents must be extended, the burden for the early pre-trial acquisition of *sensitive* materials must be shifted to the defense and witness and victim-centered standards of proof for obtaining such materials must be developed. Otherwise, sensitive materials would be provided to the defense on a date prior to trial which would give the defense sufficient time to prepare for trial. The stakes are extremely high, and the Legislature should provide a forum for *all* interested stakeholders to present any issues and concerns related to discovery and to address the many public safety issues raised in this testimony and the testimonies of our fellow law-enforcement partners today.

- **Amend the Recently-Enacted Bail Law to Provide for Judicial Discretion in Detaining Dangerous Persons and Remove New Limitations Placed on Risk of Flight Assessments:** New York State is one of only three states that do not allow judges to weigh the dangerousness of a subject in determining whether to remand the subject or set bail. Using remands and bail to control the identified violent actors in the city has been standard practice for many years, and the removal of this tool will decrease deterrence and increase the number of repeat offenders. The new legislation, not only deprives judges of the "dangerousness" assessment tool, but also creates a new limitation on traditional "risk of flight" assessments, by requiring that defendants "persistently" fail to appear in court before allowing bail to be set for otherwise bail ineligible crimes. We are unsure of what the "persistent" standard means, but it seems illogical to have arrest and bench warrants issued for non-appearance, having our officers look for and apprehend perpetrators, return them to court, and the court forced to again release them without bail. Likewise confounding is the discretion provided to police officers to factor an individual's history of failure to appear in court as the basis to deny a DAT, but depriving judges of the very same discretion in setting bail or determining to remand the individual a few hours later when he appears at arraignment. The "persistently' standard must be stricken from the law and judicial discretion must be expanded to reflect courts' meaningful role in keeping the city safe.

- **Expand the List of Crimes Eligible for Bail and Remand:** While judges were permitted to impose bail or remand individuals for a limited number of crimes, many serious offenses have been excluded. For example, an individual that assaults someone because of their race, religion, sexual orientation or other protected class is not bail eligible; promotors of child pornography or prostitution of persons under the age of 13 years old, serial arsonists, and certain categories of burglars and robbers will be released without bail. While burglary and robbery offenses are designated violent felonies in our Penal Law, the new law mistakenly removes that designation for certain burglary and robbery crimes thereby exempting them from bail or remand eligibility. The NYPD took a snapshot of those arrested for these burglary and robbery offenses in 2018 and found the following; 738 of the individuals arrested (where bail *was* imposed) had a collective, lifetime body of work that included ***9,926 arrests, including 1,134 robberies, 891 assaults, 524 burglaries, 334 weapons charges, 48 sex crimes (including 15 rapes), and 25 murders or attempted murders***. These are the individuals that will be immediately released come January to prey on our citizens. There were an additional 1,018 individuals arrested for these crimes that year that *were* released without bail. ***367 of these individuals went on to commit 848 crimes after their release, including another 109 robberies, 54 burglaries, 119 assaults, 123 larcenies, 3 rapes and 4 murders or attempted murders***. We strongly urge the legislature to correct the leniency created for these and other serious offenses before it finds itself naming amendments to the law after those that fall victim to these dangerous predators.

- **Amend the Desk Appearance Ticket Mandates and Extend the Maximum Period for when such Individuals Should Return to Court:** While provisions were put in place for certain offenses to be exempt from eligibility for a desk appearance ticket, other very serious offense were overlooked. For example, individuals found in possession of an unloaded firearm, criminally negligent homicide, possession of child pornography, public lewdness, evidence tampering, and individuals rioting would be released from a precinct within hours of arrest. Additionally, as the issuance of such tickets will dramatically increase and recipients will not be incarcerated while awaiting court, the maximum return period should be increased to eight weeks from the current twenty-day return mandate. The current DAT workload results in a return date that ranges from 3-10 weeks, depending on the volume of a particular borough.

- **Commission a State Study on Crime Victim and Witness Intimidation:** Formal studies on local victim and witness intimidation are few, yet prosecutors, police, judges, and victim advocates all believe that witness intimidation is widespread, that it is increasing, and that it has significant impacts on the ability to prosecute violent felonies. Instances of intimidation are taking place in our local criminal courts. Undaunted by repercussions, a younger generation of gang members is threatening witnesses and prosecutors inside our courthouses, even while surrounded by law enforcement officers and judges. Imagine the increased danger posed to these witnesses when they are confronted at their homes, schools or work, away from the protective eye of law enforcement. Given the significant risks placed on victims and witnesses as a result of these new laws, hard data on intimidation and threats should be compiled and tracked on a regular basis to inform police and

prosecutors on how to better protect those who seek our assistance, as well as apprise the legislators who enact laws in this arena.

While the NYPD will remain steadfast in its mission, these laws pose a formidable challenge to keeping all New Yorkers safe and equitably serving justice on their behalf. We welcome the opportunity to work with you and have a voice in future reform efforts to the criminal justice system and to these laws in particular. We can work together to develop policy that focuses on those who are truly driving crime, while offering help and protection to those who seek our assistance. Thank you for the opportunity to testify today. I am happy to answer any questions that you may have.

New York State Police

Investigators Association

I.U.P.A.-Local 4 AFL-CIO

NEW YORK STATE POLICE INVESTIGATORS ASSOCIATION (NYSPIA)
2019-2020 Public Protection Hearing Testimony

Chairman, Senators, & Distinguished Guests,

Thank you for providing a few minutes of today's important hearing to me in order to share a few thoughts and concerns. My name is Christopher Quick. I am here in my capacity as President of the New York State Police Investigator's Association (NYSPIA) which represents approximately 1200 Investigators and Senior Investigators throughout New York State.

Our agency, the New York State Police, performs as both a primary law enforcement agency in some counties, as well as secondary or support roles in other regions. Our involvement depends largely upon the geography, population, needs, and current police presence of other agencies, Regardless of our role, the one certainty is that our people will have direct daily interaction with other police agencies as well as the criminal element within our society in every county of the State. We feel that this unique placement in law enforcement provides us the ability to offer insight into some of the challenges facing the implementation of the new laws surrounding discovery for criminal cases in New York State.

The topic of discovery has been debated over the years with little to no change. Admittedly, the attorney for a defendant was often at a position of disadvantage based on when the discovery was actually provided. While that may have been a serious flaw in the current system which needed correcting, we are concerned that, without proper planning and precise implementation of this new system, we are destined for new and equally concerning problems.

I will begin my explanation at the end of the argument. In short, our criminal justice system from initial police contact with a suspect through prosecution of a defendant in court is simply not prepared with the necessary resources to comply with the new regulations. The current system, with its flaws, was funded and managed to the level of necessity under those regulations. The new regulations will have significant negative impact on the ability to properly prosecute a threat to our society simply because the system does not have the manpower and equipment in place to support the new procedures.

The new system will mandate that all discovery be provided within 15 days of the indictment. While that appears like a wise idea on the surface, it does propose many concerns. Some evidence may have been field tested but not fully processed by a laboratory. That will take additional time. Witness and victim information is mandated to be provided at an earlier time. This seems counter productive to the wise and just changes made to protect victims, especially those in specific situations, made by the legislature in the recent past (Address Confidentiality Program). The ability to protect certain information must be paramount within this new system if we are to protect the victims and witnesses from the most abusive in society.

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Many cases regarding drug sales, drunk and drugged driving, and violent crimes with blood or other bodily fluids can/ must be processed through a laboratory. The current wait times for evidence processing is often several weeks. Some of that is due to significant backlog. Some tests have a longer process time than others. In either situation, the 15 day time clock to provide information to the defense is practically impossible under our current system. Additional locations, equipment, and personnel will be required to have even a remote chance to properly comply with the new regulations.

In line with the laboratory example, we will need additional manpower within the police agencies whose sole responsibility will be collection, preservation, and distribution of evidence just within the police side of the prosecution. There is no reasonable way that the current staffing levels of police agencies will adequately maintain levels of service and still be able to comply with the regulations unless additional officers are dedicated to taking on these specific tasks.

It would be naive to believe that these new laws will not have a significant impact on proper case resolutions. In the past, minor drug cases could be plead out on first appearance, especially if the drug was field tested and the defendant admitted to the substance as part of the plea. A fine could be set and the case adjudicated. At first glance, one could anticipate the same result going forward as it is not prohibited under the new regulations. However, it would be virtual malfeasance on the part of a defense attorney to allow a client to plead to a charge without first making the government provide the fully processed drug test results. At the very least, this will slow the court process down by requiring an addition appearance. At the worst, it could results in countless cases being dismissed because the drugs could not be process in a 15 day time limit.

In closing, my commentary here today is not intended to be in a positive nor negative light in regard to any specific change in the laws. My presence is a direct effort to bring forward the concerns of my membership and others in the law enforcement community. We recognize that the legislature has chosen to bring the discovery process in a different direction. We urge your chamber, your parties, and your leaders to properly budget for the implementation of these decisions. Our performance as law enforcement, as well as the safety and satisfaction of your constituents, will be impacted by our ability to properly uphold these new standards.

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INNOCENCE PROJECT

TESTIMONY OF REBECCA BROWN, DIRECTOR OF POLICY, INNOCENCE PROJECT SUBMITTED TO SENATE STANDING COMMITTEE ON CODES REGARDING THE IMPLEMENTATION OF PRE-TRIAL DISCOVERY REFORM IN NYS SEPTEMBER 9, 2019

The Innocence Project was founded in 1992 at the Benjamin N. Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. We regard each DNA exoneration as an opportunity to review what causes wrongful convictions and identify factually-supported methods to minimize the possibility that such errors will continue to create wrongful convictions. The recommendations that we make are grounded in robust findings and practitioner experience, all aimed at improving the reliability of the criminal justice system.

Since its U.S. introduction, post-conviction DNA testing has proven the innocence of 367 people who had been wrongly convicted of serious crimes. In fact, more than 10% of the nation's exonerated men and women proven innocent through DNA actually pled guilty to crimes they did not commit, succumbing to the pressures placed upon them by an unrelenting system and in many instances because they were starved of the very information that would have allowed them to successfully fight their cases.

To demonstrate both the importance of a robust discovery framework, consider a series of cases in Suffolk County. Shawn Lawrence was wrongfully convicted of second-degree murder for a 2010 shooting which left one man dead and two others severely injured in Suffolk County, Long Island. He was sentenced to 75 years to life in prison. Lawrence was convicted based on the shaky identifications of two witnesses – one witness recanted after Lawrence's arrest but then stuck to his original story at trial, and the other claimed to have witnessed the shooting after being up for 20 hours smoking crack cocaine but recanted twice before trial. In 2017, while Lawrence's appeal was pending, Glenn Kurtzrock, the Suffolk County prosecutor in his case, was forced to resign for failing to disclose favorable evidence in other cases. Lawrence's appellate lawyer told the Suffolk County DA's office that Kurtzrock was also involved in Lawrence's case, and the DA agreed to review his case.

The review turned up 45 items/hundreds of pages of evidence that hadn't been disclosed to Lawrence's defense, including witness accounts, information and descriptions pertaining to possible other suspects (which didn't match Lawrence's appearance), police notes and reports, and information on the compensation of witnesses for meals and housing, and video footage from a hospital that showed someone one witness had identified as an uncharged shooter who visited one of the surviving victims. Lawrence's conviction was reversed and a new trial was ordered in December 2017. The prosecution moved to dismiss the charges against him in January 2018. Mr. Kurtzrock's misconduct caused charges to be dismissed in five cases altogether, although Lawrence is the only one whose

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conviction was vacated entirely. The other four plead to lesser charges after the evidence Kurtzrock withheld was discovered.

A key step in preventing wrongful convictions is ensuring that defendants have early and broad access to favorable evidence in possession of the State so they can adequately prepare for criminal proceedings. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court of the United States held that it is a violation of the Due Process clause of the Fourteenth Amendment of the Constitution for prosecutors to withhold exculpatory evidence from criminal defendants, where the evidence is material to guilt or to punishment.1 However, studies over the past several years have shown that in courtrooms across the country, prosecutors are failing to disclose information, and innocent people are being convicted without access to a full defense.2 The wrongful convictions that have been exposed nationwide demonstrate the devastating consequences that can result from a prosecutor's failure to disclose exculpatory evidence. Indeed, one of those wrongful convictions led to the passage of a robust discovery law in 2014 in the state of Texas.
It is extremely difficult for experts to quantify how often *Brady* violations occur, as it is often impossible to know the existence of something that has never been disclosed. It is also very difficult to uncover *Brady* violations in individual cases, as it is a process that usually can only be done through post-conviction discovery of FOIA requests, both of which are costly and time-consuming, and thus extremely rare. Therefore, available statistics are likely only the tip of the iceberg, which is why a pretrial discovery scheme is crucial – it allows us to avoid discovery violations and injects transparency and accuracy in the criminal system. Without proactive policies and legislation codifying pretrial disclosure, the criminal justice system will continue to risk convicting the innocent.

Against this national backdrop, it had been all the more concerning that New York State had lagged behind the rest of the nation with respect to discovery requirements before the passage of this law, ranking among the bottom four states in this area. With the passage of S.1716/A.1431, New York at long last established a discovery framework in the Empire State that could enable justice and due process. Assuring timely disclosure obligations is not only a cornerstone of the fair administration of justice; it is an area of reform that is certain to prevent future wrongful convictions. Importantly, it enables discovery to the

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1 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

2 *See* American Civil Liberties Union of New Jersey, Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey (September 2012), available at http://pdfserver.amlaw.com/nj/aclu_report09-12.pdf; Kathleen M. Ridolfi & Maurice Possley, Northern California Innocence Project, Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009 (2010), available at http://digitalcommons.law.scu.edu/ncippubs/2/; Emily M. West, Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases (2010), available at http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf; *see generally* The Center for Public Integrity, Harmful Error:Investigating America's Local Prosecutors,http://www.publicintegrity.org/accountability/harmful-error;Investigative Series,Misconduct at the Justice Department, USA TODAY, http://usatoday30.usatoday.com/news/washington/judicial/2010-12-08-prosecutor_N.htm#; Ken Armstrong & Maurice Possley,Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1-5), CHI.TRI.,Jan. 11-14, 1999, at A1.

lion's share of New York defendants who plead guilty.

Assuring that the intent of the groundbreaking law is honored, its proper implementation must be enabled and steps must be taken in advance of its effective date to assure this. A 2015 report issued by the New York State Bar Association's Task Force on Criminal Discovery3 made a series of recommendations to ensure that Brady obligations are met in the state of New York, including the importance of turning over such evidence before guilty pleas are taken.

The Report also noted that particularly upstate, there is "piecemeal" documentation of discovery materials from law enforcement to the prosecution.4 While the Mayor's Office of Criminal Justice has established a task force intent on implementing discovery practices in New York City, there appears to be no analog in upstate counties and preparations must be made that those counties are well-positioned to fully implement the law.

Further, we understand there may be consideration of a portal maintained by individual DA offices that would provide the medium for the exchange of evidence and access to witness. Given that evidence is intended – under the law – to reach both parties in an adversarial system, it makes little sense to permit a proprietary framework for only one party to control this very evidence. For these reasons, any forum/portal/cloud based system must be maintained by a third – and independent – party.

Put simply, when there is a will to assure the implementation of a important reform, stakeholders come together to enable it. The new discovery law is a foundational reform that ensures the notion of dur process is honored.

I am thankful for the Committee's consideration of this testimony and remain available to answer any questions that arise.

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3 See http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.
4 Ibid, p. 69.

Discovery For Justice

Advocating for Open, Early and Automatic Discovery

9/9/2019

Senate Hearing Room,
250 Broadway, 19th Floor,
New York, New York 10007

Dear NYS Senate Standing Committee on Codes,

Good Morning Members of the NYS Senate Standing Committee on Codes. My name is Miguel Santana. I am a board member of a community-based organization named Discovery for Justice. I am pleased to testify before you today regarding the recently passed and upcoming implementation of the Discovery for Justice Act.

Overall, Discovery for Justice focuses on nonpartisan education, advocacy on improvements in the: law, legal system, and administration of justice. But more specifically, our mission has and continues to be, to work with community leaders and non-profit organizations to advocate for OPEN, EARLY, and AUTOMATIC disclosure of evidence.

Discovery for Justice was formed seven years ago due to the inherent unfairness of Criminal Procedure Law 240. In what has been rightfully labeled the Blindfold Law, New York's criminal discovery statute figuratively: bounds, gags, and blindfolds an accused person in court. Defendants in New York State often never receive as much as a police report until the day before trial. This practice of -trial by ambush- severely impedes a defendant's chances of getting a fair trial. More importantly, 95 to 98% of all criminal cases in New York State never even get to trial, with almost every case disposed of through dismissals or plea deals.

I can sit here today and tell you of the countless horror stories of the injustices that were carried out by the criminal justice system because of this law, but today is not that day. Today we get to put this draconian law behind us, and look forward because of the:

- Defendants whose days, weeks, months, and years were stolen from them and never gave up hope;
- Parents whose children were ripped from their arms and fought back;
- Members of the faith-based community who were morally outraged and felt compelled to speak out;
- Veterans who saw their sisters and brothers who were impacted by this law and fought back;
- Legislators who heard from their constituents and realized how devastating this law was and had the conviction to take action.

Discovery For Justice

Advocating for Open, Early and Automatic Discovery

As of today, Monday, September 09, 2019, there are 114 days left before the Discovery for Justice Reform Act legally goes into effect. The Discovery for Justice Act has laid to bare the need to make evidence available right away. As a result, the act will not allow an accused person to rot in jail for days, weeks, months, and years as they wait for the exchange of evidence. To ensure that the act is enforceable on January 1st, 2020, we must accompany it with a mechanism that automates the timely exchange of evidence. To that end, we believe that the NYS Courts Electronic Filing (NYSCEF) [system] that permits the filing of legal papers **[in civil cases]** by electronic means with the County Clerk, or appropriate court, and offers electronic service of papers in those cases, can be implemented with some customized upgrades to track the disclosure of evidence in criminal cases.

As a matter of fact, the **2018 e-File Electronic Filing in the New York State Courts Report** provides a comprehensive description of how such secured software program/portal works. Thus, we've extracted a few highlights of such report for your consideration:

- Recent gains were also **greatly aided by** [NYS Senate Bill S5833] **which was enacted in 2015. L. 2015, c. 237.** This legislation achieved:

  Expanded Authority. Chapter 237 authorized the Chief Administrative Judge to add new courts to the mandatory program by administrative action rather than through legislation.

- Over the past year, **e-filing has continued to expand across the State.**

- **Expansion of the program followed extensive outreach and consultation.** The Statewide Coordinator for Electronic Filing in the State Courts, Jeffrey Carucci, works closely with court administrators, County Clerks, bar associations, and other interested groups, as well as with the relevant E-Filing Advisory Committees, to identify courts where introduction or expansion of e-filing may be appropriate, and to develop plans for implementation.

- **[They] have been guided by the e-filing advisory committees for criminal and Family Court**, both of which include representatives of all interested groups, including prosecutors and the defense bar.

- The **criminal and the Family Court committees have focused their work in** the following four areas:

  1. **Ensuring** that the NYSCEF system complies with all sealing and confidentiality mandates.

  2. **Modifying** NYSCEF to create both Family Court and criminal modules so that the system functionality and screens meet the particular needs of these courts and their practitioners.

3. **Developing** the capability to transfer data directly from NYSCEF into the court system's case management systems and into compatible systems used by litigating agencies, in an effort to reduce costs by eliminating duplicative data entry, and to promote accuracy in court records by reducing the number of points of data entry.
4. **Drafting** and **publicly vetting** rules to govern e-filing in these courts.

- [**They**] also **expect to begin pilot testing criminal e-filing in a real environment.**

- [**Applicant users**] **must** have an e-mail address, apply for a user ID and password, and register with NYSCEF for the case so that the system will permit them to file papers, and will serve them electronically when opposing parties file papers.

- **Redaction**. [They] have implemented a **functionality that automatically filters e-filed documents for social security numbers**. [They] conduct this filtering and redaction even though General Business Law § 399-ddd (6) and court system rule 202.5 (e) (22NYCRR 202.5(e)) place the burden on the filer not to file a document that contains the social security number of any other person.

- **Training and assistance**... has been made available **to attorneys and unrepresented litigants, as well as judges and court and county clerk staff.** We provide online self-help training that allows users to experiment with all the functions of NYSCEF without limitation and at no charge. In addition, assistance is available from the UCS E-Filing Resource Center.

In summary, we believe that with the: **1)** Implementation of additional amendments to the aforementioned e-filing provisions and upgrade in functionalities, **2)** Enactment of the Discovery for Justice Reform Act on January 1st, 2020, **3)** Inclusion of stakeholders such as community groups to The Statewide Coordinator for Electronic Filing committee and, **4)** Expansion of the Office of Court Administration (OCA) which functions as a neutral oversight agency that monitors the NYS Courts Electronic Filing (NYSCEF) system, that we will have a secured system that will facilitate the electronic tracking, uploading and monitoring of the disclosure of evidence in criminal cases.

Sincerely,

Discovery for Justice

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TESTIMONY OF:

Erin Leigh George, Civil Rights Campaigns Director, Citizen Action of New York

PRESENTED BEFORE:

The New York State Senate Standing Committee on Codes
Hearing on the Implementation of Pre-trial Discovery Reform
September 9, 2019

My name is Erin George and I am the Civil Rights Campaigns Director at Citizen Action of New York. Citizen Action is a statewide grassroots organization that fights for social, racial, and economic justice. We build build power to advance campaigns on issues that are at the center of transforming society - issues like ending mass incarceration and overhauling New York's archaic and unjust pretrial system. Directly impacted communities, advocates, defenders and elected leaders fought for years to win long overdue pretrial reforms - and we celebrate this historic victory. I would like to thank Senator Bailey and our legislative champions for working with our coalition to bring home a law that transforms New York's discovery system.

The new discovery law was carefully and deliberately crafted to ensure fair, open, early, and automatic discovery turnover - which is essential to ensure that New Yorkers have all the evidence they need to prepare for their own defense. The new law brings New York in line with dozens of states across the country who have successfully passed and implemented discovery reforms. Furthermore, the new discovery law is a critical step toward rolling back the rampant injustice of a pretrial system designed to decimate communities of color. Prosecutors ferociously opposed this law for one simple reason: they want to maintain an advantage in court and the power to withhold evidence and coerce plea deals. An advantage that had resulted in decades of court delays, wrongful convictions and mass incarceration.

By requiring the timely exchange of all information collected by the police and prosecution in criminal cases, the new discovery law provides for a more fair and accurate legal process. This means a dramatic reduction in wrongful convictions and quicker, fairer, more accurate case resolutions. The record of wrongful convictions in New York State has repeatedly allowed for exculpatory evidence to be withheld for long periods of time, forcing innocent individuals to spend years or decades in prison. According to the National Registry of Exonerations, New York has had approximately 250 exonerations in its history, second only to Texas. A majority of those

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ERIN GEORGE | CIVIL RIGHTS CAMPAIGNS DIRECTOR | EGEORGE@CITIZENACTIONNY.ORG

exonerations were due to misconduct by police, prosecutors or other government officials - and these numbers do not reflect the devastating impact of coerced convictions on hundreds of thousands of impacted New Yorkers. Research shows that open-file discovery improves the fairness and accuracy of plea bargaining by giving defendants the information necessary to make informed decisions about their cases. Faster resolution also means fewer taxpayer dollars spent to maintain the crisis of mass incarceration - resources should be utilized on things that truly create community safety and stability - things like public education, affordable and stable housing, healthcare, community based services and more.

We call on District Attorneys across the state to advance early implementation of the discovery rules - and we reject the false claim that implementing discovery is too challenging or requires an unreasonable allocation of new funding. It is critical that prosecutors not be allowed to leverage discovery reform to demand unreasonable amounts of funding. Implementing the new law will require District Attorneys to rethink how they prosecute, bring fewer meritless cases and to reprioritize and reallocate existing resources. Open-file discovery, and the turning over of witness names and contact information, does not impede on the safety or security of witnesses. 32 states with modern criminal discovery rules recognize that it is critical that the parties receive enough information through discovery to locate witnesses - and the New York statute is actually more limited regarding witness information than other states.

This discovery law was passed in order to achieve much needed overhaul of the system. We call on the State and New York's elected leaders to approach implementation with the same courage and commitment to justice - and ensure full compliance. Prosecutors and law enforcement must not be allowed to undermine the implementation process, impede true safety and continue harming people targeted by mass incarceration. Thank you.

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HRW.org

Prepared Testimony of:

Laura Pitter
Interim Deputy Director, US Program
Human Rights Watch

Presented before
The New York Senate Standing Committee on Codes

For a Hearing on:

Implementation of Discovery Reform (S1509 – Part LLL)

September 9, 2019

HUMAN RIGHTS WATCH

HRW.org

My name is Laura Pitter. I am the interim deputy director of the US Program for Human Rights Watch. Human Rights Watch is a non-profit, independent organization that investigates allegations of human rights violations in more than 90 countries around the world, including the United States. We document human rights violations, issue detailed reports, and advocate for changes in law, policy, and practice to address the harms.

The right to a fair trial when accused of a crime and exposed to punishment including imprisonment is a fundamental human right that US federal and state governments are required to respect and ensure. This includes the right to the presumption of innocence, to be informed promptly and in detail of the nature and cause of the charges against you, the right not be forced to testify against oneself or confess guilt, and the right to adequate time and facilities to prepare a defense.

New York's current-but-soon-to-be-replaced discovery law does not protect these rights and creates prejudice against people accused of crimes, whether they are guilty or innocent. It prevents people from having sufficient information about the evidence against them to challenge its veracity or interpretation or prepare an effective defense. Prosecutors can withhold evidence until the eve of trial, making it difficult if not impossible for the defense to determine whether witnesses have bias, mistook what they observed, or gave only part of the story to the police. As a result, defendants are likely to plead guilty at early stages fearing what is unknown about the evidence and facing harsher post-trial sentences should they refuse plea offers.[1]

Fortunately, the New York State legislature passed historic criminal justice reforms during the last legislative session, including important discovery reform measures.[2] These new laws require orderly and reasonable discovery disclosures by both prosecution and defense. Prosecutors must disclose police reports, witness statements, witness contact information, tangible evidence like photographs and video, witness criminal histories and any exculpatory or mitigating evidence

[1] Letter from Human Rights Watch to New York State Assembly and Senate, "Letter of Support for New York's Discovery for Justice Reform Act, S. 1716/A.1431," March 22, 2019, https://www.hrw.org/news/2019/03/26/human-rights-watch-letter-support-new-yorks-discovery-justice-reform-act-s-1716.

[2] New York State Senate bill, S1509 – Part LLL, Article 245, https://nyassembly.gov/leg/?default_fid=&leg_video=&bn=A02009&term=2019&Summary=Y&Actions=Y&Text=Y&mc_cid=e836527705&mc_eid=8eeb3af3f3 (accessed September 5, 2019).

within a set timeframe, absent court permission for a delay or exceptions as appropriate.[3] The defense must comply subsequently with their obligations, subject to Constitutional limitations. Disclosures give each side the opportunity to conduct investigations and to intelligently assess the strengths and weaknesses of their cases, in order to make appropriate decisions on how to proceed.[4]

Some resistant to this new law have raised concerns that it will endanger witnesses and crime victims.[5] That fear is unfounded. Many cases do not involve an identifiable victim or witnesses who are not law enforcement.[6] For those instances when there is an identifiable risk of harm to or intimidation of a witness, the new law provides strong mechanisms, including redactions, protective orders, and exceptions to discovery, that will serve as protection.[7] A recent study of other states found "little evidence that open-file discovery endangers the safety of witnesses...."[8] No state that has reformed its discovery rules has ever omitted the rules requiring district attorneys to disclose witnesses' names and contact information.[9] More than 40 states use the same rule.[10] New Jersey has used it since 1973, Florida since 1968, North Carolina since 2004, and Texas since 2014.[11]

With passage of this new law New York moved from having one of the most restrictive, harmful discovery laws in the nation to having one of the most open, fair, and safe ones. Key now will be

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[3] Center for Court Innovation, "Discovery Reform in New York: Major Legislative Provisions," May 2019, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf (accessed September 5, 2019).

[4] Ibid.

[5] Manhattan District Attorney's Office, "Written Testimony by Manhattan District Attorney Cyrus R. Vance Jr. for City Council Committee on the Justice System Oversight Hearing on 'Preparing for the Implementation of Bail, Speedy Trial, and Discovery Reform,'" May 22, 2019, https://www.manhattanda.org/testimony-for-city-council-committee-on-the-justice-system-oversight-hearing-on-preparing-for-the-implementation-of-bail-speedy-trial-and-discovery-reform/ (accessed September 5, 2019)

[6] Repeal the Blindfold Coalition, "The Discovery for Justice Reform Act Protects Witnesses," February 2019, https://indefenseof.us/assets/images/Memo-on-Discovery-Reform-Witness-Safety-Feb-2019.pdf (accessed September 5, 2019)

[7] New York Criminal Procedure Laws, New Law, Section 245.70, See Section, "Protective orders," https://www.nysenate.gov/legislation/laws/CPL/245.70 (accessed September 5, 2019); See also, Discovery Reform in New York, May 2019, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf, p. 6.

[8] Jenia Turner and Allison Redlich, "Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison," *Washington and Lee Law Review 73* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747161 (accessed September 5, 2019).

[9] Tina Luongo, "Discovery Reform is Tried and Tested," *New York Daily News*, Letter to the Editor, June 5, 2019, https://www.nydailynews.com/opinion/ny-letter-june-5-20190605-vnfzu6fpwifxfitdlv6vhkaieq-story.html (accessed September 5, 2019).

[10] Ibid. See also " List of States with Open Discovery Rules," Discovery for Justice, https://docs.wixstatic.com/ugd/30f160_1c5feb62012d4755a75d3677492c3dbd.pdf (accessed Sept. 6, 2019).

[11] Ibid.

ensuring proper implementation. As other states consider improving their discovery rules New York has an opportunity to be a model for reform. Police, prosecutors, and defendants will have to share more kinds of information more quickly than ever before. We welcome the Committee's interest in ensuring that all parties carry out due diligence and are compliant once the law takes effect.

Thank you for the opportunity to present testimony to your committee and consideration of our comments. If you have any questions, please contact Thomas Rachko in my office at rachkot@hrw.org or (202) 612 - 4328.

Sincerely,

Laura Pitter

madd New York
NO MORE VICTIMS

Mothers Against Drunk Driving
New York State Office
madd.org/NY

33 Walt Whitman Road
Suite 210W
Huntington Station, NY 11746

631.547.6233 direct
631.547.6235 fax
800.245.6233 victim support

September 8, 2019

Protects the rights of all traffic crash victims in Criminal Justice Reform

Dear Lawmaker,

As you consider criminal justice reform, Mothers Against Drunk Driving (MADD) urges you to protect the rights of victims of traffic crashes, including those killed in drunk driving crashes.

As a national victim services organization, MADD provides emotional support and assistance with medical and legal struggles that follow a drunk or drugged driving crash. In 2017, MADD provided more than 200,000 supportive services to drunk and drugged driving victims to help them cope with the devastating impact of substance-impaired driving crashes.

Drunk driving is a deadly crime that has killed 16,555 New Yorkers during the past 35 years. According to the National Highway Traffic Safety Administration (NHTSA), 295 New Yorkers died in drunk driving crashes in 2017. We must do more to stop drunk driving.

MADD urges you to consider the victims of all traffic crashes and these crimes and ensure that those who drive drunk face sure and swift consequences. This cannot be accomplished with this legislation:

- **Under the bail elimination, drivers charged with** ALL Vehicular Homicides and Assaults **are ineligible** for pretrial detention, under any circumstances including a prior conviction history, and would be required to be released awaiting trial.
    - A defendant with multiple open cases could not be detained, even if he or she continues committing the same crime while awaiting trial.
- Under the discovery reform, the names and addresses of victims and witnesses must be disclosed within 15 days.
    - This timeline would not give prosecutors enough time to adequately prepare for protective orders, or give victims the time to ensure their safety. The safety of victims and witnesses is a moral obligation for lawmakers and essential to our justice system.
    - This language should change in order to accommodate victims and witnesses who do not want their identity known or their addresses disclosed for fear of retaliation or a violation of privacy. *Without this change, prosecutors will undoubtedly lose the critical cooperation of victims and* witnesses.

Please protect the rights of all victims of violent crime and traffic crashes, including drunk and drugged driving victims, as you move forward with criminal justice reform. If you have any questions, please do not hesitate to contact MADD New York Executive Director Richard Mallow at Richard.Mallow@madd.org or 631.547.6233. Thank you for considering this request.

Sincerely,

Richard C. Mallow
MADD New York Executive Director