I want to thank the Chairman and the Members of this Standing Committee for the opportunity to speak on behalf of legislating open and fair pretrial discovery.

My name is Lee Greenstein. I began my career as a criminal defense attorney with the Legal Aid Society's Criminal Defense Division in Queens, NY from 1986 to 1990 when my wife and I moved to Albany. I worked for a personal injury firm for a year, and since 1991 have been in private practice splitting my time between criminal defense and personal injury. As a result I have experienced the discovery practices in New York City and many upstate counties under the soon-to-be-old, restrictive discovery laws, as well as experiencing the stark contrast between discovery in civil and criminal matters.

First, I want to share with you one reality of so-called "open discovery" under the old system. In one Capital District county they have had a system in place for a good number of years where a defendant could sign a "Voluntary Disclosure Agreement" – I love the use of the word "voluntary". Under this agreement the prosecution agrees to disclose police reports and witness statements if the defendant agrees not to file a discovery motion, and agrees to disclose the names and contact information of their trial witnesses before trial. First, can you believe police reports are not discoverable under the old law? Second, the prosecution has the most crucial information – in a drug case its what the police are saying in their police reports about the drug sale; in an assortment of other cases its what witnesses or victims

claim happened. In order to obtain that most crucial information available defendants have to give up their rights - tell the DA's office before trial who will be testifying for them at trial, where they otherwise can keep that to themselves until the DA has rested their case. Defendants have to bargain away very important and strategic information – how they will defend themselves and who will support that defense. This guts the principal that a defendant has no obligation at a trial, and it removes one of the only tools we have – deciding what to present to the jury only after you see what the prosecution has submitted for evidence at trial. In addition, when the prosecution knows who your witnesses are they not only go speak with them, but they often intimidate those witnesses. I, like most criminal defense lawyers, work alone. I have an investigator I hire. That's it. The DA's office has a staff of DA investigators and law enforcement officers. They show up at potential witnesses homes – witnesses who are often unsophisticated, scared of police, sometimes dealing with their own criminal cases or who are on probation or parole. You can see where this goes. So under the old system, in order to see the evidence, the prosecution can force you to give up rights under the guise of "voluntary disclosure".

I was astounded to experience the stark contrast in discovery practices when, after representing indigent defendants in Queens for 4 years in the late 1980's during the height of the crack epidemic, I began working in the world of civil litigation. After begging for crumbs of discovery when my client's were fighting for their liberty, to avoid jail, and yes, sometimes fighting to prove their innocence, I saw first hand that in civil cases each side has almost full access to all relevant

information about their opponent and their opponent's position. When people sue each other over money or property, discovery is wide open. When people are fighting for their freedom they must defend themselves with the most basic information withheld, often until a trial has begun.

I have handled every type of criminal case from murders to DWI's and everything in between, and I have done so in New York City to the cities of upstate New York, in suburbs from Westchester to Syracuse to Plattsburgh to the Capital District, and in the smallest of town and village courts located in firehouses and town halls to mountainside tin roofed structures. When I meet criminal defense clients for the first time I tell them all the same thing: "you are flesh and blood, you are my responsibility, and I take that responsibility very seriously". I can assure you that treating my clients this was is easy, as they are regular people who have either made mistakes they regret, who have substance issues, mental health issues, childhood immaturity issues, and yes, who are, more often then you think, innocent or over-charged. I can count on one hand, the number of clients over 30 years who have been objectively offensive, scary individuals. When I am asked at a cocktail party, "how do you represent those people" I say two things. "If you or a loved one made a mistake or did something wrong, you would want me, or someone like me, to provide them with the best defense possible". And then I lean in and look around the room and say, "you know a lot of those people". Criminal defense is a noble profession, not only because we stand between between our clients and the powerful forces that seek to convict or incarcerate or punish them. But because we represent

people – flesh and blood – who, way more than 90% of the time, are people you know, or are related to, or whom you would gladly have a beer with.

So what are we afraid of? We are afraid of the dark, mayhem in the streets movie the prosecutors want you to believe would result if you maintain the new legislation that provides basic fairness to the accused. Right? You as legislators don't want to wake up and read the morning papers and learn of injury or death because of something you legislated. That's fair. So let me tell you what I have seen since 1986.

So let me share my experience to place those fears in perspective. These are the facts on the ground as I have seen it. The reality as I know it, the notion that there is a need to hide the identities of witnesses and alleged victims is a fiction.

I have represented many dozens of people who have entered in plea bargains involving cooperation, or who cooperated to avoid prosecution altogether. These are cases involve drug conspiracies, guns, murders, and violence. The scariest stuff. Law enforcement, to their credit, goes to great lengths to protect the identity of defendants who cooperate. They do so because now they are now dealing with my flesh and blood clients – they don't want to see anybody get hurt. But also, they make great efforts to protect my clients because it is good business. If one of my clients is ever the victim of retribution, then I have to say to the next cooperating client, "you know, none of my clients ever was harmed because they cooperated ... except that one guy". Who would cooperate after hearing that?

But here are two truths: First, nobody has ever gotten hurt on my watch, or was the subject of an attempt to do so and I am aware of only one such case in the Capital District. There was one reported case of a shooting of a witness who testified since I moved here in 1990. And I had a client cooperate against a defendant in Manhattan recently in a drug conspiracy case that also involved the leader of that conspiracy hiring the killing of a witness. That prosecutor assured me that even in New York City, such cases were very rare events.

Second, the scarcity of cases of retribution is not because the other defendants don't know who the cooperating witness is. They do know. The other defendant knows who is cooperating against them. They can figure who they sold drugs to who is now turning against them, or who in the conspiracy has now agreed to cooperate. Just like in cases of domestic violence or assault or rape, the defendant knows - the accused knows who the accuser is. And with the Internet, it's easy to find people.

Allowing prosecutors to hide witness statements or witness testimony or witness contact information, is not protecting anyone, it's only putting the accused at an unfair advantage by hiding the words of the accuser, and hiding the accuser themselves. It's not the identity of the witness that is crucial, but what they have to say, what are the details of the accusation. That's what matters in trying to defend someone. The notion that people are being protected from harm by keeping vital information from the defense is a fantasy. That is what I want to get across to you all. Mayhem, death and a rise in crime will not

occur if you impose reasonable and fair discovery obligations on the prosecutors of this state. The prosecutors are fighting this because the old law gives them power and leverage, and they don't want to lose that power and leverage.

I would urge you not to legislate out of fear of a reality that does not exist. The system needs to be geared to be fair to the vast majority of circumstances. It must be consistent with our principals as a nation, and as a leading state in that nation. Thanks for having me here to share my experiences.

OUR CLIENTS ARE THE PEOPLE WHO LIVE NEXT DOOR

THEY HAVE POWER THEY DON'T WANT TO GIVE UP

FACTS ON THE GROUND

THEY KNOW WHO THE VICTIMS AND WITNESSES ARE

Roulette with public safety; I promise you there will be a tragedy

They have great power and they don't want to lose it

DA resources – defense resources???!!

Gj minutes – almost never indict somebody within 15 days

experts, scientific reports, drawings, - these don't exist

911 call

certificate of compliance – they file meaningless certificate's of readiness

open file discovery

research renunciation – they

The Law Office of Shane Hug

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October 28, 2019

My name is Shane Hug. For the last eleven years I have practiced criminal law exclusively, seven and one half of those years as a prosecutor. I am presently a solo practitioner of the law at my office in Troy, New York where I defend people who have been accused of all levels of offenses. I have heard many complaints from prosecutors about CPL Article 245. I have heard that it is onerous, that it is untenable, that it is an unfunded mandate and that it will put people at risk. As a former prosecutor and as an individual who routinely gets assigned cases to prosecute, I thought I would share some of these concerns. After reading the statute though, I don't.

At the time that I agreed to speak at this hearing I had not yet read CPL Article 245. Last night after sitting down to read it, I realized that it is not the boogeyman that it has been made out to be.

Will there be a learning curve in implementing these new rules? Of course; there always is with change. But stagnation is the antithesis of progress. We can always do better; we can always strive to improve and I believe that this is what these

statutes do. They attempt to level the playing field in a system whose sole concern should be justice, a system where the accused is presumed to be innocent.

There are legitimate concerns from prosecutors that the implementation of these new rules will be a hardship on undersized and underfunded offices. These concerns however, cannot be a roadblock to justice. Rather than scrapping the implementation of these rules, we should be looking for ways to help them implement them. There are legitimate concerns from prosecutors for the safety of witnesses and a fear of a chilling effect if witnesses' identities are required to be disclosed. Speaking form experience, these concerns are not present in the vast majority of cases and there are safeguards built into these statutes to deal with these issues.

I think there will be a learning curve in the implementation of these new rules. I think there will be some growing pains, but these changes are needed if our system truly is one that seeks justice. We wouldn't expect someone to purchase a car or a house without taking it for a test drive or doing a walkthrough, but for some reason we have become accustomed to a system where we expect the accused to make a decision that may result in a lengthy term of incarceration without actually seeing the evidence against them. Thankfully this is changing.

All too often the accused is left to make a life altering decision in the dark. They are not provided information in a timely fashion, discovery is routinely withheld and lawful and required disclosure doesn't occur until the day of trial, thus

preventing their attorney from making any meaningful use of it. This is not justice, and we can do better.

Testimony for Senate Code's Committee on Discovery Implementation

My name is Rev. Emma Loftin-Woods I am a fifty-four year resident of New York, Westchester County. I am representing WESPAC, a community organization in Westchester County fighting for critical social change.

I want to begin by thanking the Legislature for passing discovery law reform in April of this year. I am one of thousands of New Yorkers across the state who have been impacted by our regressive, unjust discovery laws, and who fought for change. I want to express my deep gratitude to the Legislature for hearing the suffering of New Yorkers and responding by passing this new law. Together, we stood up and said no to a blindfold law that allowed prosecutors to withhold evidence - or hide the fact that none existed. We insisted that New Yorkers deserve to know the facts of their case, that we all deserve open, early, automatic discovery turnover.

While much of this hearing has focused on the specifics of implementation, it is critical to remember the human impact and the importance of discovery reform to ensure that New Yorkers are not coerced into pleas and have all the evidence they need to prepare for their own defense.

I know these issues very personally. I spent 4 days in the Westchester County Jail, (no bail because I was charged with three felonies on a Friday night). The court procedures lasted for 96 days. My legal team repeatedly asked for and was prepared for trail, which did not take place. The charges alleged against me were subsequently reduced to a misdemeanor and the file sealed. My legal fees amounted to over $7,500.00. The mental and emotional scares will never go away they are constant reminder of where the system was.

Now that the Legislature has passed discovery law reform, no one else will suffer like I did, like my family did. Prosecutors will be required to turn over all of the evidence 15 days after arraignment and prior to any plea deal.

As New Yorkers who suffered and fought for change, we insist on the effective implementation of these bills. Discovery reform has been implemented in many other jurisdictions, so this work is not unique to New York. Both Texas and North Carolina have implemented open-file discovery systems, and prosecutors in Texas have written in support of the New York legislation.

Finally, I want to address an issue related to funding. Some of the requests for additional funding from DA offices have been outlandish. For example, the Westchester DA has claimed

that he needs 42 additional staff positions to implement discovery reform. Underlying the testimony of the DAs is the belief that they should continue to do "business as usual" - prosecuting the same number of cases and doing so with the same illegitimate leverage. However, the goal of the discovery legislation is to change prosecutorial practice. Prosecutors must rethink how they prosecute. They must bring fewer needless cases and reprioritize and reallocate their resources. They must be more thoughtful about charging, to apply scrutiny on the front end so that they are not pursuing wrongful or needless cases. This is an opportunity to exercise true prosecutorial discretion.

Our communities – those who have been devastated by mass incarceration and decades of disinvestment – are in dire need of funding for education, healthcare, and services. This is where resources should be directed – not into the pockets of prosecutors.

Our communities are counting on you. We cannot wait.

Thank you.

Testimony of the New York Civil Liberties Union before

THE NEW YORK STATE SENATE STANDING COMMITTEE ON CODES

regarding

Criminal Discovery Reform Implementation

Monday, October 28, 2019

NYCLU
ACLU of New York

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Donna Lieberman
Executive Director

Robin Willner
President

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to appear and speak briefly about New York's recently-enacted criminal discovery reforms. The NYCLU, which is the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters.

The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing.

To begin, we'd like to thank you, Senator Bailey, as well as all the other Senators and Assembly members who worked so hard last session to enact systemic reforms to New York's criminal justice system – reforms that we hope will make that system fairer and more transparent, as it continues to keep New Yorkers safe.

The Constitution guarantees a fair trial to everyone accused of a crime. The right of a defendant to receive early, broad access to the government's evidence, so their attorney can meaningfully investigate the case and effectively assist the defendant is part of those Constitutional guarantees.

Pre Plea Discovery

Early discovery is especially important because the United States Supreme Court has called the modern criminal justice system "a system of pleas, not a system of trials."[1] Indeed, the Court has

[1] *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In *Lafler*, and its companion case of *Missouri v. Frye*, the U.S. Supreme Court extended the Sixth Amendment's guarantee of effective assistance of counsel to all "critical" stages of the criminal

recognized that criminal trials have largely become a thing of the past, noting that "in today's criminal justice system, [...], the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."

Nationally, about 97% of criminal convictions are the product of guilty pleas.[2] The rate is similar in New York – about 96%.[3] And almost all plea negotiations take place long before any discovery would otherwise change hands.

This trend presents a constitutional problem. The Sixth Amendment gives defendants the right to have counsel present at all critical stages of a prosecution, including the plea bargaining phase.[4] And it requires that assistance to be effective. As part of effective representation, defense counsel have duty under the Sixth Amendment "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[5] If no reasonable investigation takes place, counsel's assistance is ineffective. Thus, it is reasonable to argue that absent pre-plea discovery, no reasonable investigation, and thus no real assistance from counsel, is possible.

And of course, the constitutional problem pales in comparison to the real cost such a system imposes on the people of New York, as every year, hundreds of New Yorkers choose to go to prison without being allowed to see the government's evidence against them.

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justice process, including plea bargaining. The Court reasoned that criminal trials had largely become a thing of the past, noting that "in today's criminal justice system, [...], the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012), *citing* Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) ("To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."

[2] *See* U.S. Sentencing Comm'n, *2017 Sourcebook of Federal Sentencing Statistics*, fig.C, *available at*: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf.

[3] N.Y.S. Div. of Criminal Justice Svcs., *Criminal Justice Processing Report - Criminal Justice Case Processing Arrest through Disposition, New York State, January - December 2017*, p.23, Table 11 (June 2018), *available at*: http://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf.

[4] *See Lafler*, note 1 *supra*.

[5] *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Come January, that must change. Funding shortages and staff shortages may become apparent, and if additional funding or staff for prosecutors' offices are necessary, that's reasonable, but funding for defense services – which are underfunded as it is – should, at the very least, be increased proportionally. But funding shortages and staff shortages, while real, cannot be an excuse to let gross constitutional problems go unsolved.

Witness Information

ACLU of New York

The Constitution's guarantees of a fair trial also require the early and complete production of eyewitness information. The American Bar Association[6], the New York State Bar Association's Task Force on Criminal Discovery,[7] and the New York State Justice Task Force[8] have all within the last few years recommended that witness information be discoverable.

This should come as no surprise, as the United States Supreme Court has said that defense counsel must have an "equal ability to seek and interview witnesses;"[9] has called the cross-examination of witnesses "singularly important" to a defendant,[10] and has said that the denial of the "right of *effective* cross-examination" – not simply any cross-examination, but effective cross-examination – is a "constitutional error of the first magnitude."[11]

The New York Court of Appeals has said that "a lawyer's interviewing a witness in the hope of getting favorable testimony . . . is not in the least improper. It is what good lawyers do")[12]; and the

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[6] *See* Amer. Bar Ass'n, Standard 11-2.1(a)(ii), *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3d ed. (1996), *available at*: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk/#2.1.

[7] *See* N.Y.S. Bar Ass'n Task Force on Criminal Discovery, Final Report, pp.9-15 (Dec. 1, 2014), *available at*: https://www.nysba.org/WorkArea/DownloadAsset.aspx

[8] *See* N.Y.S. Justice Task Force Report and Recommendations on Criminal Discovery Reform, p.6 (July 2014), *available at*: http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf (last visited February 8, 2019).

[9] *U.S. v. Ash*, 413 U.S. 300, 318 (1973)

[10] *Jencks v. United States*, 353 U. S. 657, 667 (1957).

[11] Such an error requires automatic reversal of any finding of guilt. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) (*emphasis added*).

[12] *People v. Townsley*, 20 N.Y.3d 294, 300 (2012).

Second Department of the Appellate Division has remarked that "a witness is not the property of either party".[13]

The early and complete production of witness identification data is essential.

Witness Safety

Prosecutors claim that identifying witnesses ahead of trial will put those witnesses at risk of threats, harassment, or violence. The NYCLU is sympathetic to witness safety concerns, but the truth is that:

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(1) Nothing in the new discovery law diminishes the procedural protections available to prosecutors who, based upon evidence, feel a witness may be in danger, or the broad discretion judges have to craft reasonable measures to preserve witness safety;

(2) All but three other states – Louisiana, Wyoming and South Carolina – require the prosecution to identify witnesses during discovery[14]; and

(3) **Not a single state that has adopted open discovery laws has ever gone back to a more restrictive scheme.**[15]

That's a point worth repeating, especially because many states with broad discovery rules adopted those rules decades ago. Simply put, history has proven both the effectiveness and safety of witness disclosure rules.

Lastly, Evidence Portals, or "Beware the Leopard"[16]

With our remaining time, we'd like to offer a word of caution about the growing use of evidence portals – online, in many cases

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[13] *People v. Greene*, 153 A.D.2d 439 (2d Dept. 1990) (a witness may be interviewed or even paid for expert advice by one party and still testify for the other).

[14] NYSBA *Task Force Report*, note 7 *supra* at 2.

[15] NYSBA *Task Force Report*, note 7 *supra* at 2-3, *citing* Milton Lee, "Criminal Discovery: What Truth Do We Seek?" 4 U.D.C. L. Rev. 7, 19 (1998).

[16] *See* Douglas Adams, *A Hitchhiker's Guide to the Galaxy*. 1979. ("But look, you found the notice [that Earth was to be demolished as part of an interstellar construction project], didn't you?" / "Yes," said Arthur, "yes I did. It was on display in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying 'Beware of the Leopard.")

cloud-based – databases in which evidence is stored by the prosecutor's office, and to which defense attorneys are given access as a means of transmitting discovery. The NYCLU is not flatly opposed to a portal-based evidence disclosure system. However, such a system raises troubling questions of privacy and control of evidence:

(1) Who enters evidence into the portal database? If police and prosecutors are still the only ones who decide *what gets put in the database* – and thus, what defense attorneys are allowed to see – and defense attorneys are allowed to access evidence solely through the portal, it is inevitable that some evidence, particularly exculpatory evidence, won't make it into the database, and defense attorneys will never know it exists. Such a system risks negligent exclusion of evidence, or worse, invites *Brady* violations.

ACLU of New York

To guard against that, in any portal system, the prosecuting attorney, as part of the new law's "compliance certification" process, must be the one to certify that the evidence available via the portal is identical to the evidence available in the file, and that nothing has been excluded. Appropriate remedies, including sanctions, must be available for the court to impose in the event evidence is missing from the portal.

(2) What about *pro se* defendants? A portal system must allow defendants who represent themselves to inspect evidence without having to go through the portal. Attorneys – indeed, everyone – must have the right to opt out of the portal system. This is especially so for indigent defendants who may not have internet access. The portal system *cannot* be the only way of accessing evidence.

(3) Evidence placed into the portal must remain public. Quite a few companies offer commercial portal services, and the reliability, technical support, ease of use, and 24/7 access of those software offerings makes them an attractive alternative to a city or county designing and implementing its own system. However, if the portals are to be administered by a private corporation, evidence uploaded into the portal cannot become the property of that corporation. Axon, the same company that makes police body cameras and TASERs, makes an evidence sharing platform for use by police departments in uploading, storing and sharing police body camera footage. The website is cleverly named www.evidence.com. Police can share a link to the footage with the prosecutor's office, and the prosecutor can share that link with the defense.

The problem, however, is that Axon's terms of use grant Axon free and permanent license to do almost whatever it wants with footage uploaded to the website, which often includes peoples' faces, license plate numbers, the insides of their homes, and other details they may not want shared or monetized without their consent.

To avoid this, portal evidence must be held by the prosecutor's office. The prosecutor cannot provide web links to defense attorneys and tell them to visit www.evidence.com to see video footage. Moreover, if the evidence is held by a private corporation, that corporation cannot be allowed to monetize that data in any way whatsoever. Access to evidence cannot be subject to license agreements or intellectual property protections.

ACLU of New York

Lastly, no matter who operates the portal, there cannot be tracking or data collection activity of any kind embedded in the portal software. The prosecution cannot use the portal to find out what evidence the defense has prioritized, or whether the defense has viewed some parts of the evidence and not others. The defense must be able to download all the prosecution's evidence at once, and examine it offline at leisure.

Conclusion

We thank Senator Bailey and the committee members for their time, and will happily answer questions.

Testimony of
Kate Powers
On Behalf of
Letitia James
New York State Attorney General

Before the
New York State Senate Codes Committee

Implementation of Pre-Trial Discovery Reform

October 28, 2019

Good Morning. My name is Kate Powers and I am here to present testimony on behalf of New York State Attorney General Letitia James.

Thank you Chairman Bailey and members of the Senate Codes Committee for the opportunity to speak before you today. This Senate came into office in 2019 with a mandate to finally undertake long-stalled steps to mend our broken criminal justice system. You more than fulfilled that charge, passing landmark reforms from the elimination of cash bail in the majority of cases to sweeping criminal discovery reform. The Office of the Attorney General applauds that work and thanks you for bringing us all together for what we hope will be a productive discussion about implementation.

The Attorney General is aware that a number of district attorneys, as well as law enforcement and defense organizations, have come before you and will continue to come before you to request significant funding increases. Our office is providing testimony today to say that we strongly support these requests and urge you to account for these needs in the coming 2020 budget.

Throughout her career, Attorney General James has fought for measures to build trust between law enforcement and the communities they serve. She believes that the vast majority of police officers and prosecutors are dedicated public servants who seek only to achieve the just result. But when systemic flaws continue to lead to unjust outcomes, even in instances where everyone operated with the best of intentions, it means we must change the system. Our criminal discovery regime was one of the most glaring such flaws.

Until this past year, New York State had the dubious distinction of being one of a handful of states with a "blindfold law," which allowed prosecutors to withhold key evidence until the very eve of a trial. Even if many prosecutors' offices did not take full advantage of this legal blindfold, it is unacceptable that this sort of evidence withholding was permissible under the laws of this state. Moreover, it does not require malice or pushing discovery delays to the limit to

bring about an unjust result. A failure to provide sufficient information before accepting a guilty plea is often enough to create a miscarriage of justice.

For countless individuals caught up in the justice system, therefore, reforming criminal discovery could mean the difference between liberty and confinement; a wrongful conviction and the right result.

However, just because discovery reform was the right thing to do, does not mean its implementation will be easy. Complying with the new rules *will* require more funding for staff, technology, and logistics. We will also have to support and work closely with law enforcement and accredited laboratories because they will be in possession of many of the required materials and we will need their help to meet the new deadlines. Just as importantly, it is not just prosecutors and police that will need more funding under these reforms. Public defense organizations will need to significantly expand their personnel and information storage capacities in order to give their clients the representation they deserve under the new law.

It is critically important that we all come into this process with open ears and open minds. We understand that negotiations over these changes were contentious and that concerns still remain but we share a common interest in ensuring that this law is implemented in a timely manner that is consistent with the objectives of the law. Based on the experience of our office, prosecutors around this state are doing their utmost to meet its obligations, however difficult the challenges.

But the challenges of compliance are real. For smaller offices with only a handful of attorneys for an entire county, complying with this law really may require doubling their support staff. For the largest offices with the biggest and most complex caseloads, compliance really may require investments in the double digit millions. It is also likely that storage costs will compound in the coming years as materials will need to be kept long after a trial is over. Each office has thought carefully about its own needs and capacity and we urge you to work with them to ensure that adequate funding is provided in this year's budget and going forward.

The Office of the Attorney General does not have a criminal caseload comparable to those found in New York's larger counties. Nor are our challenges with initial compliance under the status quo as daunting as those faced by less populous, understaffed counties. But even our office will need a significant infusion of resources in order to do justice to this new law.

In order to provide materials in a timely manner in all our cases, the OAG will likely need to hire approximately twenty (20) new staff members. Additionally, we will need to make an immediate outlay of $500,000 to meet our e-discovery needs, followed by $9.7 million in investments for information infrastructure and records management in the coming years.

While we have common concerns and common goals, the needs of each office are unique. For instance, while our volume of cases is not large, many of them are white collar prosecutions with inevitably voluminous records and significant storage requirements. Many of the cases

undertaken by our Organized Crime Task Force come from long-term investigations involving wiretaps and video surveillance which require massive amounts of data storage to keep and transmit. Every office will have its own specific needs and it is vitally important to ensure that every office be allowed to give voice to those needs.

New York has an opportunity to demonstrate that these reforms, and progressive prosecution more generally, deliver justice while preserving law and order. Passing these laws was the first step in that process. The next step is for all of us to work together – the legislature, the executive, prosecutors, public defenders, and the rest of us who play a part in the criminal justice system – to ensure we have the resources we need to properly implement these important reforms.

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Mary Pat Donnelly
District Attorney

Matthew B. Hauf
Chief Assistant District Attorney

I welcome the opportunity to be heard today on this very important matter. My name is Mary Pat Donnelly, and I am approaching the end of my first year as Rensselaer County District Attorney after being elected last November.

Let me start by saying that I support criminal justice reform. Before serving as District Attorney, I had the unique perspective of sitting as a town judge in a suburban community while serving as a city court judge's law clerk here in Albany. Two very busy, very different courts with many of the same faces standing in front of the bench, but the disparity was obvious. From my 21 years of experience with New York State's criminal justice system, I am in agreement that we can do better to make sure that everyone receives equal treatment under the law regardless of race, religion, sexual orientation or socio economic class. I ran for this office in order to be part of the solution to that problem.

However, the reforms as drafted are not practical. In attempting to level the playing field, we are playing roulette with public safety. There has to be a better way.

A defendant and his counsel should have fair exposure to the prosecutor's evidence before making decisions on a plea deal. This is the practice in my office and is a simply matter of ethics and human decency. I never want us to forget that the accused is innocent until the DA meets the burden of proof. And while I am, for this reason, a proponent of open discovery, it is a fact that formal discovery is not typical completed unless a case is headed to trial.

Certainly, turning over all of the material in the DA's file within 15 days does not SOUND unreasonable. Put your file in the copier and put the packet in the clerk's office for mailing or pickup? I assure you, it is not that simple. It is time consuming and, with the new additional requirements and constructive possession rules, it will become even more so.

First of all, the DA has to ensure that we have all the required paperwork from police agencies before we can turn it over. My office serves 18 municipal courts with cases from 9 different police agencies. In many misdemeanor cases, a defendant is arraigned in a town court outside the presence of the DA and given a return date a week or two later. The clock starts ticking at arraignment but the paperwork has not even made it to our office yet. In certain cases, such as drug arrests, an investigation may be ongoing. Turning over sensitive investigative material at the commencement of the prosecution will undoubtedly jeopardize these investigations. Witnesses will be in danger as a result.

That said, in order to comply with the directives of Article 245, police agencies are going to have to completely overhaul the way they do business. Law enforcement needs TIME to properly train personnel and to allow for policy decisions to accommodate these massive changes. If the police don't fully understand their obligations and if they don't have the tools to comply with the requirements, our office is going to be handcuffed in our ability to file a Certificate of Compliance and answer ready for trial. Cases will be dismissed and actual criminals will escape penalty. At the very least, I urge you to consider deferring the implementation of these reforms in order to give prosecutors and police departments sufficient time to come together on policies and procedures that will give us the best chance of complying with these directives.

The unintended result of Article 245 is going to be a dramatically enhanced need to triage criminal cases– we will simply have to abandon prosecution on "less important" cases so that we may direct our resources to the most serious. How do I tell a victim that their case is just not important enough for me to prosecute? Your loss, your injury, your humiliation doesn't matter? I don't have the time or manpower to do the necessary *paperwork* in order to seek justice in your case? It's a frightening and disheartening thought. That's why the outcry with respect to lack of funding provided for these reforms is really, really important for everybody here to understand. Reviewing files and ensuring that everything discoverable is physically in our possession and ready to be turned over within 15 days is literally going to be a second full time job for every attorney in my office.

Further, Article 245 mandates disclosure of the names and contact information of witnesses. We can no longer offer witnesses peace of mind by assuring them that their identity will be protected. Even grand jury testimony, long understood by the public to be secret, must be turned over within 15 days. This will certainly result in a lack of

cooperation by witnesses and, taking it a step further, it may cause New Yorkers to think twice about reporting a crime in the first place. While we may have the ability to seek a protective order from the Court, this is AGAIN, more work for ADAs who are already carrying an extremely heavy caseload.

I want my testimony to demonstrate to you that the District Attorneys of New York State are not simply engaging in "fear mongering" when we speak of opposition to this reform. This is not about resisting legislation which will make our jobs more difficult. I will continue to believe that my fellow District Attorneys entered this calling, like I did, to protect the community. So that we can exercise our discretion and ethical considerations to seek justice. I truly believe that legislation impairs my ability to do that.

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Jefferson County District Attorney
Kristyna Mills
Testimony before the New York State Legislature on
Pre-Trial Discovery Reform

October 28, 2019

My name is Kristyna Mills and I am the District Attorney in Jefferson County. Thank you for allowing me the opportunity to speak with you today about the sweeping changes enacted to our criminal justice system.

First I would like to tell you a little bit about my county and the efforts that we have made to comply with the new discovery laws. We are a relatively small county of approximately 114,000 people. We border Canada across the St. Lawrence River. We house Ft. Drum, a large military base with approximately 15,000 soldiers stationed there and employing in excess of 3,000 civilians. The Jefferson County District Attorney's office employs 11 attorneys, including myself. Ten of the attorneys employed as ADA's handle all felony, misdemeanor, violation and traffic infraction prosecutions that occur in the county including prosecutions of military personnel for which we have concurrent jurisdiction with Ft. Drum, and some border prosecutions that are investigated by Immigration and Customs Enforcement or the Border Patrol. Our ADA's have an average caseload of approximately 350 open cases at any given time. We also handle all of our own appeals and post judgement motions which do not factor in to the number of open pending cases that we are handling at one time. Traffic infractions, numbering in excess of 5000 per year also are not factored in.

In attempting to comply with the new discovery laws, Jefferson County has been ahead of the curve. More than a year ago, we began asking the police agencies to send their entire file to us digitally. We have twelve police agencies in our jurisdiction. Some have the technology to comply with the digital transfer of cases, some do not. In April, after the passage of the reforms, we began the process of going paperless. We upgraded our technology and began using a digital evidence system for the transfer of discovery to defense counsel and the courts. This has not been an easy transition. Not all defense counsel has been receptive to this new way of transferring evidence. We have had difficulties with the technology and with all parties to the system, from the police, to the courts to the defendants. It has been an extreme challenge finding the resources to upgrade our computer systems and give our legal and support

staff the tools that they need to comply with the changes bearing down on us. We have held nearly a dozen trainings and in-services seeking to educate law enforcement on the new laws, we have a half a dozen more scheduled. In October, we began attempting to comply with the new discovery provisions as if it was January 2020 on our felony caseload. It has been extremely difficult to keep up with the duties of prosecution when a great deal of our time is spent trying to compile and turn over far more discovery than we have ever received, in far more cases than we ever needed to before. We will attempt to start complying with the new legislation on misdemeanors and violations next week. I harbor no illusions that we will be able to maintain our current prosecution standards and I fear that cases will start falling by the wayside at our current staffing level. I anticipate being permitted to increase my staff by one ADA in the upcoming budget year. While this will undoubtedly be a help, I am concerned that it is a mere drop in the bucket in order to be in full compliance with these laws.

While we have made great strides in attempting compliance, I fear that we have miles more to go with very little time left. We are experiencing extreme difficulty getting police agencies to comply. We are imputed to know everything they know under these new laws, yet we are having trouble getting them to tell us what they know in the 15 day time limit set by statute. Another difficulty is with our federal police agency partners. They are not bound by the same rules. We were recently informed that we needed to get a subpoena to get a border patrol file in a Driving While Intoxicated prosecution. The military has tried to be cooperative but they have forms for their forms. I have little doubt that I actually know a fraction of what I am imputed to know under this statute.

Additionally, we currently have no ability to provide law radio recordings in all cases. Under the current system, the law radio recordings are mixed together as all units on the road are calling into the 911/dispatch center at once. In order to separate those recordings and turn over what is germane only to each and every case, it requires someone to listen to these recordings and manually pick out those related to specific cases and copy them to a single digital file. Our already beleaguered 911 center does not have the staff to accomplish this. They have told me in no uncertain terms that they will not be able to comply with this portion of the statute and I am concerned that we will not have a solution in place by January 1.

Another issue we are facing stems from the thousands of traffic infractions that we prosecute each year. Currently this office does not open files on those matters and is not even aware of them unless and until an individual sends us a ticket and requests a reduction or requests a trial. Neither of those things happens within fifteen days on a majority of the cases. We have yet to figure out a way to turn over body cam videos and certificates of calibration for thousands of tickets that we do not know about and furthermore have no way to contact the ticketed individual other than by the address listed on the ticket. Our digital discovery system will not work for those individuals because that system requires an email address. Attempting to change the policies of every police agency in the county to obtain email addresses on every ticket that they write and to turn the tickets over to us is a daunting task. One that is at the bottom of our list as we are trying to triage down from the most important cases to the least. This is another issue I fear that we

will lack a solution for come January 1. The safety of our highways and the revenue of our state and municipalities will feel this loss, I have no doubt.

Additionally, I fear that these laws may have unintentionally legalized misdemeanor level possessions of dangerous narcotics such as heroin, methamphetamine and cocaine. Overburdened labs across the state typically do not test misdemeanor weight narcotics unless that testing is needed for trial. Under this new law, in order for us to declare that we are ready for trial, arguably that testing must have been completed. I fear that there is no possible avenue in which these labs will be able to test these smaller amounts without enormous increases in staffing and funding. Where before we could get a plea to a misdemeanor based upon a presumptive field test, get individuals addicted to these substances placed on probation and into rehabilitation facilities or divert them into these programs, now they will have no incentive to do so because they will learn that we cannot comply with discovery and cannot meet our speedy trial burdens. These cases will ultimately be dismissed. This is at the expense of our addicted population who often need the incentive of probation or diversion programs to help them get treated and stay clean. I cannot enumerate the number of people who have approached me over the years and thanked me for helping them get needed treatment and lead a clean and sober lifestyle. I fear these new laws will have the unintended consequence of harming this addicted population who needs our help more than ever.

In conclusion, these are some, but not all, of the concerns that we are wrestling with. And we are far ahead in terms of implementation than some of the smaller counties in the state, several of which did not have case management systems, let alone digital evidence systems. District Attorney's Offices and police agencies across the state are running a losing race against time to comply with these enormous changes by January 1 with no funding to do so. With additional time and additional funding, I believe solutions could be found for these problems and law enforcement would be equipped to fully comply with the statute as written. Thank you for your time.

CHIEF DEFENDERS ASSOCIATION OF NEW YORK

The New York State Senate
Standing Committee on Codes
Hearing on the Implementation of Pre-Trial Discovery Reform
October 28, 2019
Albany NY

Statements of Andrew D. Correia, Wayne County Public Defender

Thank you Chairman Bailey and members of the Committee for this opportunity to be heard on behalf of CDANY and my clients regarding the roll out of this historic revolution in the fairness of our criminal justice system.

I. I am the Chief Defender of Wayne County New York.

Wayne County is just east of Rochester. 94,000 people. No cities. All town and village courts. County Court with three Judges. Very rural. Agriculture is the main industry; mainly apple farms and dairy farms. We handle less than 2,000 criminal clients a year in my office. Yet these reforms will improve our ability to help our clients as much or more than any other place in the State.

II. What have we done in my County to prepare for the influx of information?

Meetings with the DA. With our IT department. We discussed storage space and bandwidth. I have met with my County Board to educate them about what's coming. I have discussed internal procedures in my office for reception, retention and review.

This is change for us as well. We will have to supply more information to the State than ever before under CPL 245. I am not here to ask that the work on that front be scaled back or delayed or undermined. We are digging in, not delaying and so should the other players in the system.

III. **It can be done.**

I am here to say it can be done. I know it can be done. Why?

Although I was born in NY, went to college in NY and law school in NYC, I spent my first three years as a lawyer in New Hampshire, at the well regarded New Hampshire Public Defender's Office.

LIVE FREE OR DIE

I grew up as a lawyer with broad, open, early discovery.
All police reports. Depositions of experts AND witnesses with conflicting stories. The system there allowed virtually no surprise at all. It mattered there. They took it seriously. They knew surprise was unfair.
There were judicially controlled protections for witnesses and information, just like in this legislation.
There were consequences for defendants if witness issues were proven, just like here.
And in my experience, no more of that occurred in NH than happens here in NY, even with actual discovery.

And New Hampshire, just like every state who has moved to open discovery has not cut it back.

Why? Because it works. Because it's efficient. It's fair. It resolves the cases that should be resolved and provides a fair fight in the cases that have to be tried. People from around the country came to advise this body that such was the case.

I came home to NY in 2001 and I was shocked at how we were expected to advise our clients without anything but a charging document. Shocked at how trial was not a fair fight on equal footing, but an ambush. Finally, after decades that is coming to an end.

IV. **Their concerns.**

This is not some last second legislation pushed through with no review under cover of night. I testified in front of the Kaye Commission in 2005, in part about discovery reform, and this fight was happening long before I arrived.

There have been State Bar Task Forces that involved all players that reached the same ultimate conclusions. This issue has come up year after year after year in the legislature. All the procedures in CPL 245 have been tested around the country.

They work.
They are smart.
They are safe.
They are fair.

If Law Enforcement and the DAs need resources to meet their mandate, I am not here to object to that. I would have to be convinced that $100 million is the right number and that it wasn't just picked out of the air, but coming up with that figure is not my job today.

All their other stated objections are completely unfounded. Those objections have at their heart a reluctance to give up a systemic legislative competitive advantage that should never have existed and has no place in a system of justice. They have overplayed their hand in historic fashion. The old bail statutes and discovery reforms were hailed in their day as progressive reforms. They failed in their implementation due to the abuse of the discretion left to those in power. The stories of our clients harmed by the soon to be vanquished system finally won the day.

All of which has lead us to this moment of inevitable fairness.

Instead of trying to delay, undermine and obfuscate, let's get to work on the new age of Justice in New York.

ADC

STATEMENT OF CHEMUNG COUNTY DISTRICT ATTORNEY WEEDEN A. WETMORE BEFORE SENATE CODES COMMITTEE, OCTOBER 28, 2019

The role of a prosecutor is "to seek justice", to "do the right thing". The new discovery laws, although obviously passed with the good intentions of leveling the playing field for the accused, will, because of their broad application to all charges filed, and because of the short time constraints, divert district attorneys and their assistants from seeking justice, to seeking discovery materials.

Good morning, my name is Weeden Wetmore, I am the District Attorney of Chemung County. I have worked as a prosecutor in the district attorney's office for over 31 years, 20 years as a full or part-time assistant district attorney, and now, almost 12 years as the elected District Attorney.

Seven full-time and three part-time assistant district attorneys make up my legal staff. We appear daily in Chemung County Court before two county court judges, and in Elmira City Court before two city court judges. The assistant district attorneys appear weekly in fourteen village and town justice courts throughout the county. We prosecute annually over 2,000 criminal cases, of which 25% start out as felonies, and 75% as misdemeanors. Generally, of the more than 500 persons initially charged with felonies, we obtain indictments or superior court informations against approximately 300 of those defendants. Of those defendants indicted, many plead guilty after receiving their requested discovery materials following motion practice, and others after challenging the admissibility of evidence at pre-trial hearings. The balance of some thirty-five to fifty cases appear on the County Court trial calendars, after which more defendants plead guilty, leaving approximately 10-15 cases annually going to trial.

The new discovery rules will require in all cases where felonies are charged, whether indicted or not, even more discovery than was provided in trial cases in the past. Those mandated discovery materials will oftentimes include items that will be neither relevant nor material to the defense of the case. For example, if we assume the following facts: an 18 year-old defendant, with little to no criminal history, is arrested by the police in the act of committing a burglary and then confesses; under the present discovery rules that case would be resolved fairly and expeditiously. After providing defense counsel with a copy of defendant's confession, and offering the defendant an opportunity to plead guilty to burglary, be adjudicated a youthful offender and sentenced to probation, undoubtedly, that plea bargain would be accepted and the case closed out. By contrast, under the new discovery laws we must automatically provide within 15 days, among other materials, items such as radio transmissions whether needed by the defense or not, 911 calls whether needed or not, and grand jury transcripts of witnesses whether needed or not. Should defense counsel ask for a two week adjournment for his client to consider the aforementioned plea offer, our office would still have to begin gathering all of the automatic discovery materials as the 15 day clock is ticking within which time the prosecutor must file a certificate of compliance with the new discovery provisions.

Common sense suggests that too much time will be spent complying with the new discovery laws, whereas such time could be better spent seeking justice in other cases requiring more attention. For example, an assistant district attorney may wish to conduct legal research in a drug possession case to determine whether a defendant's constitutional rights were violated or whether the defense of agency applies. In an assault case, he may wish to research the issue of self-defense under

the law of justification. He may wish to consider the defense of renunciation where the police charge a defendant with an attempt crime rather a completed one. In certain crimes involving the influence of drugs or alcohol, an assistant district attorney may wish to consider extending mercy to a defendant due to those underlying circumstances. We will still expect the prosecutor in my office to perform these functions notwithstanding the new discovery laws, but his workload will increase exponentially due to his need to comply with the automatic discovery rules.

In the Elmira City Court and the town and village courts, where approximately 1,500 misdemeanor charges are addressed, we presently have an open file policy of discovery, meaning that we generally give defense counsel access to everything in our file, if and when they ask for it. The exchange takes place in only approximately 30% of all misdemeanors cases filed, as instead many defendants choose to plead guilty to the charge filed or a reduced charge after receiving an accusatory instrument and supporting depositions, rather than full-blown discovery materials. However, the new automatic discovery laws would require my assistant district attorneys to produce the mandated discovery materials in all 1,500 misdemeanor cases within 15 days of arraignment. We agree that full discovery is sometimes needed to make an informed determination before a defendant enters a plea of guilty, but oftentimes the automatic discovery materials may not be necessary for the defense to proceed, and thus never even reviewed by counsel or the defendant in the first place. We have no problem in providing discovery materials when requested by the defense, but many of these defendants can make informed determinations without reviewing all discovery materials, especially where adequate counsel represents them. Having to comply

with the new automatic discovery provisions will not resolve the cases more fairly for a defendant, but instead will be more time consuming and will utilize the resources of my office less efficiently.

Complying with the new discovery laws as they apply to criminal cases alone, will substantially add to the caseloads of attorneys in my office. However, the discovery reform laws also apply to all cases where a simplified information is filed, such as a Vehicle and Traffic ticket. Last year there were 17,711 traffic tickets issued in Chemung County. Requiring my assistant district attorneys to gather discovery materials within 15 days of arraignment on all of these tickets and then to issue a certificate of compliance on each ticket, will be extremely burdensome. Such practice would call for the issuance of over 48 certificates of compliance daily even if my staff worked for a full 365 days a year. Although the prosecution of traffic cases in 2018 in just Chemung County's village and justice courts generated over two million dollars in revenue, of which the state share was $1,461,473.48, I cannot envision my staff as presently constituted, as able to comply with the new discovery laws as they apply to Vehicle and Traffic violations.

Obviously to fully comply with new CPL Article 245, will require more resources in my office in terms of both equipment and staff. Additionally, more office space will be needed to accommodate additional personnel. Although the Public Defender's and Public Advocate's Offices in Chemung County will receive grant money (not from the county) that totals over $3 million dollars between 2018 and 2022, my office will receive no such aid from the state to help us defray the costs of implementing the discovery reform laws.

I realize the goal of this new legislation is to afford defendants with a full opportunity to evaluate the evidence against them in any given case. However, I believe that purpose can still be accomplished in criminal cases if the law is amended to expand the 15-day time limitation for automatic discovery to 45 days. The additional 30 days would not prejudice the defendant, and would still provide discovery well in advance of any proposed disposition or trial date.

As for automatic discovery where defendants appear on simplified informations, i.e. Vehicle and Traffic violations, the law should be eliminated. To comply with automatic discovery in such cases is not practicable in light of the time prosecutors must spend on discovery in criminal cases.

I have chosen to address practical problems I anticipate affecting my office's ability to comply with the Criminal Justice Reform laws as they apply to pre-trial discovery. However, I hasten to add that there are other troubling aspects of the law. One is the obvious conflict that arises when one considers Section 190.25 Subdivision 4 (a) of the CPL, which states "Grand jury proceedings are secret...". One reason for secrecy is for the safety and security of witnesses. I believe the release of grand jury transcripts well in advance of trial, will have a chilling effect on certain witnesses coming forward to testify as they will be concerned with intimidation. No longer can we assure them that their identities and testimony will remain secret and not revealed unless absolutely necessary. The chilling effect of this reform certainly does not assist prosecutors in seeking justice in all cases.

I hope I have given you some information to consider as you proceed with your responsibilities. Thank you for affording me this opportunity to address you.

COMMENTS TO SENATE COMMITTEE ON CODES
IMPLEMENTATION EFFORTS TO
COMPLY WITH BAIL/DISCOVERY/SPEEDY TRIAL
BUDGET AMENDMENTS

I am Tony Jordan, Washington County District Attorney. Thank you for providing me the opportunity to present testimony today regarding Washington County's efforts to comply with the seismic and transformative changes to Bail, Discovery and Speedy Trial as contained in the 2019/20 Budget with an effective date of January 1, 2020. I imagine much of what I am about to say about these efforts is similar, if not identical to what my colleagues have testified to previously or in testimony to follow. Also, although I am not speaking on behalf of other Counties across upstate New York, much of what I am going to say are concerns and experiences shared by my colleagues throughout small and mid-sized counties across New York State.

Washington County is a small (62,000 people) county located on the Vermont border. The county is long and narrow, approximately 90 miles long from North to South. The vast majority of the County lacks any public transportation system. Per capita income is just under $18,000. The county is primarily agricultural with limited industry and manufacturing; thus, a small tax base. We cover 22 local courts, most of whom have non-lawyer judges, and Washington County has 9 law enforcement agencies.

What have we been doing in Washington County to try to develop a plan to comply?

1) In summary the legislation impacted three areas of Criminal Justice in a profound and far reaching manner. Each of the impacted areas become inextricably linked and that linkage will change significantly how law enforcement handles investigations and decisions on whether and when to arrest and how cases are prosecuted. These areas impacted are:
    a. Bail
    b. Discovery
    c. Speedy Trial
2) Furthermore, these new laws apply to everything from a Vehicle and Traffic Ticket for a headlight out to Murder.
3) For the past 6 plus months we have analyzed the law to determine the extent of the impact, the consequences to public safety for non-compliance and then developing plans to insure compliance with both the spirit and content of the law.
4) Based on our experience we know what the demands will be for compliance with the law for our approximate 2,000 Misdemeanor and Felony cases each year. It is based on that known that we have focused our efforts and based our staffing and IT requests. What we do not know is how will the public respond to this law regarding Vehicle and Traffic tickets and Violations and how much discovery demands will be placed on the

prosecution of V&T tickets and violations; and ultimately how that will impact the resolution of those tickets. Keep in mind that V&T represents over 10,000 tickets per year alone, not to mention violations.

As has no doubt been discussed at length, Bail as we know it will change dramatically in 2020. That, coupled with the volume of discovery mandated and speed at which it must be delivered, will fundamentally change how we process arrests and prosecute cases.

From the time I was elected District Attorney we have had an "open file" discovery policy in my office. Currently a significant number of our Misdemeanor and Felony cases are resolved without trial. A significant portion of those are resolved in the early phases of the case. Why? Because we turned over everything that we had in our files to defense.

This simple reality means most cases are resolved with the production of only a fraction of the potential evidence that exists. Furthermore, items now required to be obtained and turned over have seldom, if ever been obtained by our office or turned over to defense; this includes 911 calls and dispatch logs. These two (2) items alone will go from perhaps 90-100 requests a year (that generally have no urgent timeline attached to production or review) to requiring the production of these items in all 2,000 cases and turned over to defense within 15 days of arraignment.

Why were these items seldom turned over? Because defense did not deem them relevant to determining whether sufficient evidence exists to establish their client's guilt beyond a reasonable doubt.

After January 1, 2020 a completely new law will take effect that both expands what must be obtained and turned over in each case but also creates an extraordinarily short time frame to obtain, review, and turn over to defense. What must be turned over?

EVERYTHING in the possession of ANY law enforcement agency in NYS that *relates* to the incident. Of our 9 law enforcement agencies, 6 are small local Village Police Departments. Many are staffed utilizing part-time officers to fill scheduling gaps. Furthermore, these agencies operate on limited budgets with limited technology. Several do not have "live-scan" capabilities for completing fingerprinting and need to drive over 30 miles to the Sheriff's Station to complete the fingerprinting process.

Many logistical challenges still need to resolved. Several of our courts have limited volume and only meet once a month. This will pose challenges with timing of Appearance Tickets and

scheduling dates for the myriad of new motions and other hearings demanded by this new law. Furthermore, working to develop a system and the technology necessary to accomplish the goals of the new legislation has required that we have systems in place to insure:

a. compilation and delivery of ALL material by Law Enforcement to our office;
b. receipt in a useable format by our office to facilitate review and understanding of what has been received and an ability to effectively and appropriately redact and otherwise manage the flow of information; and
c. Once received the Prosecution must:
    i. Certify that they have turned over EVERYTHING to defense;
    ii. Certify that the Complaint is sufficient and supported by sufficient evidence; and
    iii. ONLY then can we declare readiness for trial which will now be subject to inquiry from both the court and defense as to validity.
d. Deliver to defense and Court.

Failure to comply with the demands of the new Discovery Law brings with its various sanctions that the court can impose including DISMISSAL of the entire action. This result will have obvious negative impacts on public safety and public confidence in the Criminal Justice System.

So, what does all of this mean for Washington County and what have we been doing to comply?

1) For the past 6 plus months impacted departments (Public Safety (911 Call Center), Sheriff and District Attorney's office, Probation, Information Technology and Alternative Sentencing) have been meeting to discuss the impact, develop plans for compliance and work to access technology that will assist in compliance both effectively and efficiently to reduce costs of compliance;
2) Identify areas of weakness both internally and externally (other agencies and delivery methods) and address those early on to prevent compliance issues;
3) Develop ideal plans for compliance and then adjust those based on financial constraints/reality of the County Budget.
4) As an example, our true needs and ideal plan to insure no drop in Public Protection would include creation of a new Discovery Department consisting of:
    a. Two new lawyers to handle discovery related compliance issues and all new motion practices that will be required in the first 15-45 days of every misd. and felony case after January 1, 2020;
    b. Liaisons with each law enforcement agency in the County to insure acquisition and delivery of all related information to the case (6 people)
    c. Two (2) new investigators to work with and assist witnesses and victims dealing with the new and early disclosure of names,

addresses and contact information to defense and assist in obtaining evidence and outstanding items from law enforcement. The estimated annual costs for the true need was in excess of $1,000,000.

This necessary plan is simply unworkable under the current budget for Washington County. To illustrate this fact below is our County total budget and Tax Cap impact:

2019 General Fund Budget	$87,654,309.00
2019 General Fund Payroll	$25,796,456.00
2020 Wages based on 5 unions @ 2.5%	$26,441,367.00
2020 Wages increase	$644,911.00
Fringe @ 47.50%	$306,332.00
Total Wage increase ***before*** Discovery Requests	$951,243.00
2019 tax levy	$33,343,212.00
2020 Tax Cap Limit	$34,188,017.00
Allowable Tax Cap Limit	$844,805.00
Salary deficit ***before*** Discovery	($106,438.00)

As the above illustrates our County is already above the tax cap before ever considering any efforts at complying with this new law.

BECAUSE THE ABOVE IS SIMPLY UNWORKABLE IN THE REAL WORLD of Washington County Budget what we did as a team was develop what each of us believe is our bare minimum needs to comply with this new law. Those plans were put forth and presented to the Board of Supervisors. In each instance these requests focused solely on compliance with prosecution of Misdemeanors and Felonies only. These are cases that we know of and have a certainty in what will be required. This total request by Public Safety (911 Call Center), Sheriff and District Attorney's office totaled just over $400,000, or less than 40% of the actual need.

At present the County is still considering our budget requests. Initial indications are that the Budget Officer will not be recommending full funding of the scaled down request because of tax cap issues.

As you know doubt realize although our budget requests and plan may vary slightly from my colleagues, the concept and challenge we face are identical: Our financial needs to comply with the spirit and letter of this new Law will significantly exceed what our Counties are able to fund.

I think the more relevant question to be asking is what do we, both you as Legislators and us as Prosecutors, all believe in, what are our common concerns and how does this fit with the overall objective of these new laws.

1) I believe that you, like my fellow District Attorneys, care about ALL New Yorkers, not just our actual constituents
2) Goal of the statute is to provide a rule of law that provides all defendants with evidence as early as possible
3) Goal of Criminal Justice in total is to protect all New Yorkers: defendants, victims, witnesses and all citizens in general.

With this in mind, I am struck by the significant difference in the State's response to implementing Raise the Age with the State's indifference to implementing this new law. With Raise the Age the State:

1) Delayed implementation of the law for one and half (1 ½) years and phased-in implementation over a two-year period;
2) Impaneled a state-wide task force consisting of stakeholders from all areas of the state including:
    a. Governor's representatives
    b. Probation
    c. Courts
    d. Corrections
    e. District Attorneys
    f. Public Defenders
    g. County Attorneys
    h. Department of Social Services
    i. And many more
3) This group (of which I was a member) met regularly over the 18-month period from passage to implementation to develop plans and answer questions to assist counties in

complying with this new law. Additionally, we engaged in extensive inquiry to determine areas of costs and needs to insure successful implementation of this new and important law.

As a result of these efforts, not only has the implementation of Raise the Age been heralded as a success, the State implemented a funding stream to offset costs of Counties associated with complying with Raise the Age. All counties needed to do was submit a plan associated with compliance and, once approved, any increased costs to the county associated with complying with Raise the Age are reimbursed by the state.

Conversely, with this new law there has been absolutely no assistance from the state either in interpreting the law, implementing the law or, and most importantly, NO FUNDING TO ASSIST COUNTIES IN MEETING THE SIGNIFICANT NEW COSTS ASSOCATED WITH COMPLIANCE.

When I consider the old saying "we put our money where our mouth is" I wonder what the true objective of this new law actually is. Especially when you consider the one big Hook in the Raise the Age Funding program implemented by the Governor: A *County with an approved Raise the Age Plan will be denied reimbursement if they exceed the Tax Cap.*

A true cynic would wonder if the State placed this restriction in the Raise the Age funding program knowing full well this new Bail/Discovery Plan was coming in 2020 and that any hope with compliance, would most certainly cause many counties to break the tax cap. Thereby, placing Counties in the impossible position of either:

1) funding the necessary costs to comply with the new Discovery Law and losing reimbursement of costs associated with Raise the Age; or,
2) not funding the costs necessary to comply with the new Discovery Law, resulting in dismissals of a significant number of criminal matters.

Lastly, especially in rural counties like Washington, where limited transportation and services are the rule, I am deeply troubled about the impact these new laws will have on our efforts at diversion; especially dealing with the continued public health crisis stemming from opiate addiction.

An uncomfortable truth is that many people currently in long term sustained recovery are there in large part because they were held on bail and "forced" to detox.

Very often individuals arrested for crimes, that turned out to be due in large part to their struggle with addiction, have eventually had bail set by a Judge and would be remanded to the County Jail. Once the initial horror of detoxing had passed, these same individuals who cursed the Judge for setting bail and denying them access to their drug of choice (usually opiates) often wanted to pursue diversion and recovery, versus further incarceration (both from being in jail and being imprisoned by their addiction).

Without bail, these individuals in our rural communities will most likely be returning to their homes with the very people that were facilitating their drug use; and rather than finding recovery will just continue the cycle of drug abuse and active addiction, leading to death, not recovery.

I am not advocating detoxing in a jail cell. What I am concerned with is we have no meaningful alternative in our area and there appears to be no funding nor any effort to address this HUGE hole in our residential treatment opportunities. The inevitable conclusion to this unintended consequence of Bail Reform will be fewer people choosing recovery, exacerbating an already bad situation, at a time when we are finally making some headway in this public health battle.

So, I will close with two questions:

1) If the goal of the law is to actually provide defendants with all material related to the incident leading to their arrest, why did the State Legislature not include any funding in the 2019/20 budget to address County needs and State Agency needs?

2) Is the State prepared to provide the critical funding needed to build and staff long-term residential treatment beds in rural communities to address the critical shortage in our efforts to combat the public health crisis caused by opiates?

Thank you.

New York State Standing Committee on Codes
Implementation of Discovery Reform
DAASNY President Orange County District Attorney David Hoovler
October 28, 2019

Good morning Senators. I once again thank you and your staff for the opportunity for District Attorneys to present our concerns about the implementation of the new discovery laws. As you know I am the Orange County District Attorney and I also serve as the President of the District Attorneys Association of the State of New York, known as DAASNY.

I will be brief since I already appeared in front of this committee at the first hearing on this topic in New York City last month. Today we will be hearing from some of my upstate colleagues about how these new laws will impact their offices. Many of the District Attorneys who are here today are from smaller counties and from counties with fiscal and budget situations that may not be as strong as some of our downstate colleagues. In upcoming months, I urge you to continue these conversations so we can all work together to help find the solutions that will allow these new laws to be successful for our entire State.

After the last hearing, I convened a Discovery Summit and invited elected District Attorneys from small and mid-sized counties north of New York City. I wanted these prosecutors to be able to share ideas and exchange information and concerns with each other. We had a frank and purposeful discussion about how these laws will impact our counties.

Every single office in attendance is concerned about the implementation of the new laws by their police departments as well as the New York State Police. Most offices were concerned with workflow and compliance by laboratories. We are also concerned about how to prosecute Vehicle and Traffic Law infractions with the new discovery requirements related to these cases. Under the new law, all discovery relating to a vehicle and traffic law case will have to be turned over within 15 days. This includes 911 calls, police radio transmissions, police reports, body warn cameras and other items related to a simple traffic stop. I cannot stress enough how the process of obtaining and preparing discovery for exchange is extremely labor intensive. Smaller offices with fewer ADAS and investigators will be at a significant disadvantage. To begin to even try to comply with these laws will require completely new processes and management of staff. I learned that government's of many smaller counties do not have the resources to adequately fund the requests that are being made by local District Attorneys.

I can assure you that all of our offices are doing our very best to prepare to carry out these laws as best as we can. After these discussions, I am not confident our offices will be anywhere near being adequately funded. As we have been doing all along, prosecutors

will continue to engage in careful planning because we know we will ultimately be responsible for carrying out these laws.

Many upstate offices feel like nobody in our State government is listening. They are concerned about State labs that are already at capacity and whether they will be able to expand capacity and test evidence more quickly and in more cases. My colleagues are concerned about how they will review and redact body worn camera footage. They are concerned about how they will obtain documents in a timely manner from multiple police departments in different formats and how they will provide this information to defense attorneys. My fellow prosecutors are also faced with the important task of keeping victims and witnesses safe under the new laws that will disclose their names and addresses much earlier in a case. Many residents in these small counties have already voiced their concerns about victim safety. There is a real need for funding for pretrial services outside of New York City.

Please listen carefully to my fellow prosecutors here today and try to get a really good picture of how these laws will play out in smaller counties. The ultimate success of these laws depends on prosecutors being able to comply with them. We are asking for help. We are asking for help from our local governments, from you and from the Governor. I ask you to look carefully at what we are presenting.

My name is George LaMarche. I am a private practicing criminal defense lawyer. I am also a civil litigator and limit my civil practice to representing plaintiffs in serious personal injury claims.

I would like to thank the many people who have dedicated countless hours and tireless energy to bringing much needed change to our criminal justice system.

My perspective is a little different than some of the other individuals who have testified before you in that I am not only in private practice, but I am also a civil litigator.

As you know, when a claim is brought against a defendant in a personal injury claim, that defendant is entitled to full and complete disclosure of all matters material and necessary to the defense of the action. As a plaintiff's lawyer I can't say to the defendant's lawyer, my client was injured, pay my client money - unless there is full and complete discovery. I can't say, your client knows full well what he/she did so pay my client - unless and until there is full and complete discovery. In a civil case, understandably, the defense wants to examine my client's background, explore all of her medical history, obtain statements or take depositions of all parties and relevant non-parties as well as obtain disclosure regarding the use of experts.

On the other hand, historically in NY, a defendant in a criminal matter essentially received none of this information until the day of trial.

I've struggled with the fact that claims for money seemed more important than matters where a defendant faces prison. That our state was more content with someone going to jail than it was with someone having to pay a money judgement.

For years I've had to explain to my clients the fundamentally unfair system of justice in NY that authorizes more mandated discovery in a simple tort case than for a person who is facing life altering consequences and loss of liberty.

We have heard the calls from prosecutors that the capabilities to comply with the sweeping and long awaited discovery reform will be difficult. That the limited resources and technological incapacities will require millions of dollars and additional resources to make compliance possible. We've also heard complaints that this statute will require more judicial intervention, applications for protective orders and more hearings.

However, in my experience in civil cases, judicial intervention is rarely required because plaintiff's and defense counsel often work to together to resolve issues rather than filing motions and seeking judicial involvement.

Importantly, if I decide to prosecute a civil case on behalf of an injury victim, I know what the rules are. When I go to a conference in a civil case and the court sets a scheduling order I don't say that I don't have the time to get the discovery done because my firm lacks technology or staff. If I decide to prosecute a civil case, I do it with the knowledge that certain obligations need to be met. If I can't or do not want to comply with those obligations, I don't pursue the case. If I have concerns that a case may lack merit or that I may not have all of the necessary information to prove my case, I decline to prosecute the case. The rules as they exist force me to make important choices before proceeding with an action.

This same concept will apply to prosecutors.

For too many years prosecutors have utilized the discovery rules to hold back information and game the system; to push plea bargains or threats of higher sentences without an ability for a defendant to view all of the evidence and make a truly informed decision. The new discovery rules finally swing the pendulum back in the right direction and make our justice system much more transparent. These new rules return a sense of trust to our system of justice that are long overdue.

In my experience, prosecutors have not appreciated that I have an obligation to offer guidance to my clients about the evidence against him/her and the likelihood of success. That in order to honor my clients 6th amendment right to effective assistance of counsel, I have an ethical and professional obligation to obtain evidence so I can properly provide guidance and counsel. I've received plea offers from prosecutors at arraignments with time limits to accept or reject. I've heard prosecutors say your client knows what he/she did, despite the well-known burden of proof. I've walked into conferences with judges, probation officers and prosecutors and felt like I was walking into a party I didn't receive an invitation to attend; where the decisions about my client's future were already made long before any discovery is ever provided.

The expectations placed on defense lawyers by clients and the ethical cannons we agree to in becoming involved in cases are now being honored by this new discovery statute.

While any amount of change can bring some feeling of fear, with change will come a new normal as the system will adjust and adapt.

It should not be a time of complaining about what we can't do or how hard it's going to be to do it or how much money it's going to take to make it happen. This is a new opportunity, a time to reassess how things are being done, to prioritize, and to cooperate and collaborate to do what needs to be done to move our system of justice forward.

I hope the energy being spent challenging, questioning and criticizing the work that has been done to finally bring us up to speed with the rest of the country, can be refocused on what needs to be done to make this work. Because we all have a goal to administer justice and these new discovery rules will finally help us achieve that.

To: New York State Senate and Assembly Joint Budget Hearing Committee
From: New Yorkers United for Justice
Date: October 28, 2019
Re: Testimony by Khalil A. Cumberbatch, Chief Strategist

Thank you, Chairman and Committee Members for the opportunity to speak before you today. *My name is Khalil A. Cumberbatch. I am here today on behalf of my organization, New Yorkers* United for Justice (NYUJ) —a broad, diverse coalition that I am heading up along with another formerly incarcerated New Yorker, Topeka K. Sam, with one mission: ensuring a fairer and more just criminal justice system for all New Yorkers.

As a new organization, we worked with our colleagues to help raise state-wide awareness of the need for pretrial reforms. After dozens of conversations, we decided to launch a video campaign that focused on discovery reform, because we believed, as did many others, that discovery, despite its misleading and ambiguous legal terminology, it referred to one of the core values of our justice system, a value that is shared across political spectrums and ideologies. The simple notion that if you are accused of a crime, you have the right to see the evidence and face your accusers in court. However, and as this committee knows well enough, the theory was very different than in practice.

Thanks to members of this committee, and other members of both chambers, NYS joined 35 states, (including Texas, New Jersey, and Florida) who have open-discovery practices that require prosecutors to turn over police reports and other evidence in a timely manner in the criminal case process. Prosecutors in these states support lifting so-called "blindfold laws" to ensure that laws fairer and more efficient:

> **Assistant District Attorney Linda Garza, Webb County, Texas**, said: "Prior to discovery reform, Texas prosecutors were saddled with the "gatekeeping" responsibility of deciding what evidence should be turned over to the accused. But under the Michael Morton Act, we've been relieved of this ethical dilemma without any increased security concern for witnesses or victims. Every day, open discovery helps restore Texans' faith in our criminal justice system and we know it's something New Yorkers can accomplish here."

Texas, a particularly conservative state reformed their discovery laws in 2013 to no ill effect. That year, Texas, a historically "law and order" state with 254 counties, 192 more counties than NYS, passed and implemented the Michael Morton Act, named after a wrongfully convicted, falsely imprisoned exoneree. Michael was convicted in 1987 and sentenced to life in prison for the murder of his wife. He was exonerated in 2011 after DNA testing connected

another man – who subsequently killed again - to the brutal crime. In their investigation, Michael's lawyers discovered that the prosecutor in the original case had withheld critical evidence that could have pointed to the real killer and spared Morton the quarter-century he spent behind bars and would have spared another woman's life and another family's senseless tragedy.

It is worth noting that since 2013, the "sky hasn't fallen" in Texas as it relates to public safety, witnesses' names and address, along with other sensitive information being leaked or turned over to defense counsels. In fact, crime rates in Texas, as well as other states who have implemented similar laws, have seen crime rates decline.

Similarly, In NY, there have been equally appalling cases of injustice where the withholding or delay of turning over critical evidence led to the false confessions, and therefore, wrongful convictions of individuals, costing tax-payers millions of dollars spent in prosecution, housing and, in some cases financial compensation payouts to those wrongfully convicted person(s). The exonerated five, formerly known as the Central Park Five, being one of the most prominent and examples.

Another example is the case of Dewey Bozella, who said:

> "In 1977, 92-year-old Emma Crapser was murdered in her Poughkeepsie, New York apartment and police claimed Crapser walked in on a burglary I was committing and that I killed her. Once convicted, I learned that key information was not disclosed to my defense, including pages of police reports containing statements from neighbors that contradicted the testimony of the prosecution's key witnesses. Discovery rules requiring earlier disclosure would have enabled my defense to find these witnesses and call them at trial, and I wouldn't have lost more than a quarter century of my life. It is time for New York to get it right. No one should ever have to go through what I went through. I am a living example of how poor discovery can spell a dead end for justice and why lawmakers in Albany must pass discovery reform this session."

In closing, as the Committee knows, and as witnesses have highlighted already today, there are many benefits to the discovery reforms passed earlier this year. One of which being a much-needed upgrade of the digital capability of law enforcement and prosecution's ability to make evidence accessible much earlier in the process to defense, and also making the communication between police departments and DA's offices streamlined, thus eliminating the reliance on "tape rooms", triplecates, typewriters, and, and paper chain of command sheets. Bringing this aspect of the justice system into the 21st century is also a necessary and long overdue overhaul.

Most importantly, the new discovery law will make our communities safer. No longer will public safety be put at risk by the inappropriate withholding of evidence that has led to false confessions, pressured plea deals, wrongful convictions and ultimately the failure to hold those who commit crimes accountable for their actions. New York is safer, fairer and more just because of this law.

Thank you again Chair and committee members, if they are any questions the committee has, I will attempt to answer them now.

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New York State Senate
Codes Committee Testimony
October 28, 2019

Good Morning/Afternoon Chairman Bailey and members of the Codes Committee. I appear before you today out of concern about the level of service that the Office of the District Attorney may be able to provide to the residents of Cortland County - which is my highest priority as their elected District Attorney.

Though Cortland County is a small county with a population of 49,000, it is located between Binghamton, within Broome County, to the south and Syracuse, within Onondaga County, to the north with Interstate 81 transiting the north-south

axis of the county, this conduit of legitimate commerce, does engender illicit drug trade, among other illegal activities.

In recent months, I have repeatedly shared with my County Legislature, and now with you, information and details about the additional burdens that the State's recently passed Criminal Justice Legislation presents to my office. As an example, the "discovery" statute requirements are not a simple matter of turning discovery materials over to defense counsel.

Technology can assist with the retrieval of discovery materials; however, these materials must, in every case, be reviewed. This review process is not something capable of automation and still requires the gifts of human intellect to address.

Currently, discovery is a practice that is generally engaged in in those cases that are upon a trial track, *e.g.*, in 2018 my office handled 1,614 felony cases, of that total 156 cases were

either Indicted or advanced to County Court on a Superior Court Information, this is a scant 9.67 % of the total; of this, 9 cases were tried, this is slightly more than one half of one percent, i.e., .557 % of the total felony cases only.

After January 1, 2020, due to legislation you've enacted, discovery returns will be required in 100% of all filed criminal cases; to include misdemeanors; *as well as all vehicle and traffic cases*, which represents to my office tens of thousands of additional cases requiring discovery. This discovery *must* be reviewed in its entirety to ensure that sensitive information, such undercover and confidential informant identities, victim demographic information, or material relative to law enforcement tactics and procedures are addressed in protective orders and not inadvertently or prematurely divulged. This presents an increased workload for my office staff of 5 Assistant District Attorneys and 4 Administrative Support Staff that can

only be described as *astronomical*, and cannot be met by my current staffing. It bears mentioning that the Cortland County District Attorney's Office is one of ten, of the 62 statewide, without an Investigator. It will amount to literally thousands of hours of additional work per year; work that my present staff, already working many hours beyond their compensated 35 hours per week, merely due to their *professionalism*, currently cannot reasonably be expected to handle.

For Fiscal Year 2020 I have made the following requests above my Fiscal Year 2019 budget, due solely to the changes in the CPL:

For personnel I have requested

one (1) additional Assistant District Attorney, to be tasked with discovery compliance,

two (2) Paralegals; and,

one (1) keyboard specialist,

all of whom can be entry-level personnel that my current staff would commit to train. Upon the current Cortland County contractual pay-scale for salary, costs, and benefits, this is an increase of - $ 295,794.69

Digital Evidence Management System

I made a subscription request of - $ 5,000.00

This system is the only realistic way I may reasonable retrieve and disseminate discovery.

Professional Services (this is the line-item I use for my Grand Jury Stenographer who is a contract vendor) - $ 26,400.00

As Grand Jury transcripts will be required to be produced in every indicted matter within 15 days of arraignment.

Additional material support of 1) Lexis 2) Additional 'phone lines 3) Additional publications, 4) Additional

computers, and 5) Additional MS Licenses for the computers equaling $ 8,247, for a total of $ 335,441.69.

Less than a half a million-dollar increase in my budget may not seem like much money in comparison to the State's budget in the billions or to metropolitan counties, however, Cortland County is cash strapped, with a jail in need of upgrading for the past decade. I have been told by the Acting County Administrator that the Cortland County Legislature is presently trying to close a 1.7 million dollar budget gap.

Cortland is a County that is served by 16 local courts, presided over by 18 judges, only 5 of whom are attorneys, spread over 500 square miles. Most of the Justice Courts meet twice a month in the evening, with the largest Town Court and the City Court meeting twice per week. My office receives cases from 7 different police agencies, only three of which submit electronically. The Sheriff's Office and the Cortland

City Police Department, the two largest case generating agencies, have case tracking systems that are not currently capable of interfacing with the District Attorney's Office. For those agencies not submitting electronically, my office in some instances is not receiving cases files for up to 6 weeks after an arrest. Certainly, this is not fast enough to comply with the new discovery statute.

Cortland County is a County that is at 94.6% of its taxing authority and I am informed by the Chairman of the County Legislature that all of my additional personnel and other funding requests for 2020, largely due to the Criminal Procedure Law, § 245 statute, have been denied in the Administrator's budget in an effort to stay below the State Mandated Tax Cap. Further, my request for professional services, *i.e.*, the budget line from which I pay my contracted Grand Jury Stenographer was not fully funded. I'm sincerely concerned that the lack of financial

resources from my County and the failure of this body to be fiscally responsible in funding a piece of legislation that it enacted within the State's Article 7 budget process, will, of necessity force my office to institute a prioritization of criminal prosecutions.

This prioritization may necessitate my granting prosecutorial authority of vehicle and traffic infractions, representing some 41,000 cases per year, either to the law enforcement agencies writing the traffic tickets or to the municipal attorneys representing the municipalities wherein the offenses are alleged to occur, both of whom I'm fairly certain are less capable of handling the discovery requirements than my office, as they have received no resources for this effort either. Such could leave Cortland County practically without traffic enforcement except in criminal matters and incidents involving

fatalities, personal injury, or excessive property damage. This is far less than ideal and represents a clear threat to public safety.

New York State has for the past ten years enjoyed being the safest large state in the country and the fifth safest state nationwide. I, reluctantly predict that such will no longer be the case in the near future and such will be directly owing to the actions of this legislature this year. Thank you, I'll take any questions you may have.

Respectfully Submitted,

Patrick A. Perfetti,
District Attorney

Testimony of Darryl Herring, Community Leader at VOCAL-NY
Presented Before the New York State Senate Committee on Codes
Re: Implementation of Pre-trial Discovery Reform
October 28, 2019

Hello, my name is Darryl Herring and I am a community leader at VOCAL-NY. I have experienced, first-hand, how prosecutors have used their power and authority in unfair ways, leading to this epidemic of mass incarceration that we are experiencing in the United States and in New York State. I have been victimized by prosecutors and the police undermining due process and the rule of law. It's not fair.

As I studied my case from Rikers Island, I learned more about the discovery process in New York State, and the way that prosecutors had abused the system against me. Over the past several years I fought to change the law, so that other people coming after me would not have to suffer in the same way I did.

While I was in jail, I met many people going through the criminal justice system, who had previously been convicted of felonies. These felonies were like a noose around their head. Some had felony convictions for things they had actually done, others were innocent, but had copped out because they were scared of the power that prosecutors wielded against them. In New York State approximately 98% of cases resolve with through dismissals or cop outs. No one goes to trial because discovery is withheld. Many people suffer from mental anguish while being incarcerated and cop out in order to get out of jail.

No one in jail had ever seen any of the evidence that prosecutors had against them -- people were blindfolded and unable to mount a defense. If prosecutors had been required to hand over discovery, like they will under the new law, many people would not have the convictions they have now.

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From what I know, prosecutors' first line of duty is to get the basic facts of a case. Prosecutors have been notorious for withholding information relating to the basic facts of the case, which has brought us to where were are today where a change to the law was required. Unfortunately what we are seeing now is prosecutors using stall tactics and misleading information, in order to try to maintain power in the system. That power will be used to withhold exculpatory evidence and undermine due process.

For example, they are arguing that they will not have enough time to gather evidence within a 15-day window -- we know that this is not true. They will be able to gather the evidence that they prioritize. In one recent case in Manhattan, a person shot a police officer and threw the gun into the East River. They had no problem finding the gun and all other evidence in just a few days. Similarly it doesn't actually take that long to get lab reports -- prosecutors just do not prioritize getting them back quickly right now.

But when a person might be innocent, and the prosecutor knows it, then all of a sudden they start saying that they cannot get this possibly exculpatory material and they push you to cop out instead.

Prosecutors are also arguing that the discovery laws will endanger public safety, but there are already many laws in place that protect victims and witnesses in this process. We do not have a perfect criminal legal system, of course. What the prosecutors are doing right now is making a mountain out of a molehill.

I do understand that change is difficult and can bring conflict, especially when someone is used to holding all of the power and must now give some of it up. However if the prosecutors had been doing the right thing all along, simply providing discovery materials in a timely fashion instead of withholding it to gain an advantage and push people to cop out, we would not even be here talking about this issue.

As a state, we spend much too much money on lawsuits for wrongful convictions. The new discovery law will cut down on a lot of that, if it is followed appropriately. This will benefit the state because they won't have to pay up all that money in lawsuits, and they will also save money from not keeping innocent people in jail.

This system is designed to violate people and coerce you. These discovery reforms, if implemented correctly, will make the system more honest. That's an important thing. Below are some recommendations that I would like to submit to the committee and to Senator Jamaal Bailey, for consideration.

RECOMMENDATIONS

1. **Create and maintain a centralized database for discovery.** When you are in the court system, it says a "unified court system," but as we know with discovery this is not really true. The court should create a central database for all the evidence in a case so that a judge has an opportunity to make sure that everything is done right. Prosecutors should not be the gatekeepers for evidence, instead it should be available to both sides. This would stop the prosecutors from trying to buy time to figure out how not to turnover exculpatory materials. For example in the Bronx, all cases go to central bookings and then are dispersed into various courtrooms. Discovery should work the same way.

2. **All discovery in a case, whether turned over to defense or not, should be secured and made a part of the central court file.** The new laws will require discovery to be presented in a timely manner, but in some cases, particularly where there is a dismissal or a plea early on, discovery may not be handed over. It is essential that district attorneys hand over all evidence in a case for the court to keep on file as a requirement for formally closing out a case. This will save time and ensure more fairness in post-conviction proceedings.

3. **Law enforcement officers must not be above the law.** Importantly the new discovery law focuses on prosecutors, not other law enforcement officials, like police. We know that police officers are also part of the problem with respect to discovery in criminal cases. This is important in two ways: first, police officers might not give prosecutors exculpatory evidence. There must be something in the law to prevent this from happening. Additionally prosecutors have historically withheld discovery that speaks to illegal acts by police officers, or activities by officers that would damage their credibility on a specific case. This cannot be tolerated. We call on the state legislature to work with us to ensure that bad cops are brought to

light, and that prosecutors cannot manipulate the discovery process in order to protect and enable the bad acts of the police.

Thank you very much for considering my testimony and working hard to ensure that discovery reform is implemented swiftly and fully.

Darryl Herring

David Schopp, Chief
Executive Officer

Michele Finn, Chief
Administrator

Criminal Defense Unit

Kevin M. Stadelmaier
Chief Attorney

LEGAL AID BUREAU of Buffalo, Inc.

TESTIMONY OF:

Kevin M. Stadelmaier – Chief Attorney

Criminal Defense Unit

LEGAL AID BUREAU OF BUFFALO, INC.

Presented before

The New York State Senate

Standing Committee on Codes

Hearing on the Implementation of Pre-Trial Discovery Reform

October 28th, 2019

My name is Kevin Stadelmaier. I am the Chief Attorney of the Criminal Defense Unit for the Legal Aid Bureau of Buffalo. The Criminal Defense Unit is the premier provider of indigent criminal defense representation in the City of Buffalo. With 31 attorneys and 14 support staff representing approximately 12,000 clients per year in Buffalo City Court, NYS Supreme Court and Erie County Court, we pride ourselves on providing the highest quality of client centered representation without regard to cost.

I am also the Legislative Co-Chair of the New York State Association of Criminal Defense Lawyers (NYSACDL) and although my colleague Karen Thompson testified in the September 9th, 2019 NYC Public Hearing, my comments today are made with the full backing of NYSACDL as well.

I want to personally, and on behalf of the Legal Aid Bureau of Buffalo and NYSACDL, 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. 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. And further, I want to thank the NYS Assembly and Senate as well as Gov. Andrew Cuomo for at long last instituting pre-trial discovery reform as well as the tireless work of many countless Public Defenders and criminal justice reform advocates who have spent years fighting for the very reforms that were implemented during the last session.

We anticipate that these reforms will bring a heretofore unseen level of fundamental fairness to a process that for many years was fundamentally unfair. No longer will our clients be held on unfair bail awaiting trial only to be offered plea bargains without first being apprised of all of the evidence against them.

With these amendments to the bail, discovery, and speedy trial laws, most people who are arrested will be guaranteed release rather and will have all the evidence and information related to their case before being forced to make life altering decisions. 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. Given the devastating impact that even 24 hours in jail can have on a person, particularly impoverished clients with so much to lose, 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 effective implementation

Under the outgoing discovery statute in New York, unlike most of the rest of the country including such liberal outposts such as Texas, 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. This "blindfold law" contributed to mass incarceration, wrongful convictions and court delays. This injustice had 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 system effectively operated 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 in some cases extended to 45 days) and on an ongoing basis. It also mandates that prosecutors make these disclosures prior to the expiration of any plea offer. It further mandates that a Prosecutor's plea offer not be conditioned on the waiver of the discovery obligations; an important provision to prevent abuse of the system. 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.

In the first Senate hearing on discovery reform implementation, several prosecutors stated that the law would require them to turn over DNA lab results before they are completed and that failure to do so would result in a case being dismissed. Contrary to these fear-mongering talking points, the law does not require them to turn over what does not yet exist, as is common sense. Furthermore, the range of sanctions listed above offer judges a variety of options for ensuring compliance and it is frankly absurd to suggest that judges will dismiss charges for failing to turn over DNA lab results that have not been completed. More to the point of the law, prosecutors will have to turn over drug lab results as soon as is practicable, which are often complete early in a case but under the outgoing discovery statute are withheld for many months.

Witness and Victim Safety

Prosecutors throughout the state 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.

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.

Timely Discovery

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. You may hear that the truncated timelines on obtaining and provisioning discovery are one of the main sticking points to implementation. While we agree that the timelines will require fundamental changes in prosecutorial practices, the stakes are too high to allow DA's offices to hide behind pretextual logistical excuses any longer. Prosecutors in other states with early discovery have long complied with their states' laws. With the right administrative philosophy, this can readily be accomplished. And further the statute allows for extension requests where appropriate.

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. Having early access to these items to review them with our clients and advise them on plea offers is of critical importance. Whereas before our attorneys were forced to counsel defendants on life-altering plea offers, many with dire collateral consequences, without the benefit of knowing everything there was to know about a particular case, no longer will be have to do so. These reforms fundamentally alter the landscape of the attorney client relationship in criminal cases, as we can now have a fully informed discussion about available options with the benefit of having all the factors available for review.

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.* At Legal Aid Buffalo, we are centralizing both the receipt and transmittal of discovery in order to track, log and distribute materials more efficiently which ensures not only that we hold the People to their burdens, but that we also ensure items important to client defense aren't lost or misplaced. Given the amount of incoming discovery and the timelines it will be coming, It's a whole new world for us and, as exciting as it is, without strong preparation from our end, the

new reforms could prove very challenging. However, we are up to the task. In fact, we wouldn't have it any other way.

The Erie County District Attorney

What should not be lost in all of this is that the District Attorneys Offices around the state, instead of fighting tooth and nail to gain ground against the reforms, should instead see themselves as partners in implementation of these reforms. While there will always be an adversarial relationship between prosecutors and defense counsel, an overriding principal of fundamental fairness should always permeate and prosecutors must seek to always do justice rather than leverage power to secure convictions. While some prosecutors' offices have taken an obstructionist and alarmist position relevant to these reforms, the District Attorney of Erie County, John Flynn, has taken a different tact. DA Flynn, and his key deputies, have been working collaboratively with our office on the implementation of these reforms. Instead of seeking ways to subvert the reforms or undercut the required provisions, they have been diligent in meeting with stakeholders and reforming their administrative processes to assist us with the logistics of these complicated reforms. They deserve credit and in our view are a model for the rest of the state prosecutors to follow. While we expect that they will, as always, zealously prosecute those they believe to be guilty of crimes, they absolutely recognize that these reforms are important and require substantial efforts to effectuate them as intended. For that, we offer our thanks to DA Flynn.

Conclusion

The Legal Aid Bureau of Buffalo recognizes that change is always difficult. We further recognize that there are certain factions who will never agree that the reforms as highlighted are a positive development. While we strenuously disagree, we understand that position. However, after years of watching our clients languish under an unfair criminal justice system – a system where prosecutorial efficiency and pragmatism was prized over transparency and fairness – it is clear that we can never go back. These reforms were hard fought over a period of years and thoroughly considered in advance. These reforms demonstrate New York State's commitment to bringing our criminal justice system into the 21st Century. The reforms recognize that no longer can indefinite pre-trial incarceration and trial by ambush be the normative state. The reforms achieved were deliberative and designed to impart fundamental fairness and we urge you to continue to support and uphold the important gains that were achieved. Thank you for your consideration of our comments.

If you have any questions, please contact Kevin Stadelmaier at kstadelmaier@legalaidbufflao.org or 716-853-9555 ext. 219.

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
October 28, 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 people power to advance issues that are at the center of transforming society - including ending mass incarceration and overhauling New York's archaic and unjust pretrial system. As this committee knows, directly impacted communities, advocates, defenders and elected leaders fought for years to win long overdue pretrial reforms. I would like to thank Senator Bailey and Assemblymember Lentol for championing the new discovery law, and the Governor and Senate and Assembly Democrats - each and every one of whom voted for the passage of this law. The new discovery law brings New York in line with dozens of states across the country who have successfully passed and implemented laws to overhaul discovery practices - including traditionally "red" states like Texas - because advancing fairness, transparency and efficiency is not a partisan issue.

In more than 40 other states across the country, prosecutors are required to turn over critical evidence like police reports and witness statements early in the case, without requiring the accused person to make motions to the court to obtain them. Without early and open discovery, given that more than 95% of cases end in a plea bargain, the vast majority of people accused of crimes and their defense lawyers may never see the evidence against them when making critical decisions about whether or not to accept a plea. Particularly when a person is jailed pretrial and denied access to the evidence in their case, they are likely to agree to plead guilty to a lesser charge, regardless of their guilt or innocence. Prosecutors often overcharge and leverage draconian sentencing laws in ways that make it extremely risky to go to trial. The options at hand are to accept a plea deal on a lesser charge along with whatever sentence the prosecutor is offering, or face trial on the top charge that the prosecutor filed, with no information about the case against you, and trust that a system rigged against you and rooted in racism and stigmatization will serve you justice. What choice would you make?

The importance of our new discovery law cannot be overstated - and is a critical step toward rolling back the rampant injustice of a pretrial system that is woefully imbalanced and designed to decimate communities of color. The new law was carefully crafted over the course of years - with input from stakeholders across the board - to ensure open, early, and automatic turnover of case evidence, which is essential to making sure that New Yorkers and their attorneys have the information they need to properly prepare for their own defense. Despite the false rhetoric being pushed by law enforcement in the press and to the public - the new discovery law was written with deliberate attention to protecting witnesses and includes the same measures that have been used in 40 other states. In fact, New York's new law goes even further than many other states' to ensure witness safety - an issue that, in reality, only comes up in a very limited percentage of cases to begin with. Under the new discovery law, judicial discretion will remain in place for the sharing of witness contact information. Judges can choose to only share witness contact information with the defense attorney, and all discovery materials are subject to withholding by court-ordered "protective order" if any factor outweighs the usefulness of turning over the discovery material. Motions for protective orders made by prosecutors are granted by judges nearly 100% of the time if they find it to be necessary.

Prosecutors have opposed discovery law reform for decades in order to maintain the upper hand in court and their power to withhold evidence and coerce plea deals. Prosecutorial advantage in the courtroom has resulted in decades of court delays, wrongful convictions and mass incarceration - and is driven by the perverse incentive of law enforcement metrics - wherein success, promotions and professional advancement within the system are measured by securing convictions at all costs, rather than achieving outcomes that help to address and prevent future harm. Despite the fact that a majority of New Yorkers and state electeds support the new discovery law, prosecutors continue to engage in coordinated strategy to subvert the pretrial reforms before they've even gone into effect by spreading fear and misinformation. This is extremely concerning, as prosecutors and law enforcement are literally responsible for upholding the law, not circumventing it.

Recently, these opposition efforts have become more explicit, with prosecutors publicly stating their intentions to manipulate the new discovery law to the greatest extent possible in order to maintain the

status quo. In statewide trainings, documents and public forums, prosecutors are sharing strategies for how to circumvent the new law and prolong discovery turnover. District Attorney's offices are directly explaining to other prosecutors how they can delay and withhold the sharing of discovery material by delaying the setting up of arraignment on the indictment, unnecessarily identifying people as 'confidential informants', and increasing claims of "exceptionally voluminous" discovery - which flies directly in the face of the spirit of the new law. Prosecutors should not be training on how to "stop the clock" - but on how to achieve the intent of the law.

Prosecutors continue to claim that implementing this law will cost enormous amounts of money. This is patently false and reduces values for justice, fairness and human life to dollar amounts and percentages. I've heard complaints about the increased work that will be required to pursue infractions, violations, vehicle traffic violations, and misdemeanors under the new law. A good way to address this concern and also reduce caseloads would be for prosecutors to decline to prosecute or dismiss these low-level cases.

The starting point for implementing this discovery law should be for District Attorneys to reprioritize how they run their offices in order to comply. Yes - implementation will require District Attorneys to rethink how they prosecute, bring fewer meritless cases and to reprioritize existing resources. Law enforcement should be treating arrests and prosecutions as limited resources, and thinking about discovery implementation as an opportunity to reallocate funds and shift many cases out of the system, because they never belonged there in the first place. These things are all easily done, and more importantly, are necessary for meeting discovery obligations when the law goes into effect on January 1st.

By requiring the timely exchange of all information collected by the police and prosecution in criminal cases, the new discovery law will lead to quicker, fairer, more accurate case resolutions - which means fewer taxpayer dollars spent to maintain the crisis of mass incarceration. These are resources that should be invested in the things that truly create community safety and stability - things like public education, affordable and stable housing, healthcare, community-based services and more. The

continued rhetoric from law enforcement that implementation of the new pretrial laws will necessarily result in decreased funding for programming and treatment is disturbing. This is not a zero sum game. Government can, and should, both implement the new pretrial laws and increase funding of services. And the costs that we should care most about - the costs centered by those who fought and won this law - are the human costs of an unjust mass incarceration system.

New York's discovery law was passed with the express purpose of achieving necessary overhaul of the system - statewide. Unlike downstate, in recent years, upstate counties have seen an explosion in pretrial incarceration - overwhelmingly targeted at people of color. Justice should not be served based on geography. Upstate counties face unique challenges in the fight to end mass jailing given that they generally have fewer defense and advocacy resources and more limited court infrastructures than New York City. This is exactly why strong statewide implementation and compliance with the new pretrial laws is critical. This is an opportunity to rethink public safety, which we all care about, and utilize the implementation process to advance solutions that create safety for everyone - particularly in low income communities and communities of color whose safety is threatened by a system of mass criminalization, punishment and incarceration. Prosecutors and law enforcement must not be allowed to undermine the implementation process and impede true safety.

I thank New York State's elected democrats - all members of the Senate and Assembly majorities and Governor Cuomo - because each of you, importantly, voted in support of the discovery law's passage. I hope to see that same commitment to achieving strong statewide implementation that achieves the spirit of the law. I and Citizen Action look forward to continuing to work with you to ensure full compliance when the new discovery law goes into effect on January 1st. Thank you.

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Testimony October 28, 2019 – P. David Soares, Albany County District Attorney

On behalf of the people of Albany County, please accept my warm greetings and appreciation for this opportunity to discuss our journey towards implementation. The past several months have presented my office with its most difficult challenge. I will discuss some of those challenges here today. I hope to also discuss some solutions.

It goes without saying that the reforms passed in the April 1 budget were significant. We do not need to spend any time here today debating or re-litigating what has been done. We must put aside our opinions and concentrate on the matter at hand. While some have called the legislation passed in the budget as Reform of the Criminal Justice System, I prefer to call it a Re-imagining of the Criminal Justice System.

In Albany County, and many upstate communities, Re-imagining the Criminal Justice System has presented us with significant WORKFLOW and TECHNOLOGICAL challenges. In fact, every county in New York State is experiencing the same burden.

Albany County is home to 11 distinct police agencies, 1 County Sheriff, the New York State Police, Federal Authorities, and the enforcement arms of every State agency including Tax, DMV, and IG. The vast majority of cases presented to our office originate with our police, sheriff, and state police.

With rare exception, every law enforcement agency owns and maintains its own technology. Smaller agencies will at times share technology with larger agencies. The technology includes a Computer Aided Dispatch System, Records Management System, Radio Transmission and video system, Body Camera and Dashboard Camera System. In addition, each agency will also have its own evidence tracking and storage systems.

A simple traffic stop will employ several technologies each stored in various places within a police organization. If a driver calls 911 to report a drunk driver on the road, that agency must preserve the call, the time it was received, the time a car was dispatched, the car dispatched, the time of arrival and the time the case was cleared. If the department has a dash camera and body camera policy additional materials are generated and must be stored. A simple DWI generates many documents, recordings both visual and voice, and test results.

Currently in most DWI incidents in Albany County, many of the materials just mentioned are turned over to defense in order for the lawyers to engage in meaningful discussions with their clients. There are

many materials that are turned over in what we term "Open Discovery." Electronic transmissions and physical evidence is provided upon demand for discovery thus triggering the collecting event within the departments.

Picture every police department as a SUPERMARKET with evidence, in all of its forms, for every case sitting in different aisles. When a demand is sent to the department, the demand is like a shopping list and various people are tasked with going up and down every aisle placing the items of that list in a cart. Once that cart is complete then the materials are sent to the checkout lane and delivered to the DA's Office for review.

The Discovery legislation recently passed will change this process in significant ways in that there are more materials being sought and the compressed timeline for compliance. In other words, there are more aisles and more shopping carts moving up and down every aisle. The discovery process will present the greatest challenge and need for investment in my office.

What I have described thus far are the challenges in getting the materials to my office. Once the materials arrive, we have the corresponding obligation to review the materials, redact where appropriate and make available these materials for the defense. Remember, in Albany County we practice Open Discovery which is also termed Substantial Discovery. Complete discovery is done only in cases heading for trial which is less than 5% of all cases. Requiring complete discovery in 100% of the cases requires significant investments.

I viewed some of the exchange that took place in a previous hearing where the speakers were discussing what was "Possible." The view of most people who do not work in law enforcement is that everything is digitized. Anyone who watches CSI or other television shows would be right to believe in the robust technological infrastructure. I watched a show where the police had data collected by the library. Nothing could be further from the truth. Creating that reality is POSSIBLE. What makes it PROBABLE is investment.

Jeff Bezos envisioned a world where people could click buttons and purchase products from their homes. I am sure that the vast majority of people who were aware of his vision doubted his ability to make that vision POSSIBLE. With strategically placed distribution networks and significant investments in technology, he made that vision POSSIBLE and we shop today in ways we could not have imagined 10 years ago. In world where we purchase music and food on our phones everything is POSSIBLE. But without investment, it wouldn't be probable.

The RE-imagined criminal justice system you have created is Possible but not with a 2% tax cap. REFORM without Investment is empty Rhetoric. You can either have REAL reform or the PALM CARD reforms which are as worthless as the paper they're printed on. Without state investment you will have created a dysfunctional patchwork of systems throughout the NY whose ability to comply would be dependent on a county's fiscal health. Zip Codes should not determine the quality of justice experienced in the court system.