

CITY COUNCIL
CITY OF NEW YORK

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TRANSCRIPT OF THE MINUTES

Of the

COMMITTEE ON JUSTICE SYSTEM

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HELD AT: Committee Room - City Hall

B E F O R E: Rory I. Lancman
Chairperson

COUNCIL MEMBERS:

Andrew Cohen
Alan N. Maisel
Deborah L. Rose
Eric A. Ulrich

A P P E A R A N C E S (CONTINUED)

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Brooklyn Defender Services

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A P P E A R A N C E S (CONTINUED)

Paul Capofari
Chief Assistant District Attorney for Staten
Island

Robert Masters
Executive Assistant District Attorney Queens

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2 CHAIRPERSON LANCMAN: Good morning,
3 everyone. If you can take your seats, we can get
4 started. Good morning. My name is Rory Lancman, and
5 I am Chair of the Committee on the Justice System.
6 Welcome all of you to this hearing on issues of
7 criminal discovery practices in New York City. We
8 are joined by Council Member Alan Maisel, who is a
9 member of the committee. In 2015, a New York State
10 Bar Association taskforce on criminal discovery
11 declared that "overhauling criminal discovery in New
12 York is urgently needed and long overdue," finding
13 that current law and practice deprived criminal
14 defendants of "critical materials" that are necessary
15 for them to make informed decisions about their
16 cases, to undertake proper investigations, to
17 intelligently assess plea offers, to secure and use
18 exculpatory evidence, and to adequately prepare for
19 trial before the last minute. A taskforce convened by
20 the Chief Judge of the State of New York was hardly
21 sparing in its own critique of the current system of
22 disclosure. Though the minimum standards for
23 criminal discovery are governed by state law and are
24 the topic of much discussion in Albany at present,
25 our City's five District Attorneys have developed

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2 their own policies and procedures to complement or
3 supplement state law requirements. These policies
4 have a direct impact on the operations of their
5 offices and on those of the public defenders, the
6 courts, and arguably the Department of Corrections.
7 They also affect the operations of an overall
8 administration of justice in our city. What role, if
9 any, does the state's discovery statute in each
10 District Attorneys' offices own rules and practices
11 play in the fair and efficient administration of
12 justice, particularly, as it relates to promoting
13 speedy trials, facilitating appropriate plea
14 negotiations, preventing wrongful convictions, and
15 ensuring that victims and witnesses come forth and
16 testify at trial. These are some of the questions we
17 hope to find answers to today and potentially guide
18 the Council as it considers what steps it can take to
19 promote a criminal discovery process in the five
20 boroughs that addresses a system that nearly everyone
21 agrees needs significant improvement. With that, I
22 call our first panel of witnesses to testify. Let me
23 also mention that we are joined by Council Member
24 Debbie Rose of Staten Island who is a member of the
25 Committee. And if you all would raise your right

1 hand and be sworn in, we can get started. DO you
2 swear or affirm the testimony you're about to give is
3 the truth, the whole truth and nothing but the truth?
4 Thank you very much. Is there any particular order
5 that you've sorted out?
6

7 LISA SCHREIBERSDORF: We voted. I've been
8 voted to go first. Thank you very much, Council
9 Member, for conducting this hearing. My name is Lisa
10 Schreibersdorf and I'm the Executive Director of
11 Brooklyn Defender Services. I've been a defense
12 attorney in Brooklyn for over 30 years, and I've
13 worked under four different DAs. I think the reason
14 that I'm chosen to go first is to talk about the
15 practices in Brooklyn regarding discovery. When I'm
16 down talking about Brooklyn, the stories you're going
17 to hear from the other boroughs are going to be very
18 different, of course. Brooklyn, I think, is the
19 model of what could be done or the best that could be
20 done under our very inadequate discovery statute. In
21 other words, our DA has made a decision, and this
22 goes back to Charles Hynes, in the early 90's, made a
23 decision that police reports and other information
24 about the case should be turned over to the defense,
25 and he started doing that on a trial basis with one,

1 many of the concerns that you hear. When there is
2 any issues, let's say it's a case with a gang, and
3 it's a known gang, and the District Attorney in that
4 case feels that it's not a good idea to turn over the
5 materials, they actually ask the court for what they
6 call a Protective Order even though under our law
7 they're not required to turn it over. So, they are
8 extremely respectful to the process that they have
9 envisioned, and they follow through with it as if it
10 was required. It is done through what is called a
11 stipulation which was signed, I'm going to say, in
12 1990 where they've agreed to turn over all the
13 information. There are certain circumstances where
14 they believe it is not a good idea to turn over
15 information, and in that case they do not do so. I
16 just want to say that, you know, for the most part I
17 want to really reinforce that it is a positive
18 experience, and I feel we're very fortunate. Our
19 clients are extremely fortunate, because they have
20 the information for the most part in our cases.
21 However, it is not a perfect system, you know, and I
22 just need to say that most people plead guilty, and
23 often times these pleas take place early in a case
24 before the time even comes for discovery. Cases are
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1 offered, you know,-- clients are offered plea
2 bargains, let's say, pre-indictment which is
3 something our Chief Judge is pushing right now as a,
4 you know, method of, you know, increasing the
5 efficiency in the court system. It is, you know, we
6 don't have police reports and other information prior
7 to indictment in order to properly advise our clients
8 about a plea or investigate the case, or look into
9 the matters in time to really advise somebody
10 properly whether they should take-- I don't know, it
11 could be years in jail. I mean, I think there are
12 issues with having plea bargaining so early as well,
13 but I mean, that's another point. It is unlikely
14 that we would ever get to see, let's say, a video
15 statement so we would actually know what our clients
16 said to the police, you know, when they made the
17 statement. It is unlikely that we would have a
18 chance to review the police reports. It is very
19 possible that we would know what the DA is saying
20 they have, because they would normally tell us at
21 arraignment or on the phone, and I'm not saying that
22 they wouldn't cooperate, but we don't have anything
23 to look at. Another concern is that, you know, the
24 DAs don't always have everything. So, they may not
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1
2 be out there pushing to get materials that they
3 should have, because you know, the system as it's
4 working for them is in many ways the person is sort
5 of on the fence. You know, they turn over what they
6 have, and you know, maybe they're right up. It may
7 be the Grand Jury minutes and it may be the basic
8 police reports, but we may think, oh, you know what,
9 there's probably some DD5's which are detective
10 reports. There's probably some other things. The
11 burden really is on us to say, you know, I think
12 these things probably exist. Can you try to get
13 them? And then, you know, they do try, but it could
14 take a long time, and you know, obviously a system
15 where they are under the obligation that is a better
16 system, obviously, and I know we're not here to talk
17 about that, but I think just to understand the open
18 file discovery is not a panacea for the problems that
19 we have. A couple of other issues that come up is
20 that the Brooklyn DA's office does have a policy of
21 not turning discovery over in certain kinds of cases.
22 For example, their Homicide Unit is an exception.
23 They don't turn-- my office doesn't do homicides as a
24 rule, but there are certain units within the office
25 that do not believe in, you know, open files [sic].

1 They're excepted from the rule, the general rule.
2 So, those cases go the traditional route where we
3 have to file motions, and then we often get the
4 materials at the last minute in those types of cases
5 or never at all because most people took a plea and
6 you may never get the material. We do have, you
7 know, delays in turning things over. We have things
8 turned over in a peaceful manner. It is very easy for
9 something to get lost in the crowd because it's not
10 an organized, you know, clear process that has
11 timelines and any penalty for failure to comply with
12 it, because they're not obviously not. The other
13 thing is, and I think this is about discovery, it may
14 be a little bit off, but you know, one of the issues
15 with the evidence in the case, some of it is physical
16 evidence, and we would normally want to examine the
17 evidence. We would want to test it sometimes, and it
18 is very difficult to get access to that kind of
19 evidence. It is extremely difficult. So, although
20 the policy is very good regarding, you know,
21 documents, which is mostly what it is, it is not as
22 effective when it comes to other types of discovery
23 that we think we should be able to get to. I wanted
24 to talk about one other thing, and then of course
25

1 I'll answer any questions. Alright, I'm aging
2 myself, but back in the 80's we used to use our--
3 defense attorneys have subpoena power, and we used to
4 use our subpoena power to get police reports. And
5 I'm just thinking, there aren't too many people
6 around that still remember that, but it was routine.
7 We would get a case. The first thing we would do is
8 write up a set of subpoenas for the police reports,
9 and we would go to the judge and the judge would sign
10 them, and then we would file them and we would get
11 the precinct, and we'd go to One Police Plaza. At
12 some point they started redacting witness addresses
13 and phone numbers, and of course, that makes sense,
14 because the police at that point don't really know
15 what's happened since then. And then, at some point,
16 the Police Department started moving to quash these
17 subpoenas, and they were successful in getting
18 Appellate Division Case Law that indicated that if
19 something is discoverable, I think that's the basis
20 of the cases. If it's discoverable, it's not subject
21 to subpoena. Of course, these things aren't really
22 discoverable, but you know, that's-- let' just leave
23 that to the courts. The reason I'm bringing it up is
24 because I actually think that's a space that the City
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1 Council could consider looking at a little more
2 carefully, like why did the police decide to move to
3 quash these subpoenas? What was the policy that went
4 into that? Is that something that could be changed?
5 You know, are they still committed to that policy?
6 You know, sometimes something happens and you stick
7 with it for 20 years, and you forget that it was ever
8 different. So, I just wanted to bring that up, and
9 you know, pass it to my colleague unless you have any
10 questions.
11

12 CHAIRPERSON LANCMAN: Thank you.

13 TINA LUONGO: Good afternoon, all. Thank
14 you very much to the committee and to the Chair for
15 recognizing that despite this being a state law issue
16 that there are actually things that have been done
17 good in New York City under the existing law and that
18 New York City actually, and its DAs, could act right
19 now to provide justice and efficiency, and four out
20 of the five simply elect not to do it. I'm Tina
21 Longo. I'm the attorney in charge of the Criminal
22 Defense Practice at Legal Aid, and in that role I'm
23 the Chief Defender of our Citywide Trial Offices that
24 represent over 150,000 New Yorkers that find
25 themselves in the courts accused of crimes who

1 desperately seek the system to provide due process.
2 So, let me paint a picture of the difference between
3 what Lisa was talking about in Brooklyn and what our
4 clients in the four other boroughs and our attorneys
5 experience by painting a picture, a true picture. You
6 are at Rikers Island. You in bail, on bail, and you
7 are desperately trying to figure out what to do. Do
8 I take a plea? Do I go to trial? What's the
9 evidence against me, and you want desperately, as you
10 should be able to do, engage in your own defense
11 partnering with your defense attorney, your public
12 defender, and when you reach out to your public
13 defender and you ask for a copy of what the
14 government has against you in Manhattan, in Queens,
15 in Staten Island, and in the Bronx, every single day
16 our public defenders have to say, "We don't have it
17 yet, but they've offered you a deal." And suppose
18 your cell mate is actually being prosecuted and
19 represented in Brooklyn by either BDS or Legal Aid,
20 and you watch them going over their evidence talking
21 about how they've spoken with their public defender
22 or their attorney as to what they're going to do
23 next, and they're engaged actively in their own due
24 process. Imagine now the feeling you have as being
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1 the person who actually doesn't have the benefit of
2 that. Okay, that's not imaginary. That happens
3 every single day, and it's because four out of five
4 of the District Attorneys choose not to voluntarily
5 do what Brooklyn has done for decades. I sort of
6 what to paint that-- I paint that as a sort of
7 picture, and then I'll get into some details, but my
8 colleagues from the other defenders I'm sure will
9 fill in the gaps. So every single day I feel like I
10 either look on Twitter or in the news, and I see
11 District Attorneys jumping over themselves to talk
12 about reform, how they're not prosecuting any longer
13 turnstile jumps and they're not asking for bail on
14 misdemeanors, and it feels like it just is sort of
15 every day that they are at the table first and
16 foremost announcing it to the press. I want to pause
17 a moment to say that I've done a fair amount of
18 hearings in front of this body and others where
19 government goes first, except I'm told this morning
20 that they have decided today not to be in the front
21 of this issue, but to be in the back of the issue by
22 testifying last, which means they want to anticipate
23 their answers. So I'm going to sort of phrase for
24 you some of the things you should ask them that I'm
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2 anticipating they're going to say, and then I want to
3 talk about two specific examples in Manhattan and
4 Queens that I think you should be wary of. The first
5 thing is you should really ask them why actually the
6 four of them are not following Brooklyn. Right?
7 That's the first question. The second question
8 perhaps you should anticipate is, I think they're
9 going to anticipate they're making efforts, that some
10 of them are talking to our offices and others about
11 putting in plans. I want you to really test the
12 validity of that and say to you as the public
13 defender who is in court every single day asking for
14 evidence, those small steps that they're doing is
15 nowhere close to Brooklyn and nowhere at all
16 producing real justice. I want to-- I hope you ask
17 them why they are engaged actively in a lobby with a
18 District Attorney Association of the State of New
19 York and have been for decades to actually push back
20 on discovery form. And the issue that they are using
21 as their key throughout the state, but they are
22 members, is witness tampering and protection, and I
23 think it is really important to ask them whether or
24 not they actually don't believe either Charlie Hynes
25 or Ken Thompson or Eric Gonzales in that if there

1 were witness tampering happening in Brooklyn at the
2 extent the state's DA seem to think, Brooklyn would
3 have voluntarily changed back. So, I ask you to
4 think about that. I want to do quick examples of
5 terrible policies that could be changed right now.
6 One, in the Manhattan District Attorney's Office
7 where I actually started my career as a public
8 defender in 2002 routinely on federal cases, they
9 redact the name of the person who is accusing your
10 client of a crime on the felony complaint. It just
11 says, "A person known to the District Attorney." I
12 want to pause a moment and say how is it that a
13 public defender is supposed to investigate? How am I
14 supposed to check for conflicts of interest? And I
15 will tell you that there have been a fair number of
16 those where I have represented my client all the way
17 up to hearings and then had to get relieved, because
18 then I learned the name and I do a conflicts check
19 since we are the citywide provider, and I've had to
20 come off of cases, and 18B [sic] has had to get
21 assigned, and any 18B attorney that takes over a case
22 if doing best practice has to start from the scratch.
23 These are people who are incarcerated. So it's a
24 justice issue. It's an efficiency issue. I've asked
25

1 that it be changed. It could be changed, because the
2 other DAs don't do that and it's not been changed.

3
4 Second thing, Queens, in Queens there is a practice
5 for felony cases that you'll be offered a deal if you
6 waive your right to speedy trial and 18080, which is
7 the presentment of Grand Jury, to get a deal, except
8 we don't get discovery, and if you don't waive, they
9 will put the case in the Grand Jury and indict your
10 client and never make an offer. That is a terrible
11 practice. I'm concerned that the OCA's is planning
12 to actually now expand that to the Bronx. It has
13 started, and talks in Manhattan and Brooklyn as well,
14 and the Bronx, so all boroughs. I want you to-- that
15 could change. The Queens District Attorney could
16 either remove that forceful coercion or provide
17 discovery before someone is asked to take a plea when
18 we are asked to wave a person's right to liberty and
19 a person's right to go into the Grand Jury. So, on
20 that I set the table for my colleagues. There are
21 pages upon pages of examples in the testimony I've
22 provided about real life situations of injustice and
23 inefficiency. Thank you.

24 CHAIRPERSON LANCMAN: Thank you.

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2 SCOTT LEVY: Thank you. My name is Scott
3 Levy. I am Special Counsel to the Criminal Defense
4 Practice at the Bronx Defenders, and I thank you for
5 this opportunity to testify today. In 2013, Steven
6 Otteas [sp?] was convicted of a 2009 Bronx murder
7 based on the testimony of a single eye-witness. The
8 jury convicted Mr. Otteas despite a lack of physical
9 evidence linking him to the shooting, and the fact
10 that the sole eye-witness admitted that he was buzzed
11 from smoking a marijuana cigarette at the time of the
12 incident. Last April, after serving almost six years
13 of his sentence of 25 to life, Mr. Otteas was
14 released from prison when it was discovered that the
15 original prosecutor in this case purposely withheld
16 critical information from him and from the jury,
17 specifically an investigation by Mr. Otteas' post-
18 conviction counsel revealed that the Bronx Assistant
19 District Attorney in the case under the former
20 District Attorney in the Bronx had intentionally
21 redacted information from a police report that
22 supported Mr. Otteas' innocence. During a canvas of
23 the building where the shooting occurred, detectives
24 had interviewed a woman who described the shooter as
25 tall, dark-skinned male with a heavy beard. Mr.

1 Otteas was short, light-skinned, and beardless. The
2 eye-witness also claimed to have gone to high school
3 with the shooter, and even gave the detectives a copy
4 of a yearbook photo of the man who she said did it.
5 None of this information was turned over to Counsel
6 at trial, and the Assistant District Attorney later
7 told the New York Times that the redacting in the
8 police report was actually intentional. A
9 functioning system of discovery in the Bronx and a
10 culture of transparency would likely have prevented
11 this devastating miscarriage of justice, and sadly
12 without significant reform of our discovery
13 practices, we can expect to see more stories like
14 this in the future. New York's discovery law,
15 Criminal Procedure Law Article 240, is among the most
16 restrictive and aggressive in the country. It
17 requires only a minimal disclosure of information and
18 virtually no mechanisms to ensure that information is
19 turned over in a timely manner, if at all. Years of
20 practicing under the Blindfold Law have created a
21 culture defined by a lack of transparency among
22 prosecutors in courts in which critical evidence is
23 regularly withheld and basic principles of due
24 process and fairness are regularly enforced. In the
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2 Bronx, despite calls from the District Attorney for
3 more discovery to be turned over earlier, discovery
4 remains a haphazard affair. Cases are adjourned
5 unnecessarily for months on end while discovery
6 issues are litigated and resolved, adding to the
7 already extreme delays in the Bronx court system. In
8 our written testimony we've outlined principles for
9 meaningful discovery reform, namely that it be fair,
10 early and automatic, and that it incorporate common
11 sense protections for witnesses. However, I wish to
12 highlight one aspect that my colleague from Legal Aid
13 has already brought up which is the need for
14 discovery before guilty pleas. Only a tiny fraction
15 of cases in our system ever go to trial. The vast
16 majority of cases are resolved through a plea
17 bargain. Because New York's discovery rules do
18 nothing to guarantee transparency, thousands of New
19 Yorkers serve jail and prison sentences and are
20 subjected to the collateral consequences such as
21 deportation, loss of employment, ineligibility for
22 student loans and eviction without ever having seen
23 the evidence in their cases. Meaningful discovery
24 reform must require prosecutors to turn over
25 information before any guilty plea so that the

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2 accused can make an informed decision about whether
3 to plead guilty or to go to trial. A discovery
4 system that follows these principles will not only
5 increase fairness, transparency and equality, but
6 will promote early and efficient resolution in cases
7 by eliminating uncertainty and allowing plea
8 negotiations in appropriate cases based on shared
9 facts. These early resolutions will in turn
10 contribute substantially to the City's goal of
11 reducing the jail population and closing Rikers
12 Island as quickly as possible. And we hope that the
13 City Council can take a leading role in pushing the
14 City's District Attorneys to adopt discovery reform
15 policies and practices, but I do want to just note
16 what is going on in Albany. There are currently two
17 bills pending in Albany, one in the State Senate,
18 which is Senate Bill 7722 and Assembly Bill 4360A
19 that would make New York a leader in discovery. Both
20 bills would broaden access to discovery for the
21 defense and the prosecution, require automatic
22 discovery to take place early in the criminal process
23 and critically mandate the discovery be turned over
24 before the accused accepts a guilty plea. Both bills
25 also include common sense mechanisms to protect

1 witnesses whose safety might be jeopardized, include
2 protective orders, which upon a showing of necessity
3 prohibit defense attorneys from sharing sensitive
4 information to their clients. These are common sense
5 protections that could be easily adopted. The
6 Council should do what it can to support these bills
7 in Albany, but more importantly, the Council should
8 encourage the City's District Attorney to adopt open
9 file discovery practices and to turn over discovery
10 before any guilty plea. As we've already heard, the
11 Brooklyn District Attorney's Office has been doing
12 this for years showing that it can be done
13 efficiently and safely, and we'd ask that the council
14 push the reset of the District Attorneys to adopt
15 similar policies to make things-- and to have written
16 standardized policies so that we can all be working
17 on the same set of rules and encourage a culture of
18 transparency and predictability. Thank you.

19
20 CHAIRPERSON LANCMAN: Thank you.

21 SERGIO DE LA PAVA: Good morning. I'm
22 Sergio De La Pava, the Director of Special Litigation
23 for New York County Defender Services. We've been
24 working on these issues, those of us advocating
25 discovery reform for many years, and we hear a lot of

1 the same talking points talking about efficiency in
2 the system or how it might actually save money to
3 have early and open discovery, but what I think goes
4 under appreciated is how much this issue is at its
5 baseline a constitutional issue. It's my belief, and
6 I've been practicing in Manhattan for over 20 years,
7 that Manhattan DAs Office practice in area of
8 criminal discovery is essentially a widespread and
9 programmatic denial and deprivation of the
10 constitutional rights of mostly indigent people of
11 color, and while my colleagues have pointed out, you
12 know, in the context of plea bargaining and bail, the
13 importance of discovery, I want to focus a little bit
14 on trials. I've conducted a great many trials in
15 Manhattan. Trials are viewed as maybe the criminal
16 justice system putting its best foot forward. Well,
17 let me tell you what, in my experience, a trial in
18 Manhattan looks like. A case has been pending at
19 least six months. It's very uncommon for a felony to
20 go to trial in less than six months, more likely
21 about a calendar year. You get sent to a judge.
22 When I say you, I mean the defense attorney and the
23 client get sent to a judge who knows nothing about
24 the case. This judge is there to try the case. You
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1
2 get sent to this judge after about a calendar year.
3 You arrive at the part. The DA comes in with a cart,
4 opens it up and drops on your desk about six inches
5 of material. This is Rosaria material, and if you
6 object, which for many years we did, and said to the-
7 - turned the Judge and said, "I need an adjournment,
8 look what I've just been given." The Judge will say
9 to you the truth, which is they're complying with the
10 statute, right? But as my colleague from Legal Aid
11 has pointed out, the statute only sets a baseline.
12 As we've seen in Brooklyn, as we see, DAs can do far
13 more. It's within their discretion the way they
14 handle discovery. The statute merely sets the
15 baseline, and in my opinion sets an unconstitutional
16 baseline, because regardless of what happens, it's my
17 belief that one-- if the trial goes forward at that
18 point, regardless of how that trial is conducted,
19 that individual, that person has been deprived of
20 their Sixth Amendment right to be effective
21 assistance of counsel, right? So, our constitution
22 doesn't say you're guaranteed just an attorney, it
23 says you're guaranteed an attorney who can provide
24 you effective assistance. But how effective is your
25 attorney when they are handed discovery material the

1 day they start picking a jury? One of the central
2 obligations of any defense attorney is to investigate
3 the claims against your client. How effective an
4 investigator are you when you discover the name of
5 the individual who's accusing your client at the day
6 you're picking a jury? How effective are you when
7 the first time you see a police report is the day
8 you're picking a jury? The first time you get Grand
9 Jury minutes, right, sworn testimony under oath by
10 the people accusing your client, and the first time
11 you get it is the day you're picking a jury. This is
12 not only a deprivation of your client's right to
13 effective assistance of counsel, their right to
14 confront the witnesses against them, their right to
15 due process, their right to a fair trial? The
16 central tenants of our criminal justice system are
17 being routinely violated by the District Attorney's
18 Office without any cause. Because anybody who is
19 against meaningful reform in New York has to explain
20 what is so unique about Manhattan that 46 other
21 states can have a more open and more dignified
22 discovery procedure, and yet none of these ills
23 befall them. Because you'll hear from the DA's
24 Office, "Well, it's about witness safety. We can't
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1 tell you who the witnesses are. We can't give you
2 police reports." Don't buy that when you hear it.
3 The majority of felony trials, and certainly at one
4 point, the vast majority of felony trials dealt with
5 drug cases, buy and bust operations, where there were
6 no civilian witnesses, where the officers, the police
7 officers were the only witnesses. Did the District
8 Attorneys routinely hand over discovery material in
9 those cases since there was no concerns about witness
10 safety? Absolutely not. This is a strategic
11 decision by them to press an advantage that was given
12 to them by statute, given to them without concern for
13 the individual rights of indigent people of color and
14 which they are now pressing to their strategic
15 advantage, and they'll admit it. I'm not imputing
16 some kind of bad faith to them. They'll admit it to
17 me. They'll say, "You'll get the discovery material
18 when we get sent to the part and I see that the case
19 is really going forward." What does that mean?
20 What do they fear? They fear you'll go to a part,
21 somehow the case will get adjourned, and you'll have
22 the discovery material for the two weeks that the
23 case gets adjourned to. I've had-- everybody in my
24 office has had countless DAs tell them precisely
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1 that. Once I know the case is really going forward,
2 that's just code for once I know you can't fully
3 investigate what I'm about to tell you, then I will
4 hand you the discovery material and comply with the
5 statute. Any claim from them that they are just
6 practicing in accordance with some kind of statutory
7 framework and it's not the pressing of an absolutely
8 illegitimate advantage is baseless and should be
9 challenged by this committee. Thank you.

11 CHAIRPERSON LANCMAN: Thank you very
12 much. Let me mention that we've been joined by
13 Council Members-- I don't remember if I recognized
14 Council Member Rose, but if I did, she gets a second
15 shout out, member of the Committee from Staten
16 Island, Council Member Cohen from the Bronx who is a
17 member of the Committee, and Council Member King from
18 the Bronx as well. So, I'm just a simple country
19 lawyer and not everyone in the Council is lawyer at
20 all. So, before we get into the deed, the details
21 which I very much want to get into, can one of you
22 just explain for us the distinction between Brady
23 material, Rosario material and the discovery rules?
24 There is a perception that I have encountered in
25 discussing this issue with my colleagues. Well,

1
2 doesn't the constitution require that the District
3 Attorneys turn over certain information, and what
4 does the discovery laws have to do with that, the
5 short version, though?

6 SCOTT LEVY: I'll do my best. We'll start
7 with Brady, right? Brady is information that tends
8 to show that a person is innocent or that a-- who are
9 guilty of a lesser crime or that a witness has
10 problems with credibility. So, information that
11 undercuts the principle case of the prosecution.
12 Brady material is-- DAs must turn that over. They
13 must turn it over at a time, and what the law
14 essentially says is at a time that it can be useful.
15 So, there are no--

16 CHAIRPERSON LANCMAN: [interposing] So,
17 that by definition, the information that the District
18 Attorneys have that inculcates your client that
19 actually supports their case against the defendant.
20 They, under Brady-- Brady has nothing to do with
21 that, right?

22 SCOTT LEVY: That's right. So, but in the
23 case that I spoke about in my testimony, that was
24 very clearly Brady information. An eyewitness
25 identified someone who looked nothing like the person

1 that they had arrested. That would be sort of
2 quintessential Brady material. Rosario is sort of a
3 broader category. Rosario refers to statements of
4 witnesses who are going to be called into trial. So,
5 prior statements of people who are actually going to
6 be testifying at a trial or at a hearing, and that
7 too must be turned over, but again there are no
8 timeframes for that, so that is the information that
9 my colleague from New York County was talking about
10 that gets sort of plopped down on the desk as the
11 jury pool filed into the courtroom. Discovery is, in
12 theory, could encompass everything else. Right?
13 That information that you're talking about that may
14 inculcate somebody. That is police paperwork
15 generated by an officer who will not be testifying
16 right? A number of officers and detectives or law
17 enforcement personnel or just, you know, anybody
18 touch a case and create paperwork, create statement
19 that generate evidence and material, right? That is
20 not necessarily tied to a person who will be
21 testifying at trial. All of that is potentially
22 discoverable. However under New York's law a lot of
23 that is not discoverable. There is a huge, sort of,
24 universe of material that is associated with a case
25

1
2 that in other states is absolutely discoverable, but
3 in New York is not discoverable. But a system--

4 CHAIRPERSON LANCMAN: [interposing] But
5 could you rattle off those examples? What is
6 discoverable? Whichever one of you, and then I want
7 to get into Brooklyn. What is discoverable in other
8 states that is not discoverable here as you were
9 describing?

10 SCOTT LEVY: Well, so, in North Carolina,
11 for example, they are--

12 CHAIRPERSON LANCMAN: [interposing] That
13 liberal bastion.

14 SCOTT LEVY: Yes, they have open file
15 discovery which means anything in the file gets
16 turned over, right? And that happens fairly early in
17 the case. It is sort of radical transparency, which
18 is sort of as it should be. So, there are no
19 limitations to what is discoverable. It is whatever
20 is in the prosecution's file, and that allows
21 everyone to know what all of the evidence is, doesn't
22 allow District Attorneys to pick and choose what they
23 believe to be relevant or not relevant or what they
24 believe to be exculpatory or not exculpatory. Basically
25 says here's what we've got. There are common sense

1
2 protections if there is real reasons not to turn
3 something over, but the default is to turn over
4 everything. Other states sort of have a laundry list
5 of things. They say you must turn over A, B, C, D,
6 E, F, and those are generally relatively
7 comprehensive lists. So, there's sort of two models.
8 There's one that says turn over everything, and there
9 are other models that sort of create a list that must
10 be turned over, but generally New York is among the
11 four worst states in terms of what must be turned
12 over; 46 states require more to be turned over.

13 CHAIRPERSON LANCMAN: Sorry, maybe I
14 missed it. Could you give us some examples of the
15 kinds of things that in New York are not required to
16 be turned over?

17 SCOTT LEVY: Sure. Police reports
18 written by officers who will not be testifying.

19 CHAIRPERSON LANCMAN: Not even-- not even
20 like the day of the trial, here's your six inches,
21 not at all?

22 SERGIO DE LA PAVA: Right. So, Rosario,
23 you'll often see, for example, the Manhattan DA's
24 Office bifurcate their Rosario material. You'll do a
25 pre-trial hearing before the trial. They'll say,

1 "Here's the Rosario." You say, "Oh, this is the
2 Rosario?" No, that's your Rosario for the hearing.
3 In other words, I'm only calling these two officers
4 at the hearing, so here's the Rosario that I have to
5 give you as a matter of law. I still have this other
6 section of Rosario that is applicable to the trial.
7 And then, as Mr. Scott is pointing out, there's this
8 whole other material that I'm not even calling them
9 as witnesses on the trial, so you'll just never even
10 be aware of it its existence. I may have interviewed
11 a witness, but if they're not being called as a
12 witness at the trial, it's not technically Rosario,
13 because Rosario is prior statements by witnesses at
14 the trial in the control of the people. I mean, it
15 really just gets that--

17 CHAIRPERSON LANCMAN: [interposing] Any
18 other examples?

19 SCOTT LEVY: Again, it is so very broad,
20 but let's say for example, a person is arrested for,
21 you know, alleged crime. The officer who makes the
22 arrest fills out the arresting officer paperwork.
23 That is what the person looked like, when they were
24 arrested, where and when they were arrested. Let's
25 say three days later other detectives go out and

1 canvas the building. They ring on-- they knock on
2 doors and talk to potential witnesses, and they
3 discover that somebody heard a noise or saw something
4 or, you know, had some sort of piece of information.
5 Those detectives may write up a separate report. The
6 District Attorney may determine that that canvas
7 material isn't relevant to their case. They're not
8 going to call the detectives who did the canvas, and
9 so the paperwork that was generated through that
10 canvas would not have to be turned over because it's
11 not related to a person who would be called at the
12 trial.
13

14 SERGIO DE LA PAVA: But I should point
15 out that from the-- I don't' know if everybody will
16 agree with me, from the defense perspective, our
17 largest issue is not that we don't get something
18 ultimately. It's that-- it's the timing, right? Or
19 for example, certainly in the case where a defendant
20 takes a plea, right, or the case never gets to trial
21 or never gets to hearing, you literally will never
22 see a police report in that case. That is the vast
23 majority of ways criminal cases end in this city, a
24 client taking a plea and serving a sentence without
25

1
2 ever having seen a police report or anything really
3 tangible beyond a criminal court complaint.

4 CHAIRPERSON LANCMAN: So, I want to get
5 into Brooklyn. Just tell us, because you describe--
6 these were not your words, but sort of like the gold
7 standard-- let the record reflect that the witness
8 rolled her eyes.

9 LISA SCHREIBERSDORF: Well, I think the
10 gold standard under our current system. Okay, let me
11 just say that. Yes, I would agree, under the system,
12 which is nowhere near gold, qualified for a gold.

13 CHAIRPERSON LANCMAN: Yes.

14 LISA SCHREIBERSDORF: It's not even
15 eligible for the Olympics. Go ahead.

16 CHAIRPERSON LANCMAN: So, when does the
17 Brooklyn DA turn over this material? And does the
18 Brooklyn DA also turn over this other material that
19 they're not otherwise required to produce, or does
20 their-- what distinguishes them is merely the timing
21 of them turning over the material that ultimately if
22 it went to trial they would have to produce, but
23 they're giving it to you up front?

24 LISA SCHREIBERSDORF: Their philosophy is
25 more like the open file philosophy that you heard

1 about in North Carolina. They turn over whatever
2 they have, okay, with-- you know, just remembering
3 that if they think there's a problem with any
4 particular item, they will approach the judge and ask
5 for a protective order and say we don't want to turn
6 it over because we have a fear of any kind of witness
7 safety or intimidation, and obviously they don't even
8 really need a judge's ruling not to turn it over, but
9 they're respectful, and they judges normally do grant
10 those requests because they're very limited. So, we
11 get everything, and we get it early on in the case.
12 Now, early on is after indictment which is still a
13 month into the case. Okay. So, in an optimal
14 situation would be to get everything on day one,
15 because surveillance videos, for examples, are only
16 usually good for about a week. Most places that have
17 surveillance going usually retape over their, you
18 know, whatever they've seen, whatever, you know, is
19 on the tape. They retape it. So, if you don't get
20 out there in the first week. Now, normally we go out
21 anyway because we usually know where the incident
22 happened and we try to find surveillance, but what
23 happens is sometimes even the specifics of the
24 location can be very different in a complaint, or it
25

1 can be very vague in the initial complaint, and when
2 you get the actual police reports there's a lot more
3 specificity, like it was in front of this particular
4 store, or, you know, one thing it's on the corner and
5 another thing is in front of a certain address, but
6 the police reports will be very specific, and we may
7 have lost a chance to get video. That's just oen
8 example. We don't do a lot of pre-indictment plea
9 bargaining, but we do do some, and that takes place
10 within the first week, and we do not get anything in
11 that first week. So, although it's early in the
12 scheme of things and it's complete in the scheme of
13 things, I will give you an example of why it's not
14 the perfect system. The detectives that Mr. Levy was
15 just talking about, so they wrote up the canvas.
16 That paperwork didn't even go with the package, the
17 initial package that went when the person was
18 arrested that went to the DA's Office. So, sometimes
19 no police reports go, but let's assume that the
20 arresting officer had a complete package of police
21 reports that they brought to, you know, when the
22 person was arrested. The detectives didn't do their
23 work until three days later. So, there is no
24 requirement that the detectives then send their
25

1 reports to the DA, right? The DA has to request
2 them, and the DA has to notice that there were other
3 police reports. And one of the problems that occurs
4 is really a DA not even knowing maybe that there may
5 be more of an investigation that happened after the
6 arrest or later on the in the case, because sometimes
7 that's going on parallel to the prosecution. So, I
8 think those are the kinds of things that tend to get
9 delayed longer and longer until often times we're the
10 ones that figure out, you know, I think there was a
11 detective involved in this case. You see a reference
12 in, you know, some esoteric little spot to a DD5, and
13 you know, can we get those, and the DA sometimes has
14 trouble. I mean, I don't want to short-- I don't
15 want to give short trips to the DA problems that they
16 have, which I'm sure they'll talk about. Getting
17 information from the Police Department there's like,
18 you know, definitely a divide because that is not
19 automatically just constantly sent.

21 CHAIRPERSON LANCMAN: The Brooklyn DA's
22 Office, do they continually update you with new
23 information as it comes in, or is it just like one
24 dump at the beginning and then we'll see you at
25 trial.

1
2 LISA SCHREIBERSDORF: No, they will
3 continually update. I mean, it's still even at trial
4 sometimes we still get-- I mean, we never get six
5 inches of material, but especially a complicated
6 case, it's often true that we get something at the
7 last minute, but it's mostly because they didn't have
8 it either, which is another separate problem.

9 CHAIRPERSON LANCMAN: So, we've asked the
10 District Attorney's Offices to provide any written
11 policies that they have regarding their own discovery
12 rules or procedures. Does Brooklyn have-- has it
13 reduced this policy to any kind of written format
14 where you could go to the DA and say, "Hey, you're
15 not adhering to section two of your policy."

16 LISA SCHREIBERSDORF: Okay. I think it's
17 more complicated by the fact that we've had so many
18 different DAs in the last few years than anything
19 else. I can tell you that under Joe Hynes, I had a
20 letter written by him with a list of all the stuff
21 we're supposed to get signed by him, a personal,
22 original letter, and it was-- I actually had it taped
23 onto the door of my office so that if anybody didn't
24 get something on that list, they could take a
25 handwritten letter and bring it to court and they

1 could get whatever they needed. There is something
2 called a, you know, a stipulation that was written
3 also, you know, under the Hynes era that was actually
4 negotiated about all the different things they're
5 supposed to turn over, which is a very complete list.
6 You know, it goes-- it's very extensive, and it
7 really does cover most of what anybody would need.
8 And however, you know, abidingness of that, the
9 validity of it, I'm pretty sure that Eric Gonzales is
10 going to draft his own new policy. You know, he just
11 got elected and sworn in the last few months.

12
13 CHAIRPERSON LANCMAN: Why do they not
14 apply this procedure to homicide cases, do you know?

15 LISA SCHREIBERSDORF: I think you need to
16 ask them that question.

17 CHAIRPERSON LANCMAN: Okay. One of the
18 things that I have heard from the DAs and intuitively
19 I think it is very compelling argument that it's hard
20 enough to get victims and witnesses to participate in
21 the trails, to show up. There's a tremendous amount
22 of witness intimidation that is out there. The City,
23 frankly, and the state does a very poor job of
24 protecting witnesses. What kind of standards do you
25 see being applied when the Brooklyn DA's Office goes

1
2 for a protective order? I assume the protective
3 orders are almost always to protect the identity of a
4 witness, or-- what's that conversation like with the
5 court? What is the court looking for the DAs to show
6 that would justify withholding the identify of a
7 witness? And do you--

8 LISA SCHREIBERSDORF: It's usually not
9 the sensitivity of the witness or the victim and, you
10 know, their concern about anybody knowing their name.
11 it's usually a legitimate, you know, basis of
12 knowledge that there is truly some sort of treat to
13 that person, and I can tell you it's normally, let's
14 say a gang situation where it is known entity and
15 that you have one gang against another, and they know
16 that if they actually give the name of that person,
17 that that person is legitimately in danger. And when
18 I talk about that, the sensitivity of the witness of
19 course is important to all of us, but I will tell you
20 that on sex crimes they do turn over the discovery,
21 okay. In my experience it does not in any way impair
22 their witnesses' willingness to come forward. Many
23 of these cases are sensitive for a lot of other
24 reasons that have absolutely nothing to do with that
25 person's fear of somebody knowing who they are, oaky?

1
2 Because that can be easily protected. We can have a
3 name with no address. It's easy to find out who it
4 was. So many cases involve people that know each
5 other to start with. It is quite easy in many cases,
6 you know, to sort of figure out what's going on, and
7 the witnesses, you know, there's a culture of not
8 coming forward in Brooklyn. You know, Brooklyn has,
9 I would say-- I'm just going to put it out there--
10 like the worst cases in the City, you know, most
11 serious, harsh, you know, scary cases. Really, I
12 mean, just to put it out there. And to be able to do
13 this in a borough like that really tells you that
14 that is unrealistic to worry about people coming
15 forward in other boroughs, because the problem of
16 people coming forward is not about fear of safety.
17 It is really very complex, and it's not about that,
18 in my opinion.

19 CHAIRPERSON LANCMAN: Could each of you
20 address that, because it is such a central argument--

21 TINA LUONGO: Sure.

22 CHAIRPERSON LANCMAN: for the District
23 Attorneys.

24 TINA LUONGO: So, the first thing I would
25 say is 46 other states including North Carolina and

1
2 Texas, the other bastion of progressiveness, have
3 done this, and actually in the New York State Bar
4 Association Taskforce that was made up of defense
5 attorneys, judges, and prosecutors. They called the
6 prosecutors from other jurisdictions who said we
7 don't have an issue, and if we did, we would change
8 it. I'm also going to say while they are saying that
9 it is a problem in this city and state, I point to
10 Kings County again to say if that were a problem, the
11 Brooklyn DA is voluntarily doing this. They can go
12 back to the way the other four do it tomorrow. So, I
13 sort of raise that to say we've heard this fear
14 mongering and dog whistling for a really long time.
15 I want to raise this. At some point, if the system is
16 providing the due process that my colleague from New
17 York County talked about under the Constitution,
18 there would be a trial. That means the person has to
19 come into court. So, this notion that they can't
20 share a name of somebody who ultimately is going to
21 be a witness in court, really should paint for you
22 the picture that they don't want to actually turn it
23 over before then, because really what it is is a
24 strategy to take a plea so that the witness perhaps
25 never comes to court. Now, I'm not saying that their

1 duty is not to protect witnesses. I am saying that
2 there are ways in which to do it so the New York
3 State Bar Association because there were District
4 Attorneys and judges on that commission actually
5 highlighted not only protective orders but a few
6 other measures that could be done right now to
7 actually protect witnesses in those very limited
8 cases. First of all, you can carve out as the New
9 York State Bar Association plan does, gang cases. It
10 also carves out homicides and sex crimes, and while
11 we don't agree to that because I do think we have a
12 duty regardless of the severity of the charge, there
13 are those protections. There is moving for a
14 protective order. There is them making an
15 application to a judge that they will turn it over to
16 defense counsel for the purposes of our investigation
17 and so that we understand the likelihood of a
18 conviction so that we can advise our client, and then
19 the judge could order us not to share that
20 information with our client until there is a trial,
21 in essence gag ordering us, and that because a judge
22 ordered it would mean I don't have to turn it over
23 and I could still be effective under the Sixth
24 Amendment. Or, if there is an issue about providing
25

1 me not only a name or an address or a name where I
2 would get an address because they don't want people
3 to be disclosing a home address, the New York State
4 Bar Association plan allows for them to call the
5 witness to their office for me as defense counsel
6 without my client to go talk to the witness so I do
7 not know the home address until it is relevant.
8 Therefore I can talk to a witness face to face, and I
9 would do it without my client. So there are
10 protections. SO when we hear about fear mongering
11 and witness tampering, I am going to pause again to
12 say you have to dig deep, and I ask you to do so.

14 CHAIRPERSON LANCMAN: I would welcome the
15 perspective of the practitioners in the Bronx and
16 Manhattan on the issue of witness intimidation.

17 SERGIO DE LA PAVA: You know, it's not a
18 problem. It just isn't. Statistic-- I mean, there
19 are very few prosecutions for intimidating a witness.
20 The vast majority of cases don't involve a civilian
21 complainant that has to be protected to run an entire
22 discovery practice that affects, you know, in
23 Manhattan 100,000 people a year based on this
24 incredibly rare occurrence and to center your
25 practice around, you know, this fear makes no sense

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2 whatsoever in my opinion. So, I think it's just a
3 talking point that's disingenuous.

4 SCOTT LEVY: I echo the comments of my
5 colleagues. We don't see a rash of charges of
6 witness intimidation. And what I think you see too
7 among boroughs is, you know, you have the model of
8 the Brooklyn DA, you know, counter-- juxtaposed with
9 Manhattan DA, the Bronx is somewhere in the middle.
10 We do get information, but it comes in drips and
11 drabs. There is no sort of set policy. There is no
12 sort of predictability in the process, but we do get
13 information sort of along the way. Most of what we
14 get is on the eve of trial, but we do-- there is
15 sharing of information. It is haphazard and
16 unpredictable, but it happens. And there is no--
17 there are no concerns, generally speaking, about sort
18 of witness intimidation, and when there is those
19 issues raised and dealt with in a common sense way I
20 think, you know, judges are very sensitive to claims
21 that somebody is being intimidated and will take
22 swift action, right, if there's a credible reason to
23 believe there's a problem. The right approach to
24 discovery generally is to say turn everything over
25 unless there is a good reason not to, and judges are

1
2 very open to listening to those good reasons. If
3 there's a good reason not to turn it over, judges
4 will order that it not be turned over, or that it be
5 turned over in a modified way. You know, as we've
6 already sort of discussed. The argument that a
7 blanket prohibition or, you know, a blanket policy of
8 not turning things over, you know, is just too
9 expansive and too far reaching to credibly counter
10 what is a very narrow and small problem.

11 LISA SCHREIBERSDORF: I just want to add
12 one thing. We have never had a judge say to a DA who
13 asked for-- you know, not to disclose discovery.
14 Now, legally, I don't know that they could, but no
15 judge has ever said I don't agree with you. They
16 always respect the DA because they know that the DA
17 knows information that they are sharing or sometimes
18 can't share. Sometimes there's stuff that happens in
19 the DA's office that they know about that they can't
20 share, and we do find for the most part that they act
21 in good faith and they don't come forward and say
22 that they have a reason in particular case not to
23 turn it over that they can't share for some reason
24 when that's not true. That is just not something
25 that happens, and not something the judges are really

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2 questioning, you know, you must turn it over unless
3 you tell me there's-- the option of also doing it ex-
4 parte [sic]. They could talk to a judge privately,
5 you know, not in the presence. And again, you're
6 talking about the most extreme situation where
7 there's a real reason to believe there was an actual
8 threat already made. At that point, the defense
9 defers to those conversations because it's so
10 limited. It happens so rarely, right? And so you
11 know, because we don't have sort of the tail wagging
12 the dog in Brooklyn, we-- you know, that piece of it
13 gets handled extremely efficiently, respectfully and
14 in a way that I think never jeopardizes anybody.

15 CHAIRPERSON LANCMAN: We're going to go
16 to my colleagues, and then I'll ask questions to wrap
17 up this panel. Just make the observation, the
18 District Attorneys, the public defenders, the
19 Department of Corrections, and so far they're
20 impacted, that's all funded by New York City. We
21 have a lot of skin in the game in the system being
22 fair and efficient. When we look back around to me,
23 I'm going to ask each of you the extent to which, if
24 any, the issue of speedy trial, wrongful convictions,
25 are impacted by the state's discovery rules and the

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2 DA practices that exist now. But for now, Council
3 Member Andy King.

4 COUNCIL MEMBER KING: Thank you, Mr.
5 Chair, and I applaud and appreciate all of you for
6 coming out today and giving us your testimony and
7 your information in regards to discovery and the
8 problems with discovery. I have pretty much one
9 question, but I just wanted to put something on the
10 record, and I ask-- I don't know where everyone
11 stands who are in the room today where you are when
12 it comes to discovery, but I just ask each and every
13 one of you, whatever your position is, to be an
14 advocate for open and early discovery. As I
15 understand it, you know, I even have a resolution in
16 repealing Criminal Procedure Law 240 and putting in
17 place a piece of legislation that Legal Aid has done
18 research on, 245, which is something that requires
19 open and early discovery, because if someone is
20 innocent from the start, then they should not spend a
21 day or two days in jail while the system figures it
22 out. I believe that the system is flawed as we all
23 know and believe that it is flawed. I also believe
24 it's organized to keep people incarcerated. I
25 believe that, you know, when we start to talk about

1 this country and incarceration rules, I always take
2 it back to the induction [sic] of the Constitution,
3 the Three-fifth Clause, whereas when it stopped
4 being, "being implemented," and as you said it, to
5 people of color, we always get mistreated when it
6 comes to this system. Well, it was designed from day
7 one, and even when they implemented the 13th
8 Amendment, it only said that slavery is illegal in
9 the union unless you're in prison. So, slavery goes
10 by the day-- of incarceration today, and that means
11 all the rules and policies that have been in place
12 has been designed to make sure there's an
13 incarceration system that stays in place for profit
14 and a way to oppress a certain set of Americans in
15 this country. So, I say to each and every one of you,
16 what are you going-- what can we do, continue to do
17 together to reveal it? Because I once heard that you
18 should have a jury by your peers, but why is it we
19 have a system in America that kind of negotiates
20 against that? You know, that the-- it's almost like
21 we will advocate against you not going to court, but
22 we want to advocate the art of the deal, you know, so
23 people never get their day in court. When I hear 90
24 percent of trials, cases never go to trial, then what
25

1 is this rule that I have the right to go before a
2 jury of my peers to hear what's against me? So, if
3 there are systems in place, there's rules in place to
4 make sure that early discovery is never in place,
5 it's designed to make sure that you keep your system
6 of incarceration in place, and that's unfair to the
7 American people. it's unfair especially to those
8 people who have been subjected to the 13th Amendment
9 and the Three-Fifth Clause, and I believe always goes
10 back to the beginning, and until we kill the root up
11 to the beginning, we'll always have these policies in
12 place that will trip you up in order to save and help
13 people who are innocent, and I thought we were
14 innocent until proven guilty, but people sit in jail
15 for months until they are able to be heard and find
16 out whether or not they are-- whether they're
17 innocent or guilty. So, something's flawed. We need
18 to make sure that early discovery is part of the
19 system, and it should be one universal system.
20 Brooklyn shouldn't be operating different than Staten
21 Island. Staten Island shouldn't be operating
22 differently than Rockland County. Rockland County
23 can't be operating different than Schenectady. I
24 mean, everyone across the state of New York needs to
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1
2 operate under one system, and I believe if we do
3 that, then we can really find true fairness in our
4 system, but we need to take out the prejudicial
5 mandates that was in from day one in the Constitution
6 that still is the underlying factor for why we have
7 so many hurdles in the jobs that you're trying to do
8 to keep New Yorkers and the population of the state
9 of New York free. So, that's my comment, and I'm
10 looking forward to us having a more robust
11 conversation on, you know, early and speedy trials
12 and as well as the resolution that we have repealing
13 Criminal Procedure Law 240 and implement it with
14 something that just makes sense, because if we're
15 looking to do the right thing, then we will do the
16 right thing. If it's about locking people up, why?
17 Because we want to protect the system? Well, when
18 does the system protect the people? Right now it's
19 not protecting the people, and I thank you, Mr.
20 Chair, for giving me the opportunity to speak today.

21 CHAIRPERSON LANCMAN: Thank you, Council
22 Member King. Council Member Rose, do you have
23 questions? Council Member Cohen?

24 COUNCIL MEMBER COHEN: Okay, thank you,
25 Mr. Chair. I'm going to just let the cat out of the

1 bag that I do-- I was a past sponsor or co-sponsor of
2 Council Member King's resolution, so I know how I
3 feel, but I'm just trying to get a sense of sort of
4 the weight of the problem, I guess, in that you know,
5 one of you made a passionate argument about the
6 effectiveness of counsel, but there's a difference
7 between counsel and the client. I mean, in some
8 ways, like, if I were going to plead guilty, I don't
9 need discovery as the client. I know if I did it or
10 I didn't do it. When I plead guilty I'm aware when I
11 make that plea I have the knowledge as a client. I
12 understand that you've gotten a position to advise
13 the client of-- but in terms of guilt or innocence,
14 I'm just curious in your opinion, I mean, if you see
15 or if you believe in your practice, that there's a
16 lot of people pleading guilty who are in fact
17 innocent because they don't have discovery, or is it
18 really just-- and I, again, I'm completely
19 sympathetic and I understand that, you know, having
20 effective counsel is vitally important. It would be
21 significantly more outrageous than it is already if
22 it was leading to I think a significant number of
23 people pleading guilty who are not guilty. So, could
24 you just talk to that for a second?
25

1
2 LISA SCHREIBERSDORF: Let me take that
3 one.

4 SERGIO DE LA PAVA: I mean, I don't know
5 what a significant number would be, but I mean,
6 there's no question that the discovery practices as
7 currently constituted gravely increase the risk of
8 wrongful convictions. There's-- because as I said,
9 by reducing the effectiveness of your attorney,
10 foremost, but also by-- as pointed out by my
11 colleague from Bronx Defenders, you know, there's
12 tangible evidence obviously that a strong
13 contributor, and I believe someone from the innocence
14 project is going to speak later, a strong
15 contribution to false-- to wrongful convictions in
16 this country are, you know, misconduct with respect
17 to turning over evidence by prosecutors. And what
18 happens is when you create a situation like this
19 where you have a DA's Office as in Manhattan saying,
20 "We're just going to do the bare minimum. We're
21 going to barely just comply with the statute." You
22 create a culture where what's prized is strategy and
23 leverage towards gaining a result more than justice,
24 which is what a prosecutor is charged with seeking.
25 You create a game situation. You create the playing

1 of games, the hiding of certain things. "I'm making
2 this offer," a DA will tell you, "but you have to
3 tell me by the next court date." Well, how can you
4 advise a client whether or not to take this offer
5 that's going to, you know, effect the next decade of
6 their lives when unbeknownst to you, the DA's been
7 not handing you a grand jury testimony where maybe
8 the complainant expresses significant doubt as to an
9 identification, or maybe sets forth a self-defense
10 claim. Because there have been countless times in my
11 career where I've said to a client, "I can't believe
12 this client is not taking this plea." Suddenly, I
13 get that six-inch pile I've been telling you about,
14 and I say, "Oh, I see now why the client has been so
15 reluctant." There are tangible problems with this
16 case, not just problems in a strategic sense, actual
17 doubts about, you know, the way the DA has been
18 portraying this case, portraying a complainant who
19 saw perfectly, who is 100 percent confident. I'm
20 looking at the Grand Jury minutes, now I understand
21 why my client's been so reluctant to take this offer
22 that to me seemed good. So, it cuts both ways. Many
23 times our clients understand that there are all these
24 weaknesses in the case, and we are kind of inured to

1 that after decades of saying, "Yeah, well you're not
2 being realistic. Get the police reports. Oh, boy,
3 I'm really glad that the client didn't take a plea in
4 this case." So, it's less about, you know, the
5 Hollywood guilt or innocence and more about dignity
6 for our constitution, respect for the criminal
7 justice system. You know, this current format
8 greatly reduces respect for our criminal justice
9 system. I went to an event in Monroe College
10 sponsored by Discovery for Justice, and it was a
11 packed auditorium. There was anger in the community,
12 mostly people of color who are seeing, you know,
13 loved ones go serve long sentences without ever
14 having been shown, without ever having read a police
15 report on their case, tangible anger in that
16 audience, tangible anger from our clients to us. As
17 my colleague from Legal Aid pointed out, the
18 situation where a client calls his lawyer and says,
19 "Well, let's start talking about a plea," and the
20 lawyer says to them, "I don't have that information."
21 You know, that's not the end of that interaction.
22 The client doesn't believe you're being honest with
23 them. They attribute bad faith to you or laziness or
24 apathy. They don't want to hear that that's the
25

1 system and that there's nothing we can do to change
2 it. They blame us. Case has been going on for eight
3 months, how can you still not show me a police
4 report? I've had a variation of that conversation
5 probably 5,000 times in my life, and they don't-- and
6 many times they do point to-- my cell mate has seen
7 everything a month into the case. You look up the
8 person they're talking about, sure enough Kings
9 County, right? How do you explain to a client facing
10 a decade in prison that if they had been arrested
11 over the Brooklyn Bridge it would be a totally
12 different situation, and you can give them tangible,
13 informed advice, but because they're in Manhattan you
14 can't?

16 LISA SCHREIBERSDORF: Can I just address
17 that, because I want to answer just like a little
18 more specifically? You know, it's very easy to think
19 somebody's either innocent or guilty and they know,
20 but there are so many variations on that, and you
21 know, we've obviously spent our entire careers
22 analyzing those issues, but I'll give you a few
23 examples. You might have, let's say, stabbed
24 somebody with a knife. It may be-- you know you did
25 it, but it may be self-defense, and that's a nuanced

1 conversation that you need to have with your own
2 client and that that person needs to have with
3 themselves when they're being offered a certain plea.
4 And let's say that there are five witnesses that say,
5 yes, it was definitely self-defense. I mean, then
6 you know that that-- as a lawyer, you can say to that
7 person, you know, you should go to trial because, you
8 know, you're going to win this trial, because you're
9 right, you are innocent, but it's a legal innocence,
10 right? Because you did stab the person. But then if
11 you know there are five witnesses that tell a story
12 that's a little different than what, you know, your
13 client is saying, you might say to that person,
14 "Well, that's a big risk if you go trial. You're
15 probably going to lose." Now, keep in mind, that
16 when you have two people in an incident, even if five
17 people said one thing or five said the other doesn't
18 even mean that's-- you know, it's a game of
19 telephone, right? You don't even know what really
20 happened. And so when we-- you know, when we talk
21 it's very-- it's tempting to basically say the person
22 know what they did, but there's so much more, because
23 there-- for example, I mean, I give you-- there's a
24 story in her testimony about a client who actually
25

1
2 did go into a store and steal items from the store,
3 but he was so drunk that he doesn't remember it. And
4 so, look, do I think that's the greatest thing in the
5 world that the guys is so drunk he doesn't remember
6 it? No, but when you read the story you understand
7 that the original allegation was that he took some
8 items and took money from the cash register, but when
9 we eventually got the information we found-- we saw
10 in the surveillance he never took money from the cash
11 register; he took food. And with that, and with him
12 knowing and getting to see that surveillance himself
13 or the police reports, I can't remember right now, he
14 was able to get to a place where he recognized what
15 he needed to do, and by the way, the District
16 Attorney also recognized that they needed to
17 reconsider their offer. Now, he took drug treatment
18 and he successfully completed treatment, and that's a
19 net gain for everybody. So there's a lot of gray
20 area in whether somebody did or didn't do something.
21 And I just want to also add, let us not forget that
22 when somebody didn't do something that those are the
23 people that are getting hurt the most from this
24 process. So, they know they didn't take-- do
25 something, and they refuse a plea in a case where the

1
2 mandatory minimum is five years in jail if they get
3 convicted, and they're making this decision-- they
4 might have a probationary plea in front of them and
5 they're innocent, and they have a chance to walk away
6 from this without ever worrying about going to jail,
7 which is the horrible-- the worst thing that could
8 ever happen to somebody who's innocent, and we can't
9 even tell them don't take this plea which will, you
10 know, impact your job, your life for the rest of your
11 life, because we can't say, "Look, you are innocent,
12 but we have no idea what the evidence is going to
13 look like at the trial and what's your chance to be
14 vindicated." So, I think we should remember that
15 that is one part of the analysis that the person
16 knows, but the innocent person is the one who knows
17 the least about what actually happened during that
18 incident. So, that's the person-- excuse me-- that
19 gets hurt the most.

20 COUNCIL MEMBER COHEN: I guess what I'm
21 just trying to get a feel for, and you know, we're
22 looking at it systemically, and I understand that if
23 you're the individual that's looking at serious time
24 or any time that it's profoundly important to you,
25 but looking at it systemically I'm just trying to get

1
2 a handle on is this in terms of impacts and outcomes,
3 is this an enormous problem? Is it a relatively small
4 problem? In terms of-- and I don't know if you can
5 speak to this-- but disposition times, does Kings
6 County, are you much more likely to get a disposition
7 significantly quicker in Kings County than you are in
8 the other four counties?

9 LISA SCHREIBERSDORF: We did an informal
10 study in our office, because there are some cases
11 where we don't get discovery, and we found out that
12 cases where we get discovery is a sixth-month
13 difference in resolution time versus the cases that
14 don't get discovered.

15 COUNCIL MEMBER COHEN: Does anybody know,
16 though, from county to county from arraignment to
17 disposition is the time significantly different in
18 Queens versus Brooklyn or the Bronx?

19 TINA LUONGO: Well, in Queens as I talked
20 to you about their waiver policy, often you're not
21 even seeing an indictment because you're waiving--
22 your client is sort of waiving to try to get a deal
23 because if they don't waive they will be indicted and
24 then no deal. So, those times skew Queens in a way
25 that I think has to really be looked at. And then

1 the other boroughs, yeah, it's true. The other thing
2 that those-- there is, and I think this leads to the
3 Chairman's, sort of, question about sort of looking
4 at this as a comprehensive issue, bail and speedy
5 trial, there are times-- there were times, despite my
6 client being in, I had to say, "Judge, I need an
7 adjournment because I have just gotten DNA reports,
8 right, a week before trial. Now I need to get an
9 expert." In fact, in some cases, and they were
10 highlighted both in the New York Times, but in here,
11 we didn't get the DNA reports until after the jury was
12 picked. So, imagine that. You know, to talk about
13 sort of the systemic problem, I want us to hopefully
14 look at this as a justice issue, and I often compare
15 criminal discovery with civil discovery. Some people
16 may practice, who are lawyers, practice in a civil
17 world. We actually don't look at it from a "who's at
18 fault and who's not at fault" or "who did the
19 malpractice and who didn't." The fact is, on civil
20 matters, when money is the outcome or fault, civil
21 fault is what you're deciding. You're not deciding
22 guilt or innocence. So we're not saying just because
23 you're guilty, and it-- there's not an innocence
24 problem, we shouldn't change the system. That civil
25

1
2 system provides for interrogatories, questions you
3 ask your opponent that are fully asked, depositions
4 where you are meeting the client and questioning them
5 outside of trial on the record. You have pretrial
6 evidentiary hearings where the judge orders turning
7 over, and if not, you can move for preclusion at
8 trial or summary judgement of an issue. That's when
9 money is at stake. If liberty is at stake, I want us
10 to pause to say the calculation on justice is not--
11 is this unfair to innocent people. The calculus is
12 this unfair to the system and the question there is
13 yes.

14 SCOTT LEVY: If I can just address your
15 question. One of the tricky parts about answering
16 your question is that because our discovery system is
17 so broken, we don't know what we don't know, right?
18 So, it's in some sense an unanswerable question,
19 because as sort of wrongful conviction cases show,
20 there is a world of evidence out there that is just
21 kept hidden from view. It comes to light in a
22 handful of cases, right, where a conviction is
23 overturned, and if you read those cases you always
24 see that there's some very specific set of facts in
25 some, you know, dogged family member who for years

1
2 went after this case and found the oen thing that
3 sort of broke everything open, right? Be we
4 shouldn't have to depend on that to reveal what we
5 don't know, right? And the trouble again with the
6 question is, you know, how many people are pleading
7 guilty when they shouldn't have plead guilty? We'll
8 never be able to answer that because we don't know,
9 right? We don't know what we don't know, and without
10 having full transparency it's sort of an unanswerable
11 question.

12 COUNCIL MEMBER COHEN: Thank you, Mr.
13 Chair. Council Member Rose?

14 COUNCIL MEMBER ROSE: I just have one
15 very simple question. Are these restrictive
16 discovery laws keeping you from being the most
17 effective, providing the most effective defense for
18 your clients?

19 TINA LUONGO: Yes.

20 COUNCIL MEMBER ROSE: Thank you.

21 TINA LUONGO: Simple ans-- simple
22 question, simple answer.

23 SERGIO DE LA PAVA: Without question,
24 absolutely, and that's outrageous.

25

1
2 COUNCIL MEMBER ROSE: And in so doing
3 this since you are tasked with defending them and
4 providing them with the most information that allows
5 them to make an informed decision about the rest of
6 their lives, you are in essence-- without the
7 adequate discovery you are a party to fueling the
8 pipeline to prison. Would you say that's so?

9 TINA LUONGO: We have no choice but to
10 say yes to that. Do we want to say yes to that--

11 COUNCIL MEMBER ROSE: [interposing]
12 Absolutely not.

13 TINA LUONGO: no. Absolutely not. Do
14 the 1,200 public defenders at Legal Aid Society and
15 our colleagues in each oen of our offices, and
16 frankly, our colleagues throughout this state want to
17 practice like this? No. but if we look at it as
18 this is what we have, and in the moment we have to
19 act on the best interest of our client, and if that
20 is to waive, unfortunately, months upon months to try
21 to get a deal in Queens without having any discovery,
22 that's in the best interest of the client; we have to
23 do that.

24 COUNCIL MEMBER ROSE: And if you want to
25 provide the best defense for a client, you now then

1
2 sort of become party to them no longer having a
3 speedy trial because if I'm correct, I heard you say
4 you now have to ask for an adjournment to try to
5 provide the best type of defense for your client.

6 TINA LUONGO: That's right.

7 COUNCIL MEMBER ROSE: so now--

8 TINA LUONGO: [interposing] Because the
9 stakes are that high, and--

10 COUNCIL MEMBER ROSE: [interposing] But
11 options are either, you know, the pipeline to prison
12 or delayed justice.

13 UNIDENTIFIED: That's right.

14 TINA LUONGO: And when you look at it
15 also in terms of bail, the providing of information
16 earlier to us allows us-- could allow us, and often
17 if we get it, for instance, through our own means, I
18 find out information and I get an investigator and
19 they go out, and I believe that there is a change of
20 circumstance, I am going to make a bail application
21 to reduce that person's bail and get them out. I
22 can't do that or I can do it more if I had the
23 information earlier to make a real change, and so it
24 is, as we have said in Albany and as we have said, it
25 is a comprehensive approach to criminal justice

1 reform, and discovery helps in all matters, whether
2 it's speedy trial or looking at bail and the
3 assessment of bail and that decision by a judge that
4 is made in New York City 24 hours after arraignment
5 with very little information based on just the
6 application of the prosecutor and the information
7 provided in the prosecutor, but without any real
8 evidence, if I had then within five, ten days after
9 that given the information, I can go back and do a
10 bail application and say, "24 hours, now there's more
11 information. Judge, release my client on their own
12 recognizance." But I can't. I can't, and speedy
13 trial, I can't. So, it is the lynchpin. Providing
14 us information is the lynchpin for us to do what is
15 right by our client, and we in all of our offices
16 have gotten really creative to do more for our
17 clients with the very little information.

19 COUNCIL MEMBER ROSE: And you just, you
20 need the tools to do your job effectively.

21 TINA LUONGO: We need that information
22 clearly.

23 COUNCIL MEMBER ROSE: Thank you.

24 CHAIRPERSON LANCMAN: You know, I don't
25 know what's going to happen up in Albany, obviously,

1 and whether or not this is going to be the year, but
2 one thing that we might be contemplating would be as
3 we have funded Vera to do or CCI to do different
4 studies and different pilots, and Vera's embarking on
5 a pilot related to bail and the information that's
6 available to judges and everyone involved, you know,
7 if there were a study to be done that the Council
8 were to fund that would examine how discovery
9 practices in the different jurisdictions were
10 impacting speedy trial or wrongful convictions, you
11 know, x number of people that are Rikers that maybe
12 wouldn't be, etcetera, would that be a fruitful
13 endeavor on our part?

14
15 TINA LUONGO: I would-- of course,
16 looking at it and data is critical. You know, as
17 public defenders, the Mayor's Office of Criminal
18 Justice has asked me for us and all of us, but
19 certainly under our contracts to provide them lots of
20 information about how we effectively represent our
21 clients. Right? From you know, looking at how many
22 investigators and social workers and paralegals we
23 have to the training of our lawyers to how many bail
24 applications, what motions you're filing, right, you
25 know, what is the-- you know, have you taken a plea

1 on the top charge? Have you taken pleas-- how many
2 clients have you put in the Grand Jury? Like, this
3 is all information that both the city and the state
4 have asked, and for those of us who practice in
5 Manhattan and the Bronx, the First Department
6 Indigent Defense Organization Oversight Committee--
7 it's a mouthful-- IDOOC every two years asks us all
8 of these questions, both anecdotally and data to
9 ensure that the public defenders of this city are
10 doing right by our clients because we are contracted
11 to do so and mandated to do so. What data is
12 collected on the discovery practices on how they have
13 asked-- what their policies are for asking for bail,
14 what their policies are for asking for adjournments.
15 There's a whole host of things. They are funded by
16 the City the same as we are, and we know that the
17 number of low-level misdemeanors have been trending
18 down because of the efforts and the reform efforts of
19 this council, public defenders, and the District
20 Attorneys, and the Mayor's Office of Criminal
21 Justice. While we're having conversations-- this is
22 a preview to the budget testimony coming up, but as
23 we're talking to the Mayor's Office of Criminal
24 Justice and we are hearing things like, "Well, you
25

1
2 may not need that much funding because that's"--
3 right? DA's budgets don't actually do that. And so
4 the real question is, so you have less cases, so are
5 you really doing an active look at the cases you do
6 have, turning over the information, because I am
7 going to also say the same way we are required to
8 analyze our cases from day one should be that of the
9 District Attorney, and this idea that I don't have to
10 turn over discovery until trial, I have friends who
11 are District Attorneys, who are former District
12 Attorneys, and we know our colleagues who are in the
13 Defense Bar, who are former District Attorneys who
14 admit because I didn't have to turn anything over,
15 because I knew trial was a year away, I didn't really
16 have to talk to my witness right away after the Grand
17 Jury. I didn't have to check in with them. I didn't
18 have to ask the police officers to turn over the
19 stuff. That's why in Lisa's case in Brooklyn and in
20 our office we get it on a regular basis because
21 they're under an obligation, voluntarily by the way,
22 but in obligation and a promise to do so, they turn
23 it over because they're asking for it more regularly.
24 The four other boroughs are not, and so you're not
25 really analyzing your case, so you don't know

1
2 actually if your, for instance, your complainant no
3 longer wants to come or has changed their story and
4 the young man is sitting at Rikers for three years.
5 You don't know that until you unfortunately know it
6 and it's too late.

7 CHAIRPERSON LANCMAN: Yes, sir?

8 SCOTT LEVY: I would--

9 CHAIRPERSON LANCMAN: [interposing] Let me
10 just recognize we've been joined by the Public
11 Advocate, Letitia James.

12 SCOTT LEVY: Just on the question of
13 doing a study. Discovery practices is the one place
14 where you already have a natural experiment occurring
15 right now. Generally, when you're doing one of these
16 studies, one of the hard parts of designing a study
17 is finding a control group and an experimental group.
18 Right? With Brooklyn you have that. You have a
19 natural experiment ongoing for decades and you can
20 see--

21 CHAIRPERSON LANCMAN: [interposing] Let
22 me-- so let me press you in that. Do you have
23 questions? Okay, let me press you on that. The open
24 file discovery in the Brooklyn DA's Office has been
25 in place for some time now, right? It started with

1
2 DA Hynes. Can we say that there have been fewer
3 wrongful convictions in Brooklyn than in the other
4 jurisdictions? Can we say that speedy trial is more
5 real in Brooklyn and other jurisdictions? Can we say
6 that Brooklyn has sent fewer people or had fewer
7 people sitting on Rikers Island for want of being
8 able to intelligently negotiate a plea? How would
9 that control group work out? How would that study
10 work out?

11 LISA SCHREIBERSDORF: I mean, my only
12 concern is that there are so many factors that go
13 into a lot of those things. My understanding is that
14 Brooklyn in general does resolve case. You know,
15 when you look at the whole package, tends to resolve
16 cases at the bottom end. Like, if you look at the
17 Bronx, they may take three years. You know, we'll
18 look at Brooklyn. It'll be like nine months or, you
19 know, six months or something like that. I would say
20 it's probably related to the discovery practice, but
21 it's very hard to, you know, separate that out from,
22 you know, for example, bail practices are judge
23 dependent. You know, there's a lot of other issues
24 that play into it. So, I don't-- look, I'm not
25 against the study, and of course we would be very

1 happy to cooperate and work on a study. I just found
2 it really hard to, you know, imagine-- I mean, a lot
3 of work has been done on this issue already, and I
4 think what we need is action and probably not more
5 studies. I don't oppose a study, but I feel like
6 sometimes studies are used as a way to delay action,
7 and I feel like we have delayed this a long time, and
8 that may not be the best solution. I would be really
9 interested just to say-- I would be really interested
10 in some conversation with the Police Department about
11 their potential role in this as well, because for
12 example, in North Carolina, you know, when you find
13 out you have a case you actually go to the Police
14 Department and they give you the file. You know,
15 it's not always required that everything goes through
16 the DA's. So, I think there's a space there where we
17 could really talk about more than just this.

19 CHAIRPERSON LANCMAN: So, one of the
20 things that we are very interested in coming out of
21 this hearing is the possibility of passing
22 legislation requiring the Mayor's Office of Criminal
23 Justice to convene all the stakeholders as it does in
24 other circumstances, whether it's trying to clear the
25 backlog of cases that are at Rikers Island or other

1 issues, the DA's, the public defenders, the police,
2 whoever else, and try to establish obviously
3 voluntarily because the DAs are independently elected
4 officials, but some kind of standard or best
5 practices for New York City. I served in the
6 Assembly. It's difficult to pass legislation that is
7 as equally relevant and vital in Brooklyn as in
8 Chemung County, and if we don't see action in Albany
9 this year, we might think it makes sense to really
10 force the issue, at least here in New York City to
11 the extent that we can, and try to get some uniform
12 practices that are recognized as being what in 2018
13 should be an appropriate way for criminal
14 prosecutions to be handled. And so that's-- that
15 would be the opportunity to bring the PD and
16 certainly District Attorneys and the public defenders
17 and whoever else into that conversation and force a
18 result that we may not be able to get out of Albany.
19 With that, Madam Public Advocate?

21 PUBLIC ADVOCATE JAMES: Thank you, Mr.
22 Chair. So as a, for full disclosure, a former Legal
23 Aid attorney, former public defender, and someone
24 obviously who is committed to justice. So the
25 question was already asked, and that was the

1 consistency in the City of New York, and it's my
2 understanding that there's open file discovery in
3 Brooklyn, but the other boroughs unfortunately lag
4 behind. So, the open file discovery, at what
5 juncture does that come into play when a case is
6 marked ready for trial, or?

8 LISA SCHREIBERSDORF: No, we get our
9 discovery shortly after indictment.

10 PUBLIC ADVOCATE JAMES: Okay, and that is
11 not the practice in the other five boroughs, and does
12 it only apply to misdemeanors or to both misdemeanors
13 and felonies?

14 LISA SCHREIBERSDORF: It's for
15 misdemeanors and felonies.

16 PUBLIC ADVOCATE JAMES: So, the other
17 boroughs, no open file discovery?

18 TINA LUONGO: No, largely no. You know,
19 as we sort of mentioned before, you know, there is--
20 I could think of cases in which I've pressed and
21 District Attorneys will turn over things, but as a
22 principle it is not happening, and in the few
23 instances such as in Manhattan and there is some
24 recent conversation of Staten Island that they want
25 to make changes by in large. It is only if you have

1 a date certain. For instance, a date circled for
2 trial, which does not help 90 percent of our clients
3 who plea very-- before trial, long before trial.
4 Only in some instances, in some felony cases with
5 lots of exclusions, and the suggestions coming out of
6 Staten Island are basically a write of redaction that
7 would make any document meaningless.
8

9 PUBLIC ADVOCATE JAMES: And we apparently
10 in New York and New York State are -- we have more
11 restrictive discovery statute than Texas, Alabama,
12 North Carolina, and 43 other states. Is that true?

13 UNIDENTIFIED: Forty-six.

14 LISA SCHREIBERSDORF: Rick Perry, when he
15 was the Governor of Texas, changed the discovery
16 laws. I want us to pause on that. Rick Perry
17 changed the discovery laws. For him, according to
18 the statements he made when he did it, was that if
19 Texas was going to be a law and order state where
20 they were going to put people away for many, many
21 years, he was going to ensure that due process was at
22 least given.

23 PUBLIC ADVOCATE JAMES: And these other
24 46 states, as far as you know, do they-- can you get
25 discovery through the Police Department, or is that

1 just an anomaly in that one particular state that you
2 mentioned?

3
4 SERGIO DE LA PAVA: Well, you know,
5 obviously it varies.

6 PUBLIC ADVOCATE JAMES: Yeah.

7 SERGIO DE LA PAVA: But the thing that I
8 think is most important to know is that there's a
9 nationwide trend and it's always towards greater
10 discovery. So, none of these 46 states, and this is
11 similar to the Brooklyn DA's Office, they've never
12 came back and say, "Oh, we made a mistake. We need
13 to roll back. We need to make our discovery more
14 restrictive." I think whatever the date ultimately
15 turns out to be it'll still remain true that the
16 Brooklyn DA's office has never back-tracked on that
17 policy. They've never said, "Oh, we've made a
18 mistake. Manhattan was right." Because look at
19 what's happening in terms of witness interference or
20 look at what's happening here. We're now going to--
21 and they're free to do that since they can comply
22 with the statute. What they're doing is largely
23 voluntary. They can easily-- in fact, you've never
24 seen that, and you've never seen any other state that
25 has opened their discovery laws, come back later and

1 say, "Well, you know, that was a mistake. We're
2 going to take that back." So, it's a nationwide
3 trend and unfortunately New York is at the rock
4 bottom somehow.

6 PUBLIC ADVOCATE JAMES: But you know what
7 is really concerning to me is that under the former
8 District Attorney in Brooklyn he formulated this
9 conviction review panel, and we've uncovered a number
10 of individuals who are wrongfully convicted. It's
11 been primarily focused in Brooklyn. All the attention
12 has been on Brooklyn and it's continued under the
13 leadership of Eric Gonzales. And so, the question is,
14 once we begin to review these cases in the other
15 boroughs what we will uncover, what we will discover.
16 Will the number of wrongful convictions exceed that
17 in the borough of Brooklyn?

18 SERGIO DE LA PAVA: Well, I mentioned
19 this earlier and how a lot of research has been done
20 on, you know, the higher incidents of let's call it
21 the lack of open disclosure to the defense of
22 material by the DA and how that contributes, and
23 there's other people who you'll be hearing from who
24 are in a better position to elucidate that, but it is
25 certainly a factor in many wrongful convictions is

1
2 whether you want to call it a Brady violation or late
3 disclosure or nondisclosure of material that somehow
4 could have assisted the defense.

5 PUBLIC ADVOCATE JAMES: And I understand
6 your concern about analysis to the point of
7 paralysis. I join with you in that. But if it's
8 going to convince, and I would imagine it's the State
9 Senate which is holding up this bill as opposed to
10 the Assembly, whatever evidence that we can put
11 forward, whatever analysis that we can put forward to
12 convince them that this a step in the right direction
13 I think will go a long way. Does anyone know where
14 the Governor stands on this? Has he stated a
15 position with respect to reform in this area?

16 TINA LUONGO: So, the Governor in his
17 State of the State and in the budget placed not only
18 bail reform front and center but also discovery and
19 speedy trial and talked about how this is really a
20 racial justice issue, and he continues to compress
21 that this is a comprehensive approach. And we know
22 that both the Assembly and the Senate minority have
23 also enacted a proposed, in their one house, bail
24 discovery and speedy trial as a comprehensive
25 package. Ultimately, we hope that all three prevail,

1
2 because it's-- as with discovery, as I said before,
3 is a lynchpin to helping us obviously both in terms
4 of net-- should have negotiate for our clients, you
5 know, moved a trial quicker or hearings, make those
6 critical decisions as well as making bail
7 applications when people are in. We need that
8 information in order to do it, which is why it was
9 talked about as comprehensive. So here we are in New
10 York City and there's a lot of conversation by the
11 District Attorneys on bail and speedy trial. The
12 conversation we're not hearing is how they can reform
13 discovery, too. So, it seems to be being left out of
14 the conversation.

15 PUBLIC ADVOCATE JAMES: The only leverage
16 we have, and I thank the Chair for his indulgence,
17 the only leverage that we have is the state budget.
18 Do you know whether or not this is where-- this is
19 part of the negotiations with respect to the state
20 budget?

21 TINA LUONGO: It is in the budget, and we
22 anticipate it being a very large conversation when
23 everybody gets into a room together.

24 PUBLIC ADVOCATE JAMES: Thank you. And I
25 hope at some time we can-- at some point, as you

1
2 know, I've been a proponent. I've not only reforming
3 criminal discovery practices, but also Grand Jury
4 practices in the state of New York because there's
5 been some abuses in that area as well. Thank you.

6 CHAIRPERSON LANCMAN: Thank you. Council
7 Member Cohen?

8 COUNCIL MEMBER COHEN: Thank you. Again,
9 to be clear, I definitely am completely supportive.
10 But I wonder if-- and I don't know-- again, it
11 appears to be hard to compare apples to apples county
12 by county, but could unintended consequence more
13 trials? Is a trial more likely in Brooklyn than in
14 the other counties? Is there any evidence?

15 LISA SCHREIBERSDORF: No. In fact, the
16 thing that's most likely is that the right plea is
17 arrived at earlier when everybody has the same
18 information. That, you know, the trial rate is not
19 dramatically different from county to the other.

20 TINA LUONGO: And I sort of want to also
21 pause to say, you know, as the citywide provider, so
22 I can also look at internally our data on this, there
23 are a lot of reasons why that might be. So, it isn't
24 speedy trial. It is in Brooklyn, for instance, they
25 have had a history of very well alternative to

1
2 going to use as the framework as to why we should
3 turn over discovery.

4 COUNCIL MEMBER COHEN: Thank you, Mr.
5 Chair.

6 CHAIRPERSON LANCMAN: Thank you very
7 much. We have two more panels today. The closing
8 panel will be our District Attorneys, but before we
9 hear from them we will hear from Rebecca Brown at the
10 Innocence Project, and Marie Ndiaye-- I apologize if
11 I'm not saying that correctly-- from the Katal Center
12 for Health, Equity and Justice. Good morning.

13 UNIDENTIFIED: Good morning.

14 CHAIRPERSON LANCMAN: Barely, almost
15 there. Would you raise your right hand to be sworn
16 in? Do you swear or affirm the testimony you're
17 about to give is the truth, the whole truth and
18 nothing but the truth?

19 UNIDENTIFIED: Yes.

20 UNIDENTIFIED: Yes.

21 CHAIRPERSON LANCMAN: Thank you very
22 much. Whichever one of you would like to go first?
23 And Mr. Sergeant at Arms, can we get five minutes on
24 the clock?

1
2 MARIE NDIAYE: Good morning. Good
3 morning. First I want to thank the Committee.

4 CHAIRPERSON LANCMAN: I think you need to
5 turn the mic on.

6 MARIE NDIAYE: Thank you. Hello? I'll
7 try that again. I want to thank the Committee on
8 Justice Systems and the Council Member for holding
9 this hearing on a very important part of our criminal
10 justice system which is discovery in criminal cases.
11 My name is Marie Ndiaye. I am the Senior Policy
12 Manager at the Katal Center for Health, Equity and
13 Justice. The Katal Center is a nonprofit organization
14 that co-founded and co-directed the Close Rikers
15 Campaign through the victory of having Mayor de
16 Blasio adopt closing Rikers as a City policy. Prior
17 to that I was a public defender right here in
18 Manhattan. I worked for the Legal Aid Society and
19 practiced in 100 Centre Street which is down the
20 block from here. I was there for five years. I
21 represented over 2,000 New Yorkers and misdemeanor
22 and felony cases, and I'm submitting my testimony
23 armed with the experiences of my clients over those
24 five years. This is a very important time for New
25 Yorkers when it comes to criminal justice reform.

1 Our Mayor, City Council and Governor have all
2 committed to closing the Rikers Island jail complex.
3 However, it cannot be overstated that closing Rikers
4 cannot be achieved without critical changes to our
5 free trial justice practices and that includes our
6 discovery practices. As mentioned by the former
7 panelists, including my former boss Tina Luongo, our
8 current law at the moment allows District Attorneys
9 to withhold evidence until the day trial begins, and
10 that is often the most important evidence in a case
11 including police statements, Grand Jury minutes and
12 statements of witnesses who would be testifying. And
13 here is how the application of the current law
14 manifested in my practice over the last five years.
15 You know, I've been handed Grand Jury minutes on the
16 day of trial and reviewed them and found that they
17 were insufficient, which led to the dismissal of
18 those charges. I've been told by prosecutors on
19 several occasions that I cannot receive testimony--
20 I'm sorry, I could not receive evidence until we were
21 in a trial part, sitting ready to start a trial.
22 That also meant that if for some reason we didn't get
23 a trial part, the case would be adjourned again and I
24 would not receive that evidence. I have been handed
25

1 a stack of material until, you know, you have five
2 minutes to review this, you know, and then we're
3 going to start this hearing. And I've been handed
4 video in DWI cases on the day that the District
5 Attorney is answering ready on the case and been
6 told, okay well, got try this case. No, it's not
7 surprising. This was not just in victim cases where
8 the prosecutors claim to be worried about witness
9 safety. This happened in cases that didn't have to
10 go hear witnesses. This happened in petit larceny.
11 This happened in DWIs. Even in fare beats, the
12 turnstile jumps, and in cases where the accused and
13 the complainant are known to each other. So, this is
14 not about witness safety. This is about a culture of
15 maintaining advantage by withholding evidence, and
16 it's a power play, and unfortunately that power comes
17 at the expense of the people who are innocent until
18 proven guilty. Our current discovery practice
19 undermines our system at every turn. It completely
20 eviscerates the attorney/client relationship and
21 leaves the accused who often themselves as witnesses
22 to crimes or victims of crimes extremely reluctant to
23 cooperate with law enforcement and prosecutors.
24 People's experiences as defendants do inform how they
25

1 will behave as victims and witnesses of crimes, and
2 that is the real public safety issue. As previously
3 mentioned, New York is among one of the four states
4 with the most restrictive discovery practices and
5 Manhattan is one of the boroughs with the most with
6 the most restrictive practices here in the five here
7 in New York City. It is time to bring our discovery
8 practice in line with the rest of the country with
9 other states like Texas and North Carolina and
10 Missouri where defendants can receive police reports
11 at arraignments. It's also important to note again
12 that these states, none of them have rolled back
13 their discovery protections, and neither has the
14 county of Brooklyn right here in the City. And I
15 think now is the time for uniformed practices across
16 the city that are fair and foster a culture of
17 transparency and not secrecy and we have alternatives
18 that would achieve that transparency. Currently, in
19 the Senate, Democrats and the Assembly Majority have
20 both released criminal justice packages that have
21 proposed changes to bail, speedy trial, and discovery
22 practices. We would urge this council to reach out
23 to your colleagues in the State Assembly and in the
24

1 Senate and urge them to pass the best discovery bill
2 possible.

3
4 CHAIRPERSON LANCMAN: Thank you.

5 REBECCA BROWN: Thank you. Thank you,
6 Chairman Lancman and members of the Committee. My
7 name is Rebecca Brown. I'm the Policy Director with
8 the Innocence Project. The Innocence Project was
9 founded in 1992, and we work to free the innocent who
10 remain incarcerated. We do that through post-
11 conviction DNA testing and we also work to reform the
12 system to prevent future miscarriages of justice. A
13 total of 241 people have been wrongfully convicted.
14 Those have been revealed in New York State alone, and
15 of those 30 of those people were proven innocent
16 using post-conviction DNA testing. Many of these
17 cases involved official misconduct, some of which
18 flowed from New York's antiquated and frankly
19 anomalous discovery practices, and for this reason,
20 the Innocence Project has a compelling interest in
21 the improvement of discovery practices here in New
22 York State. Our clients, those people whose
23 innocence were proven using DNA testing were
24 convicted of the most serious violent felony crimes
25 like rape and murder. On average, their innocence

1
2 wasn't proven until 13 years later after their
3 wrongful conviction, and it's only then that we
4 sometimes discover the extent of which discovery
5 rules and practices stymie justice in their cases.
6 It's simply tragic that the very information that
7 would have prevented the wrongful conviction from
8 occurring in the first place is learned of by the
9 defendant so many years later, and I'd like to share
10 an example from Brooklyn. You heard earlier about
11 how Mr. Hynes had changed the discovery practices in
12 Brooklyn, and this actually occurred before that
13 change took place. So, I think it's interesting to
14 think about that in that context. In August of 1989,
15 a 22-year-old named Darrell Rush [sp?] who was a drug
16 dealer was shot to death in Brooklyn. Four days
17 later the NYPD arrested Johnathan Flemming [sp?], a
18 rival drug dealer in the neighborhood, and charged
19 him with murder. Mr. Flemming's alibi was simple.
20 He was in Orlando at the time of a shooting on a
21 family trip to Disney World. During the trial, Mr.
22 Flemming's lawyers provided evidence showing that he
23 was in Orlando, including plane tickets, video
24 footage, and vacation photos from the family. But
25 there was a woman who said she was an eyewitness who

1 saw Mr. Flemming pull the trigger from her bedroom
2 window 400 feet away in the dark. So, Mr. Flemming
3 was convicted. The only people that provided an
4 alibi for him were family members, and so they were
5 not believed, and right after sentencing the woman
6 who said he was the trigger man admitted that she was
7 lying, because she had been arrested by police on a
8 larceny charge and was threatened with jail time if
9 she didn't help them to solve this case. Mr.
10 Flemming was given 25 years to life, and 24 years
11 into his sentence his case was reinvestigated by the
12 Brooklyn DA's Office in light of new evidence.
13 Investigators located a phone receipt in the case
14 file. At 9:27 p.m., less than five hours before the
15 murder, Mr. Flemming had paid a phone bill at the
16 Orlando Quality Inn, making it impossible that he
17 would have made it back to Brooklyn in time to kill a
18 man. Even though that receipt was in the police file
19 it wasn't never given to the defense. And then other
20 evidence was uncovered and was never turned over.
21 There were alibi statements from Quality Inn staff
22 members who remembered Mr. Flemming that were never
23 handed over to the defense. Indeed, Mr. Flemming's
24 defense layer never had the phone bill receipt from
25

1 the hotel, the witness statements from hotel staff or
2 even information about the charges against the
3 eyewitness who pointed to him as the trigger man.
4 Mr. Flemming's conviction was overturned after 25
5 years. He was an innocent man and he suffered a
6 quarter-century behind bars for a crime he didn't
7 commit, because the defense lacked access to the very
8 information that would have prevented his wrongful
9 conviction. When the state possesses evidence that
10 can help show someone didn't commit a crime, they
11 should be required under law to hand it over and with
12 enough time so it can be used by the defense so they
13 can investigate and put the piece together, and
14 because of how discovery rules work in New York,
15 innocent people are very likely to plead guilty to
16 crimes they did not commit. So, this goes to Council
17 Member Cohen's question early about do innocent
18 people plead guilty to crimes they didn't commit. We
19 know from our DNA-based exonerations there are 354 in
20 the United States that ten percent of those people
21 plead guilty to crimes they didn't commit, and these
22 are rapes and murders, the most serious violent
23 crimes possible. So, when you think about when the
24 stakes are lower on a misdemeanor crime or a lower
25

1 level felony, it's that much more likely that people
2 are going to plead guilty. The stakes are lower and
3 we know from DNA-based exonerations that 10 percent
4 of people are pleading guilty to rape and murder.
5 So, it's not just an anomaly, it's actually a trend.
6 It is something that happens. And one of the most
7 important reforms we can put in place in New York
8 State, and there are many, is bringing massive reform
9 to New York's discovery rules. It's an outrage that
10 people accused of crimes considered innocent under
11 the law do not get access to police reports, witness
12 names, witness statements until right before trial
13 begins. We must lead with major reforms in New
14 York's discovery rules. Poor discovery affects bail.
15 It affects speedy trials. It leads the innocent to
16 plead guilty, and it leads the innocent to be
17 convicted. Having some of the worst discovery rules
18 in the country, and you've heard a lot about that
19 today, also gets in the way of identifying and
20 correcting police and prosecutors who break the
21 rules. New York has one of the four-worst discovery
22 laws in the country. Indeed many have described the
23 current framework here in New York as trial by ambush
24 since the defense does not receive witness statements
25

1 and police reports until the eve of trial, making it
2 nearly impossible for the defense to adequately
3 investigate, properly advise or defend their clients.
4 New York falls behind states like New Jersey, just
5 over the river, Texas, North Carolina, Missouri,
6 you've head them today. While many in the
7 prosecutorial community in New York have argued that
8 reforming discovery practices will lead to witness
9 tampering or safety issues, prosecutors from those
10 states that have reformed their practices do in fact
11 endorse broader open file discovery and do not claim
12 that they are unable to protect witnesses. It's our
13 hope that this year we will finally bring changes to
14 this truly broken system. While the statutory
15 framework must also be amended to ensure uniformed
16 and fair discovery practices in the state, there's no
17 reason why New York City's individual DA offices
18 cannot put in place more progressive practices like
19 in Brooklyn. The Innocence Project encourages the
20 committee to ensure robust discovery practices both
21 in the city and also to push the state to take
22 decisive action on this issue this year. Thank you.

24 CHAIRPERSON LANCMAN: Thank you very
25 much. In terms of-- let me just mention Council

1
2 Member Eric Ulrich has joined us. He's a member of
3 the Committee. In terms of what you see among the
4 five DA's in New York and the testimony about what
5 Brooklyn provides, is that in the absence of state
6 legislative change? Is that the standard that you
7 would like to see? Are there things that Brooklyn
8 should do differently, particularly from the
9 perspective of protecting innocence, and then your
10 perspective as a, you know, your background in
11 practice?

12 REBECCA BROWN: I mean, I do defer to my
13 defense colleagues since they're the ones actually
14 practicing day to day, but I do know one of the
15 issues, you know, and I think that Brooklyn does have
16 very strong discovery practices. I would say that,
17 you know, extending that also to homicide cases would
18 be quite helpful. I mean, obviously a lot of our
19 wrongful convictions cases, our homicide cases or
20 combination of rape/murder cases, so for that reason
21 sure we would like to see that extended as well, but
22 I think, you know, if the other four boroughs were to
23 follow Brooklyn it would be an incredible
24 achievement.

25

1
2 CHAIRPERSON LANCMAN: Have-- so you want
3 to-- have you noticed a difference in the outcomes or
4 the prevalence of wrongful convictions among
5 jurisdictions based on their discovery rules or based
6 on the number of wrongful convictions that would be
7 traced back to some kind of-- but for some version of
8 open discovery?

9 REBECCA BROWN: Right. I mean, I think
10 it's a complicated question because so many of our
11 cases involve multiple factors. If you look at a lot
12 of our cases you'll see there was a false confession,
13 a misidentification, official misconduct. So, it's
14 hard sometimes to tease out, you know, what factor
15 was the most prevalent factor in the wrongful
16 conviction, but what I will say too is that often
17 times, you know, you will see the revelation of more
18 wrongful convictions in places with more progressive
19 policies. So, they shouldn't necessarily be punished
20 for doing the right thing. I mean, I think a lot
21 about Dallas County which preserved all of its
22 biological evidence, and by extension revealed more
23 wrongful convictions than some states have, and
24 that's because they did the right thing. They saved
25 their evidence. And so I think it's, you know,

1 important think about, you know, when we're putting,
2 you know, a more progressive policy in place, and
3 that may indeed reveal more wrongful convictions.
4 That's, of course, not a reason not to do it.

6 CHAIRPERSON LANCMAN: I remember the prior
7 iteration of my committee we had a hearing on
8 wrongful conviction. The Innocence Project was
9 there. I think Barry Schick [sp?] might have
10 testified, and he identified, or the project
11 identified lack of open discovery as one of the
12 significant factors in your view for the wrongful
13 convictions that your organization sees.

14 REBECCA BROWN: Absolutely.

15 CHAIRPERSON LANCMAN: Colleagues, do you
16 have questions? Alright. Well, thank you v-- thank
17 you very much. I appreciate your patience and your
18 testimonies. So, now it's our pleasure to invite up
19 the District Attorneys to give testimony. If you're
20 here from the DAs, come on up. Okay, I can
21 officially say good afternoon. I promise I will not
22 have the opportunity to say good evening. Would you
23 mind if you raise your right hand so we can swear you
24 in? Do you swear or affirm that the testimony you're
25 about to give is the truth, the whole truth and

1 nothing but the truth? Thank you all very much. I
2 think it would be appropriate, unless you all have
3 worked out some other arrangement, for us to first
4 hear from Brooklyn since amongst your colleagues
5 you're probably the least popular fellow in the room
6 today.

8 LEROY FRAZER: I'm always popular with
9 these colleagues.

10 CHAIRPERSON LANCMAN: Can you-- can we
11 move that mic over for him?

12 LEROY FRAZER: This is fine.

13 CHAIRPERSON LANCMAN: Are you comfortable
14 there? You good? Okay, great. Good afternoon,
15 Chairman Lancman, Lancman, and members of the
16 Committee on the justice system. I am Executive
17 Assistant District Attorney Leroy Frazer, Junior, and
18 I am presenting testimony on behalf of the Office of
19 Kings County District Attorney, Eric Gonzales. Thank
20 you for the opportunity to speak to you today about
21 our discovery practice. The Brooklyn DA is committed
22 to a vision of keeping Brooklyn safe and
23 strengthening community trust in our criminal justice
24 system by ensuring fairness and equal justice for
25 all.

1
2 CHAIRPERSON LANCMAN: Is it because of
3 the video? Oh.

4 LEROY FRAZER: As I was saying, the
5 Brooklyn District Attorney is committed to keeping--
6 to a vision of keeping Brooklyn safe and
7 strengthening community trust in our criminal justice
8 system by ensuring fairness and equal just for all.
9 Without community trust in our system we are less
10 safe, and indeed, our very democracy is at risk.
11 Procedural justice, or the sense that everyone who
12 comes into contact with our system, whether as a
13 victim, a witness, or someone accused of a crime is
14 treated fairly by the system is essential to
15 strengthening community trust. When the community
16 perceives that we as prosecutors have a win-it-all-
17 cost mentality and engage in gainsmanship [sic] for
18 tactical advantage it negatively impacts their sense
19 that the system is fair. As prosecutors, our duty is
20 to do justice, not just to secure convictions, and DA
21 Gonzales believes that early discovery in criminal
22 cases is an important part of providing procedural
23 justice. Failure to provide the defense of all
24 discoverable material in a timely manner may deprive
25 the defense of the ability to review the material

1 thoroughly, investigate any leads as necessary, and
2 adequately prepare a defense in anticipation to
3 hearings and trials. This inability may in turn lead
4 to wrongful conviction, a result that confounds our
5 goal of obtaining justice. Open file discovery aims
6 to curtail such emphasis by apprising the defense
7 early in the case not just for the prosecution's
8 evidence of the defendant's guilt but also of any
9 evidence the defense would consider favorable to the
10 defendant. Accordingly, the Brooklyn District
11 Attorney's Office engages in open file discovery with
12 regard to most matters. However, we recognize that
13 our commitment to procedural fairness in early
14 discovery must be balanced by a concern for the
15 safety of witnesses and the integrity of
16 investigative process. Only discovery may,
17 unfortunately, facilitate a defendant's tampering
18 with evidence or interference with ongoing
19 investigation. Our greatest concern is that early
20 discovery may lead to witness harassment and
21 intimidation, and by extension discourage victims and
22 witnesses in a particular case and in general from
23 cooperating with law enforcement. The problem has
24 become especially acute in our age of social media
25

1 and electronic devices. We must be especially
2 vigilant that the search for justice through the
3 adjudicatory process does not endanger the lives of
4 victims or witnesses or the lives of their families.
5 We take our obligation to protect the safety of
6 victims, witnesses and their families very seriously.
7 Our office has practiced open file discovery since
8 the mid-1990's. We believe that the practice
9 accelerates the disposition of cases and that worry
10 [sic] to return to routine motion practice of the
11 adjudicatory process will slow down considerably. As
12 a general matter, in Criminal Court where
13 misdemeanors are prosecuted, we provide open file
14 discovery on the first court date after the
15 conversion of the complaint to information. For
16 felonies, the process begins at the defendant's
17 Supreme Court arraignment on an indictment. Much of
18 the discovery is provided at the arraignment. This
19 allows for defense attorneys to review much of the
20 evidence before their clients much accept or reject a
21 plea offer. This is a meaningful effort to provide
22 not only procedural justice, but allow for quicker
23 resolution of cases. The bulk of the discovery is
24 then provided on the first adjournment following
25

1 Supreme Court arraignment. The initial open file
2 discovery packet consists of everything that has been
3 in the peoples file accept Grand Jury minutes. Of
4 course, documents are appropriately redacted to
5 withhold witness' contact and personal information.
6 Grand Jury testimony of any witness whom the people
7 intend to call at trial is turned over after the
8 minutes have been inspected and found sufficient by
9 the court. To the extent that certain times will not
10 be immediately available to the Assistant District
11 Attorney prior to the open file discovery date such
12 as hospital records, medical records, the result of
13 scientific tests, video, audio recordings, Assistant
14 District Attorney are instructed to obtain provide
15 such items as expeditiously as possible after the
16 initial court date. In the event that people
17 possess a discoverable item which if disclosed to the
18 defense pursuant to open file discovery time table
19 would jeopardize the safety of a victim or witness
20 who endanger the integrity of physical evidence or
21 adversely affect the legitimate needs of law
22 enforcement including the protection of confidential
23 informants. Assistant District Attorneys are trying
24 to provide to request a protective order. Although
25

1 we engage in open file discovery with regard to the
2 vast majority of cases, there are a small number of
3 cases where we do not. Generally we engage in motion
4 practice and not open file discovery in murder cases,
5 gang cases, and special victim's cases. District
6 Attorney Gonzales firmly believes that our discovery
7 policy appropriately balances fairness and public
8 safety and advances our overarching goal to keep
9 Brooklyn safe and strengthen the community trust in
10 our criminal justice system by assuring fairness and
11 equal justice for all.
12

13 CHAIRPERSON LANCMAN: Any preferences?

14 Any takers?

15 JULIAN O'CONNOR: Yeah, I'll go next.

16 CHAIRPERSON LANCMAN: Yes, sir.

17 JULIAN O'CONNOR: Good afternoon,
18 Councilman Lancman, members of the Committee. My
19 name is Julian O'Connor. I'm General Counsel at the
20 Bronx DA's Office. I sit on this panel as kind of
21 the unicorn here, because my experience is such that
22 I'm not a career prosecutor. I've spent-- I started
23 my career as a Bronx Defender, the indigent service
24 provider in the Bronx. I've spent the vast majority
25 of my career working within the court system as a

1 court attorney seeing the court system through the
2 lens of the judges and on the, I would say, back
3 stage view, and now I have the unique opportunity to
4 serve in a capacity at the DA's Office in this role.
5 So, with that in mind, if I don't sound like the
6 prosecutor that you expect, that might be a reason
7 for it. So, I'd like to start by talking about what
8 DA Clark has done during her transition and taking
9 the office in a new direction. The first thing that
10 we know is that she converted the office from
11 horizontal to vertical prosecution. And she
12 announced her vision, and that was simply prosecution
13 with integrity. Along with this vital reorganization
14 there came two pivotal pieces of new units in the
15 office, and that's the Conviction Integrity Unit and
16 the Professional Responsibility Bureau. As we
17 observed in our reinvestigations as part of the
18 Conviction Integrity Unit, we saw ineffective
19 assistance for trial council, and we also saw that
20 failure to disclose was part of the reasons that the
21 DA had come to her conclusion to vacate and
22 ultimately dismiss three cases in the Bronx. When we
23 talk about professional responsibility, it's a unit
24 that performed an office-wide evaluation of the best
25

1 practices and looked into detail with a consultant
2 from outside the office, long-time practitioner Chris
3 Hammond, to really evaluate our discovery practices.
4 As a result, the Bronx DA office is looking to
5 reshape our substantive practices by expanding what
6 we normally turn over in discovery. So, I want to
7 focus my conversation by discussing the practices in
8 the office by considering policy first, compliance,
9 witness protection, and then finally resource
10 allocation. So, in thinking about policy, what we
11 know is that in civil cases, right, you get hit with
12 an avalanche of material to kind of bury the truth,
13 and in criminal cases, we don't have the same method
14 of discovery. It's not fair. It doesn't engender
15 trust in the community, and we don't have the good
16 will and the confidence of people if we're not fair
17 in this process. Given this reality, there's no
18 opposition to modernizing the existing law to make
19 discovery practices more fair so long as we do not
20 compromise witness safety and the integrity of
21 ongoing investigations. So, with that mind, you
22 know, I think we all know what discovery is-- that's
23 the exchange of materials during litigation. For
24 prosecutors, we have an ethical obligation to
25

1 disclose information, and for the defense bar, it's
2 an opportunity to evaluate the strength of the case
3 and to present an intelligent defense. Fairness
4 requires that trial counsel present reliable
5 information about a case so that a defendant can
6 decide whether or not they're going to plead guilty
7 or go forward. Expanding discovery levels that
8 playing field because it helps defendants begin to
9 investigate with knowledge about the case against
10 them. However, while expanding discovery promotes
11 fairness on one hand, on the other hand there are
12 increased concerns about witness safety, specifically
13 intimidation and coercion. In addition, we also have
14 to think critically about whether or not there are
15 opportunities for perjury, if somebody receives
16 information ahead of time and they want to tailor
17 their testimony. Accordingly, increased discovery
18 can promote fairness, but the expectations of the
19 potential benefits are tempered against the potential
20 for that coercion, the perjury and the exposure that
21 can happen with an ongoing investigation. Now, we--
22 okay. We're aware that there's significant
23 differences in let's say the letter of the law and
24 the spirit of the law, right? SO, we can pronounce
25

1 policy changes, and we could look at the law and
2 people could follow it to the T but not engage in the
3 spirit of what is considered fundamentally fair. SO,
4 to do this, what we're looking at is truly a cultural
5 change here. So, to penetrate this cultural change
6 within the office, what we've done is-- we have a
7 Professional Responsibility Bureau that includes
8 litigation training, best practices, and an ethics
9 committee. The training piece is the DA
10 investigating in training and educating our
11 assistants, having roundtable discussions before any
12 policy is announced so that we can get the buy-in
13 from our people. We can get people to understand
14 exactly where we're going and why these changes are
15 so important. So, that's the piece where the Bronx
16 has taken their time to investigate, to learn more,
17 to educate our assistants before pronouncing our
18 policy. The other important piece when we talk about
19 professional responsibility is that there's an ethics
20 committee. So, when there's complaints from the
21 community, the defense bar, judges, wherever they
22 come, we investigate those claims. We prepare
23 findings, and we submit those to the DA herself, and
24 there are recommendations, if necessary and if
25

1 appropriate, for corrective action. So, that's the
2 model that we're considering and the steps that we're
3 taking in the Bronx. When I-- I wanted to bring up
4 one more piece, because I know that my esteemed
5 colleagues are going to talk in-depth about witness
6 safety. But I want to talk about resource
7 allocation. You know, on one hand we talk about
8 making sure that defense attorneys can effectively
9 represent their clients. So they have to have
10 investigators. They have to have the opportunity to
11 put up a meaningful defense, but in the DA's Office
12 we're expanding all of these obligations, right? We
13 know that there is a tidal wave of body-worn camera
14 footage coming with the expansion of body-worn
15 cameras that are going to be available in every
16 precinct, and we're talking about now produced
17 documents early. If possible, turn it all over at
18 arraignments. All of this requires funding. It
19 requires resources, and those resources are at two
20 ends of this. It's NYPD being able to give the DA's
21 Office the documents timely, whether we're requesting
22 GILIO [sp?], whether we're asking for police reports,
23 and at the same time it's being able to process all
24 that video, redact, extract, you know, collated and
25

1 presented to defense attorneys timely. So, that's a
2 resource allocation issue that requires funding. So,
3 if we-- if we're going to meet these goals, if we're
4 going to meet these challenges, we have to work that
5 angle as well. In conclusion-- I know I've run way
6 over-- I just want to say that if we truly value
7 fairness and integrity, we have to recognize the
8 reality that providing information as early as
9 possible will provide an effective investigation and
10 inform decisions by defendants, but the DA's Office
11 advocates for resources to fund this expansion and
12 promote serious consideration of any policy that also
13 preserves safety and preserves the integrity of
14 ongoing investigations. Thank you.

16 CHAIRPERSON LANCMAN: Thank you. So, the
17 bells are-- not quite a red light, but they are a
18 yellow.

19 KAREN FRIEDMAN-AGNIFILO: Would you like
20 me to go next?

21 CHAIRPERSON LANCMAN: Yes.

22 KAREN FRIEDMAN-AGNIFILO: Good afternoon,
23 Chairman Lancman and members of the Committee on the
24 Justice System. I am Executive Assistant DA Karen
25 Friedman-Agnifilo, and I'm happy to be testifying

1 here on behalf of Cyrus Vance, Junior, the Manhattan
2 District Attorney. Sitting here this morning and
3 listening to the testimony by the defense providers
4 was interesting and also gives us an opportunity to
5 explain to the committee there seems to be a
6 difference between perception and reality, and there
7 seems to be testimony about the way things used to be
8 done and the way things at least are moving in a
9 direction to be done, if not already being done. So,
10 I'm really happy to be here today to talk about our
11 policies and practices, many of which that have
12 already started, but ones that are also on the way.
13 Prosecutors at the Manhattan DA's Office have always
14 been committed to complying fully with, if not
15 exceeding, our constitutional, ethical, and statutory
16 obligations with respect to the disclosure of
17 discovery information and documents. In May of 2017,
18 so almost a year ago, we issued a new office-wide
19 disclosure policy that was so important and so basic
20 that our office named it simply, "Turn it over."
21 Prosecutors must disclose any and all information
22 that is in the file regardless of the individual
23 prosecutor's assessment of the credibility of the
24 information or its importance to the defense. So, if
25

1 it's in the file, we turn it over. And the
2 suggestion this morning that we only give certain
3 witnesses and not other witnesses is just no longer
4 our policy. Like I said, it's simply called, "If
5 it's in the file, turn it over." There are only
6 three exceptions to this rule: witness safety,
7 unrelated case information that impact privacy such
8 as photos of a victim's child who might be on her
9 cell phone, or attorney work product. Those are the
10 only exceptions. If it's in our file, we turn it
11 over. Over the past several years, our Office has
12 implemented enhanced disclosure practices, offering
13 expedited discovery at the time of Supreme Court
14 arraignment as well. And these are cases primarily
15 where the law enforcement is primarily the witnesses
16 in the case. And last year, we gave a notification
17 to the Defense Bar that we would be turning over all
18 of this information at Supreme Court arraignment.
19 It's roughly half of our felony cases. It's almost
20 50 percent. So, to suggest that we have open file
21 discovery in only a small number of felonies is
22 simply not true. It's our policy in 50 percent of
23 our cases. It's our practice to do it in far more. In
24 fact, the more serious the case, the bigger the file,
25

1 the more likely the prosecutor is going to turn over
2 all of that information so that we can have a trial.
3 I'll give you a case and point of Aton Pates [sic].
4 That was a trial that occurred with almost 100,000
5 pieces of discovery information. That was turned over
6 years in advance so that it could be gone through and
7 gone through and made sure that we could all go to
8 trial on time. And those are our most serious cases.
9 However, we take very seriously this idea of
10 compromising the safety and security of the civilian
11 witness. We are currently also expanding this policy
12 on misdemeanor cases that have no witness safety at
13 all, but you should know in our quality of life part,
14 which is where our low-level misdemeanors occur--
15 we've had about 24,000 cases in there so far. That
16 has an open file discovery policy 100 percent. Every
17 one of those cases, if a defense attorney emails us
18 and asks for it, we'll email the discovery. We're
19 trying to save trees. That's why we're not photo-
20 copying them all.

21
22 CHAIRPERSON LANCMAN: What's that
23 category of cases that you said?

24 KAREN FRIEDMAN-AGNIFILO: I'm just
25 talking about misdemeanors in our quality of life

1 part. Only four percent of defense attorneys have
2 asked for the discovery. So, it's available, it's
3 just people aren't taking advantage of it. So, while
4 the collective impact of Manhattan's practices is to
5 increase fairness in the criminal justice system, a
6 goal that I am happy to hear this committee shares,
7 importantly we are not doing anything to compromise
8 witness safety. And why do we feel so strongly about
9 this? I'm going to give just one case example. I'm
10 not going to bore you with lots and lots of stories,
11 but there's one recent case that I think it's
12 important to highlight. We had a victim whose name
13 was Scottie Scott [sp?]. He was a 13-year-old boy who
14 was murdered in Harlem in 2008. A defendant named
15 Daniel Everett [sp?] who was a member of a gang
16 called 2MF fired seven shots in the direction of
17 approximately 15-20 rival Lenox Boys [sic] members
18 and young bystanders who had gathered to watch a
19 fight. Two bullets pierced Scottie's heart, lungs,
20 liver, and leg and he died on the scene. Two other
21 victims were seriously wounded by survived. The
22 defendant eventually was convicted and sentenced to
23 32 years to life in prison in 2012, but only after
24 being recorded on a phone from Rikers Island
25

1
2 instructing gang members to intimidate witnesses in
3 the neighborhood and even inside the courtroom. A
4 New York Post columnist wrote at the time, "Even
5 though the sun had not set and more than two dozen
6 people saw the shooter recklessly whip out a nine-
7 millimeter and aim it at a thick crowd, everyone on
8 the street that day including two shooting victims
9 who survived somehow suffered collective amnesia,
10 nobody wanted to snitch." Finally, a full three
11 years after Scottie's murder, a young woman who
12 witnessed the shooting saw Mr. Everett laughing with
13 friends at a basketball game and was upset to see him
14 going on with his life even though she knew he killed
15 Scottie Scott. Even though she was terrified she
16 came forward to the police, before being-- we had to
17 relocate her from New York for her own safety. The
18 necessity of this measure was apparent during the
19 trial. Upon learning a particular witness's identity,
20 the defendant immediately relayed that information to
21 a fellow gang member on the phone and asked him to
22 press the witness. Not surprisingly, that witness
23 failed to appear in court to testify against them.
24 Although the witness did eventually testify,
25 immediately after his testimony he came back into the

1 courtroom and begged 2MF gang members sitting in the
2 back to spare him from retaliation. In a chilling
3 recorded call later that day, the defendant marveled
4 at the effect his intimidation tactics had on the
5 witnesses and commanded his fellow gang members to
6 continue to appear in court, sit in the back of the
7 courtroom and intimidate witnesses to alter their
8 accounts. As I said, I have other examples. I'm not
9 going to go over them in the interest of time, but I
10 tell this story not to shock or alarm, but to show
11 that witness intimidation is real, and it's a real
12 and present concern. We know from experience that
13 prematurely identifying witnesses not only can result
14 in harassment, intimidation and violence, this also
15 can prevent people from wanting to come forward and
16 cooperating in the first place and impacts our
17 ability to bring cases and indict cases. I also want
18 to point out, and this is something else we're
19 dealing with in the immigrant community. The
20 immigrant community right now is very afraid to come
21 to court because they're worried about ICE and ICE
22 reporting their personal information, and we care
23 very much about protecting our victims and witnesses
24 from such deportation. Our witnesses and victims
25

1
2 care just as much to not have their identities and
3 their addresses and their phone numbers and
4 everything else about them handed over to the very
5 individual who just did the thing, a terrible thing,
6 and committed the crime against them. It just seems
7 very-- it seems counterintuitive that a young person
8 can be walking down the street, be jumped by a group
9 of kids, a gun could be held to their head, and their
10 items are stolen. They're terrified. And the next
11 thing is we have to now give over their name, their
12 address, their phone number and all the personal
13 information about that poor individual who was just
14 walking down the street living about their lives.
15 There's great cost to witness relocation--

16 CHAIRPERSON LANCMAN: [interposing] Sorry,
17 in that scenario you're referring to the victim? To
18 the victim of being jumped and having--

19 KAREN FRIEDMAN-AGNIFILO: [interposing]
20 Yes.

21 CHAIRPERSON LANCMAN: a gun put to them?

22 KAREN FRIEDMAN-AGNIFILO: Correct. That
23 we would now have to turn over a victim's personal
24 identifying information, the name, the address, the
25 phone number, all the ways that you would now find

1 where this individual lives, how to reach them, how
2 to contact them. It just seems counterintuitive that
3 that is what that person who became a victim of a
4 crime by doing nothing but walking down the street,
5 now all of the sudden has to reveal that information.
6 I also want to talk a little bit about witness
7 relocation. That is not the answer. How many people
8 want to be uprooted from their lives and sent to a
9 city where they know no one, away from their
10 families, away from their communities? It's not
11 something people really want to do. We do it. It
12 costs something like 50,000 dollars a year or more to
13 do it. We can do it, but it's not really the thing
14 that everyone wants to do. It does have great cost
15 socially, economically, and personally to the
16 victims. I also-- I just want to make a comment
17 about protective orders. Protective orders are never
18 a guarantee, and you have to wait until the person is
19 threatened before you can ask for a protective order.
20 So, the comment earlier that protective orders are
21 never denied when we ask for them, it's because we
22 don't ask for them when we know legally we can't. We
23 don't answer them just because. We only go when we
24 meet the legal standard. So, we have been examining
25

1 our own discovery practices for many years. We are
2 in the process of making them more expansive. As I
3 said, we're already in 50 percent of our felony cases
4 giving over discovery at Supreme Court arraignment,
5 and in our more serious cases where there's no
6 witness safety concerns, we're doing it as well, and
7 we are going to continue to do this and be more
8 expansive in this area so long as witness safety is
9 not jeopardized. I want to also talk a little bit
10 about a concern about a question that your honor had
11 about timing and whether it expedites cases. I just
12 want to point your attention to the DCJS, the
13 Department of Criminal Justice Services, the
14 statewide agency that keeps statistics. They have a
15 lot of this information, and just for example, if you
16 were to look at the number of cases in New York City,
17 in Manhattan, we had 3,858 indictments that plead in
18 a particular year, and that took 309 days on average,
19 and in Brooklyn it was roughly the same, it was
20 3,581, and that was 315 days, slightly more, but I
21 would say it's statistically the same. So, I don't
22 know that there's a correlation necessarily between
23 expedited discovery and case efficiency. I can tell
24
25

1
2 by the way you're looking at me that you'd like me to
3 hurry, so I'm going to.

4 CHAIRPERSON LANCMAN: It's my move along
5 comportment.

6 KAREN FRIEDMAN-AGNIFILO: I see that. I
7 can see that, and I'm going to move along.

8 CHAIRPERSON LANCMAN: Only because we
9 want to get to questions.

10 KAREN FRIEDMAN-AGNIFILO: Understand.
11 So, let me just see-- let me just make sure there's
12 nothing else. Let me just make sure there's nothing
13 else that I want to say other than thank you for the
14 opportunity to speak today.

15 CHAIRPERSON LANCMAN: And we will
16 definitely be talking more with you.

17 PAUL CAPOFARI: Chairman, I am Paul
18 Capofari [sp?]. I'm the Chief Assistant District
19 Attorney on Staten Island. I'm here on behalf of
20 District Attorney McMahon. We're committed to seeking
21 justice on the behalf of the community and victims of
22 the crime. Every day we work to ensure fairness,
23 efficiency and transparency within the criminal
24 justice system. We've prepared testimony. I'm just
25 going to do some highlights. We do discovery by

1 stipulation that we copied from Brooklyn on our
2 misdemeanor cases. Even though we've been in office
3 for two years, it's flown by. We've studied our
4 discovery process, and we're going to go to-- we're
5 going to call it Early Action Discovery Plan where
6 within 21 days of the arraignment we'll turn over the
7 police reports, the witness statements, the search
8 warrants redacted for witness safety. A statement
9 was made--
10

11 CHAIRPERSON LANCMAN: [interposing] That--
12 sorry, is in that all cases or just misdemeanors, or?

13 PAUL CAPOFARI: That's the felony cases.
14 So we're going to turn over the felony paperwork
15 within 21 days of arraignment. That's what we're
16 trying to do.

17 CHAIRPERSON LANCMAN: You're breaking
18 news today.

19 PAUL CAPOFARI: Yes.

20 CHAIRPERSON LANCMAN: Okay, good.

21 PAUL CAPOFARI: Yes. That's our Early
22 Action Discovery. You know, we talked about a
23 culture change and trying to get people in the
24 office. You know, unfortunately I spent 25 years in
25 the Army so I like to order people to do things. It

1 doesn't always work, but we're pushing this through.
2 It is something that we've copied once again from
3 Brooklyn, and that's what we're going to try do.
4 So, we've always been turning over a voluntary
5 disclosure form, which has the 240 discovery in it.
6 Now, we're going to try within 21 days so that at
7 that first adjournment there's an informed process
8 going back and forth, but it is a cultural change
9 that we're going to try to push through. We talked
10 about resources. I can't emphasize what was already
11 brought up. The body-worn cameras are bomb [sic]. We
12 have to look at them to make sure of what we're
13 turning over. We intend to turn them over, but we
14 have to catalog them, find them, look at them.
15 That's a resource thing. There was a comment made
16 earlier about alternates to incarceration. I started
17 the Mental Health Court on Staten Island. We've
18 started a Veterans Court, and I know that
19 Councilwoman Roe who is in the same building as I am
20 knows that we want to have a Community Justice
21 Center. We're hoping for that. Those kind of
22 alternatives like a Community Justice Center, help
23 you ensure the fairness and the disposition of cases
24 that we can break some of the cycle of recidivism.
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We need a justice center on Staten Island. Oh, I got a thumbs up and a yes, I got to write that down. Alright, I got to take that back to the DA. Thank you very much. Do I have a-- there we go. Thank you. Sir, thank you.

CHAIRPERSON LANCMAN: Thank you very much. Queens?

ROBERT MASTERS: Good afternoon, everyone. Good afternoon, Mr. Chairman and other members, Ms. James. I guess I drew the shortest of straws because I think I'm last.

CHAIRPERSON LANCMAN: You're like the Mariona Rivera [sp?] of DAs. Think of it that way.

ROBERT MASTERS: Thank you for-- you're very flattering. I'll take it. My name is Bob Masters. I'm an Executive Assistant District Attorney in Queens. I've been a prosecutor for nearly 28 years. Before that, I spent nine years like Julian working in the court system, both the Supreme Court and Criminal Court in both Queens and Kings County. Within the office my duties vary quite greatly, but for the last 25 years I've been trying murder cases as recently as only a few months ago when I worked on the trial of Demetrius Blackwell,

1 the now convicted murderer of the on-duty killing of
2 the posthumously promoted Detective Brian Moore. And
3 apart from that I'm Judge Brown's liaison to all law
4 enforcement and governmental agencies. I also
5 supervise all of the training in our office and the
6 appeals efforts to defend all the convictions in the
7 case-- in the county. I'm Chair of our office's
8 Committee on Professional Standards which focuses on
9 all of the professional work that's done and any
10 lapses that occur, and the Best Practices Committee
11 that was mentioned. I've been a member of that since
12 its inception, and I worked on the working group that
13 developed the protocols for recording interrogations
14 and for identification procedures that were made into
15 law last year and adopted around the state. I've
16 also been on the Mutual Assistance Committee for the
17 District Attorney's Association, and as a result of
18 that I've worked and helped on a number of complex
19 homicide prosecutions throughout the state. I've
20 been a Special Assistant in suburban county Suffolk.
21 I've also been a special Assistant in perhaps one of
22 the most rural counties in the state, Franklin
23 County, and from that perspective I think I can see a
24 number of things. I'm also the incoming Chair of the
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1 Criminal Justice Section of the State Bar Association
2 Criminal Justice Section. I've worked intimately--
3 I've been an officer for the last five years. I've
4 been intimately involved in every single report
5 that's come out of that committee, including the
6 Discovery Taskforce Report, and in sum, I have to
7 tell you I've spent a lifetime working exclusively in
8 criminal law, and I think that I've faced all of the
9 public safety issues, and the arch of my career goes
10 back from before the difficulties that cocaine really
11 presented when cocaine was just the Studio 54 drug,
12 before the crack wars now all the way through to our
13 opiate crisis. And what I'm taken by is that it's
14 always seen as an article of faith that the system is
15 broken, and I think that's uttered by people who
16 unfortunately don't have the historic perspective to
17 realize the time when the system truly was broken,
18 and I say that from the perspective of in 1992, the
19 first full year of the Brown Administration, we
20 endured one murder a day. The last two years for the
21 most ethnically diverse, socioeconomically diverse
22 county of two and a quarter million people, we've
23 been under 50 murders a year. That's less than one a
24 week, and I think that that shows you that the system
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1 was broken then, and hard work has led to safety now
2 being guaranteed to all of our citizens, where I
3 think there was grave doubt in the 80's and 90's
4 about whether or not government worked, about whether
5 or not government could provide basic security. I
6 think now that there's been much comfort on behalf of
7 everyone, and in truth, all the diversion programs
8 that have been mentioned by other panelists here,
9 those have all come about through the efforts of the
10 District Attorneys. You know, our office, we have
11 more than 30 of them and they've all been successful
12 and they've all led to basically giving an exit ramp
13 for many individuals never to be participants in the
14 criminal justice system again. Now, I think what the
15 advocates are talking about is this trial by ambush
16 phenomenon, and I think that anybody casually looking
17 at the view of this as it's practiced on a daily
18 basis certainly in my county is that it's a myth.
19 And the evidence of that is that in 2006 the New York
20 County lawyers conducted a survey on discovery
21 practices around the city, and that report was cited
22 in the news report that's been mentioned, and the
23 results were that little litigation resulted in no
24 impediments the dispositions were occasioned by
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1
2 discovery practices in Queens, and that has been my
3 experience form the years that I've practiced there.
4 And I think you have look at what our discovery laws
5 are and are not. There's a continuum of information
6 that's provided. Article 240, the bulk of it under
7 24020, I would say the entire universe of discovery
8 material in any case, at least 85 percent of it is
9 available on demand 30 days after arraignment on an
10 indictment. That is all the scientific reports, crime
11 scene photos. That is all of the scientific
12 information, any surveillance videos, any phone
13 calls, any-- that's the material that a defense
14 attorney needs to know to realize the predicament
15 that his client may be in. Before a suppression
16 hearing, and I would say 90 percent of cases that are
17 litigated in this city there is a suppression hearing
18 that's conducted, there's another round of discovery
19 of all of the statements of the witnesses, and it's
20 the detectives who investigated the case. They're the
21 primary witnesses, and all of their materials are
22 turned over, and only at trial is the final step in
23 this continuum made possible that civilian witnesses'
24 testimony has to be turned over, and I would say that
25 on the continuum of the universe of everything that's

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2 there, it's certainly less than 10 percent of the
3 discovery that's available in any case. And I will
4 tell you from my experience as a litigator, I myself
5 tried the Zodiac Killer case where that defendant was
6 at liberty for six or seven years. The police
7 developed a room full of discoverable material. I
8 could not turn it over fast enough. I held back a
9 total of about 50 pages of material until two weeks
10 before trial out of concern that one witness asked me
11 hold it back. I worked on the Wendy's Massacre.
12 Every single page of discovery material was turned
13 over months in advance. On the Brian Moore case that
14 I just tried there were perhaps 8,000 pages of
15 discovery. When we had a sure trial date, about
16 three weeks before we actually saw a jury, Mr.
17 Saunders and I turned over the last 100 pages of
18 discovery material, and within hours, one of the
19 civilian witnesses was reached by an investigator. I
20 got a harried call from that person frightened asking
21 to be relocated, asking, "Do I have to testify?"
22 Now, I think we have to look at facts, and John Adams
23 once said that facts are very stubborn things. With
24 regard to this debate about discovery there are
25 certain facts that are inalienable. New York City

1 has a population approaching 8.6 million people.
2 Last year there were 290 murders. New York State,
3 population of 19.8 people-- 19.8 million people-- had
4 a total of 600 homicides, the lowest since 1965 when
5 there were reliable statistics kept. New York State
6 is the fifth safest state in the union, the safest
7 big city. We only have the ninth lowest rate of
8 incarceration in the union. One thing to note, the
9 violent crime indexes, New York State ranks just in
10 the middle, 26th. So, there are reasons for concern.
11 There are reasons to hope for improvement, and what
12 you have to look at is the homicide rates of other
13 cities. Indeed, in Chicago last year there were 650
14 homicides for a population of 2.7 million, more than
15 the entire state of New York. In Baltimore with a
16 population one-fourth of Queens County, they had 343
17 homicides, seven times more than we did, 18 percent
18 more than New York City with a population 13 times
19 larger. And I think what we've heard here is this
20 very facile argument that has been made that New
21 York's discovery statute is one of the most
22 restrictive in the country, that comparing just one
23 of the 80 articles of New York's Criminal Procedure
24 Law without examining its interaction to the other
25

1 articles I think is intellectually dishonest, and I
2 think it's reckless, because that position assumes
3 that New York City's entire CPL is a prosecution-
4 friendly, regressive statutory scam. Anything-- but
5 that is absolutely a complete fiction. Defendants
6 perhaps receive more protections in New York State
7 than any other state in the union. Constitutionally,
8 everybody charged with a felony must go through the
9 Grand Jury. We're almost unique in that. No hearsay
10 is admissible in a Grand Jury in New York State.
11 That's unique position. Transactional immunity is
12 available in New York State, another uniqueness, and
13 it must be done within 144 hours after arrest, and
14 New York State is one of 17 states, only 17 states,
15 that have automatic judicial review of the procedure
16 of what occurred in the Grand Jury as to the
17 sufficiency and to make sure that it was appropriate.
18 And our discovery laws are complemented by the notice
19 requirements of CPL 710 1A and 1B. They are unique
20 in the United States. In many states, whether or not
21 a defendant confessed or whether or not he's been
22 identified is subject to ordinary discovery. New
23 York makes those things unique. If we fail to turn
24 those things over within 15 days, we do so under the
25

1 pain [sic] and preclusion. They're out of the case.
2 So that is something that is a defense benefit that
3 is unique anywhere in the United States. And I think
4 what you have to do in looking at what the discovery
5 law is the way it is, is that it was meant to create
6 a balance to the many procedural advantages that are
7 unique to defendants in New York. It's to permit law
8 enforcement the opportunity to be thorough, to
9 process, to gather everything that they can to
10 maintain as much cooperation as they can from all of
11 the witnesses, and we've heard now examples of other
12 states that are so wonderful, and by taking one
13 section from their statutory scheme and saying that
14 it should be adopted here in New York. Florida is
15 often used as the example. It's promoted as an ideal,
16 but people don't realize that the only Grand Jury
17 available in Florida is for a capital crime. Hearsay
18 is admissible there. There is use immunity, meaning
19 the target can be automatically called to the Grand
20 Jury, and apart from that, unless it's a capital
21 trial, a defendant in Florida only gets six jurors
22 and only 10 preemptory challenges unless he's facing
23 life in jail, something that is the minimum
24 requirement of preemptory challenges for anyone
25

1 charged with a felony in New York State. There are
2 actual penalties for the failure of reciprocal
3 discovery which in New York are completely illusory.
4 So, I think comparing our discovery scheme alone
5 without comparing the interconnecting procedural
6 points that are also triggered by it is going to be a
7 distortive process and it creates a funhouse mirror-
8 view of what happens on a daily basis, and on a daily
9 basis in Queens County, in our county of two and a
10 quarter million people which is larger than 13
11 states, many whom's procedure people he asked us to
12 compare and use as example. For the past 21 years
13 I've either been a Bureau Chief or an Executive, and
14 I have to tell you, I get many calls from judges. I
15 get many calls from defense counsel. I've never
16 received a complaint about not having adequate
17 discovery, the hiding of material, about sandbagging.
18 I'll get complaints about us not being ready in time.
19 I'll get complaints about perhaps the attitude of
20 assistants, about sloppy practices, but I have never,
21 ever had a complaint about not having adequate
22 materials to defend a client. The other thing I can
23 tell you is, I supervise--
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25

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2 CHAIRPERSON LANCMAN: [interposing] I--
3 just we want to wrap it up because we do want to get-
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5 ROBERT MASTERS: [interposing] Yep.

6 CHAIRPERSON LANCMAN: We do want to get
7 to question.

8 ROBERT MASTERS: I'm almost done. In the
9 appellate process, what happens is there may be
10 prosecutorial misconduct claims. They're all related
11 to summation error. With regard to discovery the
12 only claims have been the loss of materials due to
13 Hurricane Sandy and the erasing of surveillance
14 video. Now, what I'll tell you is this, what has not
15 been focused on at all here has been clearance rates,
16 and that's something that I think everybody has to
17 bear witness to. What a clearance rate is is what-- a
18 police term. It's solving the crime. It's not a
19 conviction. It's answering who done it. Crimes are
20 solved by the police. It's the gathering of
21 intelligence and information to answer questions to
22 resolve the mystery. Prosecutions are fundamentally
23 different. That's converting that intelligence, that
24 information into admissible evidence sufficient to
25 satisfy every single element of a crime that's

1 charged. If a mystery is solved but there's no
2 prosecution, I can't imagine anything worse for
3 society, because there's no deterrents. There's no
4 preventing the perpetrator from reoffending. There's
5 little impact on our goal of public safety, and New
6 York City enjoys a clearance rate that is the envy of
7 every big city in the United States. Indeed, we're
8 in the position now post-9/11, we've had a social
9 contract with our public, if you see something, say
10 something. It's become a cliché. If any of these
11 changes that are advocated or adopted, it'll be a
12 unilateral renegotiation of that social contract.
13 Those who saw and then said, who are brave enough to
14 come in and say, they will soon be revealed and
15 identified of having been the one to have seen and
16 said and told about the person who's in jail, and
17 it'll be known by that person and all of his friends
18 and associates, and I can tell you that that is the
19 reason why we have that clearance rate. That is the
20 reason the conversation you have with a witness to
21 get them to testify to get them to participate that I
22 can control the release of that information as long
23 as need be. Without that and that conversation is
24 replaced by trying to explain the variables of a
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protective order or the right to redact, I submit to you is farce [sic] gold [sic] that it would have the same impact. And I ask any parent in this room if they would let their kid testify hearing my second speech about the vagaries of a protective order as opposed to the definity [sic] of knowing that ultimately there is secrecy attached to their having testified. Now, Karen talked about the change of culture, and I have for you a PowerPoint that I'll leave with you that Jim Quinn [sp?] of our office prepared. I think you've seen it before where there's--

CHAIRPERSON LANCMAN: Rikers one?

ROBERT MASTERS: I'm sorry?

CHAIRPERSON LANCMAN: The Rikers one?

ROBERT MASTERS: No, no, witness intimidation, and it is chilling, and I will also show you something that I don't believe has been discussed, the dissenting report from NYSBA [sic] that was prepared by the only three members on that taskforce that were prosecutors in all of the attachments they have that reveal the level of witness intimidation.

1
2 CHAIRPERSON LANCMAN: What's that? Well,
3 I got my copy. You were-- good?

4 ROBERT MASTERS: I'll just say that with
5 conclusion people come to us to learn how to drive
6 down crime. We have visitors from offices all over
7 the country. I go to CompStat sessions for Queens.
8 They always have visitors at NYPD from other
9 jurisdictions that want to copy and mimic their
10 success, and what we're talking about is borrowing
11 from states where it has not worked in their own
12 jurisdictions. New Jersey was spoken about earlier.
13 I've spoken at-length with prosecutors from New
14 Jersey. Their rules are followed in the breach.
15 Their caseloads swell, nothing happens, and as a
16 result of that, cases die of neglect. That is the
17 type of thing that we're talking about borrowing.

18 CHAIRPERSON LANCMAN: Well, thank you,
19 and now is the opportunity to have questions. I
20 certainly don't mean to pit prosecutorial offices
21 against each other. You're each representing
22 individually elected District Attorneys, and you each
23 have your own circumstances and philosophies. So,
24 I'm going to try to have that conversation, this
25 dialogue without putting a new one on the spot in

1
2 that way. But, turning to the borough of Brooklyn,
3 in your testimony you stated, "Early discovery may
4 unfortunately facilitate a defendant's tampering with
5 evidence or interference with an ongoing
6 investigation." Our greatest concern is that early
7 discovery may lead to witness harassment and
8 intimidation, and by extension discourage victims and
9 witnesses in a particular case and in general form
10 cooperating with law enforcement." The problem has
11 become especially acute in our age of social media
12 and electronic devices, and I think that those
13 concerns represent if not a full summation of the
14 concerns that were expressed by the Queens District
15 Attorney's Office, but a big chunk of them. And yet,
16 Brooklyn has figured out how to conduct open file
17 discovery. Could you tell us how in Brooklyn you
18 reconciled these very legitimate concerns with none-
19 the-less a policy of open discovery?

20 LEROY FRAZER: Well, first of all, you
21 have to understand that we don't do the open file
22 discovery in homicide cases and gang cases and things
23 like that, and this is where we've seen the biggest
24 impact from social media. The--

25

1 CHAIRPERSON LANCMAN: [interposing] Let me
2
3 just-- sorry. Let me just ask you. So, let's just
4 understand the exclusions. So, you don't apply open
5 file discovery in homicide cases?

6 LEROY FRAZER: Gang cases--

7 CHAIRPERSON LANCMAN: [interposing] Gang
8 cases, any other categories of cases?

9 LEROY FRAZER: Some special victim's
10 cases and cases where there are prolonged involved
11 investigations.

12 CHAIRPERSON LANCMAN: Got it, and those
13 circumstances there's more of a case by case what can
14 we turn over consistent with--

15 LEROY FRAZER: [interposing] Well, with
16 homicide cases and gang cases we adhere to motion
17 practice in accordance with the CPL.

18 CHAIRPERSON LANCMAN: Okay.

19 LEROY FRAZER: And what I was saying was
20 for example, in one of-- I was just talking to a ADA
21 yesterday who was telling me that in a gang case,
22 because we were able to-- we turned over DD5's which
23 are police reports in a course-- regular course of
24 CPL, and people can-- in one instance they took a
25 picture of the DD5 with a camera and posted it on

1
2 social media and resulted in witness intimidation and
3 things like that. That's why we don't do it in those
4 cases.

5 CHAIRPERSON LANCMAN: By the way, does
6 the office have-- is the open file discovery reduced
7 to some kind of written policy in your, I don't know,
8 assistants manual or something like that?

9 LEROY FRAZER: As I've said, we've been--
10 the office has been doing it since the 90's. When DA
11 Gonzales came in he has asked one of the counsels in
12 our office to-- we're in the process now of revamping
13 it and reducing it into a written file to make sure
14 that it's applied across the board. He's looking to
15 expand it and move into the area of electronic
16 discovery. That's one of the things we've been
17 talking about in terms of funding to do that and
18 we'll be back before you to request funding as part
19 of the budget process.

20 CHAIRPERSON LANCMAN: And once it is
21 reduced to writing, is that something that you can
22 share with us? Because we've requested of all the
23 offices if they do have a written policy regarding
24 discovery that they share it with us. We haven't
25 gotten anything, and I would be happy to be

1 corrected, from any of you. So I want to ask each of
2 you if you do have a written policy.
3

4 LEROY FRAZER: Once the policy is
5 established and put into place I will-- it depends on
6 what-- how it's classified as a work product and that
7 sort of thing, but I'm sure that we'll be able to
8 share--

9 CHAIRPERSON LANCMAN: [interposing]
10 Alright. Well, at the very least, you could let us
11 know that there is a written policy and then we can
12 have a dialogue about--

13 LEROY FRAZER: [interposing] That's
14 correct.

15 CHAIRPERSON LANCMAN: whether you can
16 disclose it with us.

17 LEROY FRAZER: That's fine.

18 CHAIRPERSON LANCMAN: And Staten Island,
19 has this new breaking news policy--

20 UNIDENTIFIED: [off mic] we copy what
21 Brooklyn--

22 CHAIRPERSON LANCMAN: We can get a few.
23 Bronx, if I understood your testimony correctly, it
24 sounds like the office is seriously looking at
25 formalizing some kind of open discovery process, is

1
2 that a fair characterization, or you want to put that
3 in your own words?

4 JULIAN O'CONNOR: I think what's fair is
5 that we have a working draft of policy considerations
6 for misdemeanors that is pretty expansive and would
7 look to include open file discovery. In our felony
8 practice we're looking to provide discovery earlier.
9 However, we're in a kind of beta test mode right now.
10 We started what's called an SEI part just this Monday
11 in the Bronx, and part of the process that we're
12 engaging in is doing something novel which is pre-
13 indictment discovery on those cases, and what we're
14 looking to turn over in those cases within two weeks
15 is what would normally be considered just the police
16 paperwork that we have available. After that two-
17 week period, then-- please note that this is in
18 exchange for defense counsel waiving either 30.30 or
19 180.80. We do not have the process like in Queens
20 where their defense bar routinely waives in order to
21 receive an offer on the case. So, you know, this is
22 a big culture change in the in the Bronx where, you
23 know, we're trying to engender trust on both sides,
24 and so applying some of that police paperwork early
25 and providing our offer early, we're going to see if

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2 that results in, you know, faster dispositions or an
3 improved process, but I think through going through
4 this beta test, it'll in form what our discovery
5 practices can be in the felony round whether they be
6 sooner and what documents will be included.

7 CHAIRPERSON LANCMAN: And have-- in terms
8 of your internal process, is there a date by which
9 you're going to assess how this is pilot, for once of
10 better turn is--

11 JULIAN O'CONNOR: So, the question
12 itself, the defense bar, the court system and the
13 DA's office, we're engaged in this part and we've put
14 a tentative 60-day beta test on it to see how it's
15 working. So we can kind of determine after that 60-
16 day period if we see some results. But within the
17 DA's office itself, we haven't set a strict timeline
18 for when we're going to pronounce policy. We're
19 going to take our time and really penetrate the
20 culture of the office, educate our assistants and
21 make sure that we come up with something that works
22 best for us, because as you can see, there's a range
23 of practices within New York City when it comes to
24 discovery.

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CHAIRPERSON LANCMAN: Alright. But it's fair to say that the office is looking to expand its disclosure, its voluntary disclosure obligations--

JULIAN O'CONNOR: [interposing]
Absolutely.

CHAIRPERSON LANCMAN: and where that will take you still remains to be determined.

JULIAN O'CONNOR: Correct.

CHAIRPERSON LANCMAN: Okay. So, Manhattan, I just want to understand, we haven't gotten any written policies from you, but we have what has been shared with us by others which seems to be or might be your office's policy. So, have you reduced your discovery policies to some kind of memorandum or written policy that we can see?

KAREN FRIEDMAN: So, we have been, like others like the Bronx, we have been testing different types of discovery to evaluate it as well. And there was a--

CHAIRPERSON LANCMAN: [interposing] I'm listening.

KAREN FRIEDMAN: There was a pilot project that we did in Manhattan where we took two equal Supreme Court parts, same trial bureau in our

1 office. So there should be no-- the management was
2 the same. And we did this thing where we said we're
3 going to do open file discovery in the category of
4 cases if the defense attorney will give us a date
5 certain for trial. And most defense-- about half
6 defense attorneys opted out. They didn't want to do
7 that. They don't want a date certain for trial, and
8 I say this because there's sort of a false narrative
9 that's being perpetuated that somehow delay is the
10 prosecutor's friend. But I will tell you, we want
11 cases to go quickly. We want cases to go as quickly
12 as possible, and I will get to your answer in a
13 minute, but I have to give a little history here. We
14 want cases to go quickly because memories fade,
15 evidence gets lost, witnesses' interest in
16 participating fades, witnesses can be scared to
17 testify. Police officers can retire. Cases don't
18 better with time. So, for us, the sooner a case
19 goes, the better, and the sooner we can justice the
20 better. So we want them to go quickly. So we have
21 said to the Defense Bar, both in that pilot project
22 as well as more recently-- which is related to this
23 that you just handed me-- more recently we sent a
24 letter to every defense provider that practices in
25

1
2 Manhattan, and said if you want an expedited trail
3 schedule 30 days from Supreme Court arraignment or 30
4 days prior to when you want the trial, we will give
5 you all your discovery if you give us-- tell us the
6 name of the defendant, the case, and we'll put it on
7 an expedited trial schedule. We have yet to get a
8 single request. So, there's just this kind of myth
9 out there that somehow we want delays and we're
10 tactically not turning things over. That, despite the
11 face that we're not seeing-- we're not seeing cases
12 going faster. We're not seeing requests for this, for
13 expedited discovery. We still think it's important
14 like my colleagues to improve discovery practice and
15 make the system more efficient and more fair. So,
16 what we've done is we've carved out certain
17 categories of cases where we are going to do this
18 routinely, and what you handed me is a copy of the
19 memos of a certain category of cases where it's the
20 policy. Now, that does not mean that we don't do it
21 in other types of cases. It's just those other types
22 of cases are more on a case by case basis. The more
23 serious the case, the more you're going to turn over
24 because you want the case to go. You know that if
25 you have voluminous discovery it's going to delay

1 things, and you don't want that to happen. So, there
2 are certain types of cases, though. Sexual assault
3 cases is an area where we don't have a policy of open
4 file discovery or turn it over. Gang cases, we're
5 not doing that at this point. Homicide cases, we're
6 not doing it. Domestic violence cases, there's
7 certain categories of cases that we have not put in
8 this memo, because we'd rather make a case by case
9 assessment. But the memo from-- I believe this is
10 from May of 2017.

11
12 CHAIRPERSON LANCMAN: 2015.

13 KAREN FRIEDMAN: I'm sorry, 2015. No,
14 you handed me two memos. You handed me one called
15 "Expedited Discovery." There's no date on--

16 CHAIRPERSON LANCMAN: [interposing] That's
17 not dated.

18 KAREN FRIEDMAN: It's not dated. I
19 believe--

20 CHAIRPERSON LANCMAN: Okay. Was that the
21 one from May 2017 you referenced before?

22 KAREN FRIEDMAN: Yes, that's what I was
23 about to--

24 CHAIRPERSON LANCMAN: [interposing] And
25 then there's a--

1
2 KAREN FRIEDMAN: indicate. That's from
3 May of 2017. That's a categorical type of case where
4 there's a policy of turn it over.

5 CHAIRPERSON LANCMAN: Just give me one
6 second. I need to get yelled at really quick. Go
7 ahead.

8 KAREN FRIEDMAN: So, there's one memo
9 from May of 2017 that puts together the policy for a
10 certain category. Again, this is 50 percent of our
11 felony indictments. This is a huge number of cases
12 where we say just open file at Supreme Court
13 arraignment. All the other cases, the other 50
14 percent, are ones that fall into the category like my
15 colleague Mr. Frazer who used to work at the
16 Manhattan DA's Office and now is at Brooklyn. He--
17 those are the types of cases that we also hold back
18 and don't do it, and we're not putting in this
19 policy, because we make case by case assessment. The
20 second document you handed me is dated January 2015,
21 and this applies to all cases in the whole office.
22 This is what's known as, "if it's in the file, turn
23 it over," and this just means we don't want
24 prosecutors making their own assessments of what they
25 think is relevant in the case, what might be relevant

1 to the defense. Let the defense attorneys make that
2 determination, thank you. So, the example that was
3 given earlier about how you're only going to be
4 giving over Rosario from witnesses that are
5 testifying, but maybe there are other civilians who
6 were eyewitnesses but aren't testifying, that we
7 wouldn't turn that over. That is technically what
8 the law says we can do, and that is the way many
9 prosecutors, and I'm sure including in my office,
10 used to practice years and years ago. DA Vance
11 changed all of that, and so that's why in 2015 this
12 went out. It says, "If it's in the file, turn it
13 over, period, end of story." You don't make any
14 determination of whether it's material, about whether
15 it's relevant. There's just three exceptions, and
16 again, witness safety, personal privacy, and work
17 product, but otherwise it gets turned over to the
18 defense. So, the way we practice today is very
19 different than what I heard this morning.

21 CHAIRPERSON LANCMAN: What do you think
22 accounts for the defense bar having a very, very
23 different perspective on the way discovery works in
24 the Manhattan DA's Office than what you understand it
25 to be? I mean, as you said, what you heard this

1
2 morning is very different from what you understand
3 your practice is to be.

4 KAREN FRIEDMAN: I think it's a
5 combination of things. I think, first of all,
6 there's a long history of us practicing a certain
7 way, and so-- as we're not perfect, and culture
8 change is not easy. It's something that takes time.
9 So, I'm sure there are some people in my office. We
10 do a lot of cases. We no longer do 100,000 cases a
11 year. We probably-- we're down to about 60,000 cases
12 a year, but we have a lot of cases and about 500
13 lawyers. So, I'm sure there are still some people
14 who don't follow the rules perfectly, and that's a
15 management issue. So, and we try to address it, and
16 any defense attorney who wants to bring this to my
17 attention should. You know, like my colleague here
18 from Queens, I haven't gotten these complaints, but
19 certainly I'm sure we're not perfect. So, if we
20 aren't doing it, I'd like to know about it. It's
21 also relatively new. It's from May of 2015, and I
22 think that perhaps people who are testifying here
23 aren't aware of what's happening, what's happening in
24 the court rooms. I think the final reason, and I
25 can't-- you'd have to ask them why there's that

1 disconnect, but I think the final reason is, because
2 at the end of the day what they really want is this
3 10 percent of information that my colleague from
4 Queens is talking about. They really-- we're really
5 only arguing over 10 percent of information. Ninety
6 percent of everything else is given over in most
7 cases. It's really just that information about the
8 witnesses and where they live and who they are and
9 how they can now go and do their research. There's
10 so much available about people on the internet,
11 right. You can think about the among of things you
12 can find on social media and in everywhere else that
13 you can sort of learn--

14
15 CHAIRPERSON LANCMAN: [interposing] I
16 understand.

17 KAREN FRIEDMAN: and that's what they
18 want, and so that's why there is this kind of feeling
19 and this kind of sense, because what they really want
20 is the thing that we're struggling with whether or
21 not to give over in order to keep witness safe--

22 CHAIRPERSON LANCMAN: [interposing] But
23 and then I want to give my colleagues the opportunity
24 to ask questions. But that 10 or 15 percent,
25 whatever the right number is, and I don't know if

1 that includes 10 or 15 percent of what you're
2 required to give over, or the 10 and 15 percent of
3 the whole body of open file discovery that you'd
4 have-- you would give over-- documents and
5 information you'd give over if it was truly open
6 file, meaning the kind s of reports that was referred
7 to before, that you may never under the discovery law
8 be required to turn over, but whatever it is. You
9 know, when you testified before about-- I think was
10 it was the person who had a gun put to their head and
11 had their phone stolen or had something stolen, and I
12 asked you, "Are you talking about the victim?" Mr.
13 Masters, when you talked about the person whose
14 information that was turned over to witness, and then
15 they were contacted by an investigator. Isn't there
16 an inherent unfairness for the defendant who has got
17 to defend against losing his liberty to not know who
18 the witnesses are, not know who the victim is in a
19 timely manner so that they can do their own
20 investigation and be able to prepare their defense?
21 Eh-- you know the Bar Association a court that you
22 served on, it's what I quoted from in my opening. You
23 were in the dissent.

1
2 ROBERT MASTERS: Yeah, I was going to
3 say, had you read the dissent?

4 CHAIRPERSON LANCMAN: I did. I heard your
5 voice throughout it. I did.

6 ROBERT MASTERS: That would be most of
7 the witnesses that ever come in to walk through the
8 door would agree with the dissent.

9 CHAIRPERSON LANCMAN: No, I'm sure that
10 they would. They're not coming from the perspective,
11 most witnesses and I was, I guess, sort of a witness
12 in one minor insignificant case-- like, they're not
13 charged with the obligation of doing justice.

14 They're-- they have their perspective, and they want
15 to get their result based on what they know happened.
16 Are you concerned about just the unfairness of a
17 defendant not having access to that information in a
18 timely manner so they can defend themselves?

19 ROBERT MASTERS: I'm very conscious that
20 the defendant, and I think it is sacred, is entitled
21 to the right to confront people who say he did
22 things, that right should attach in a courtroom. It
23 shouldn't attach in a poor victim's living room. It
24 shouldn't attach at his place of work. It shouldn't
25 attach when he's unsuspecting. It should-- a person

1 who's already endured a crime, who's already been
2 victimized, shouldn't be frightened on top of it.
3 And I can tell you in the last case that I tried that
4 I had to negotiate with a witness who had evidence
5 that was devastating to Mr. Blackwell's commission of
6 the crime and evidence that was more subtle that
7 undermined his psychiatric defense that he was
8 offering. The morning he was to testify he bailed
9 out on it. I had to negotiate with him that he would
10 only testify to the subtle information, not the
11 devastating information. That way he could go back
12 to his community and not be bothered by others for
13 being a snitch. That's the culture we live in today.
14 That's a reality. That's a reality. One thing I
15 just like to-- about in Queens, just I didn't make it
16 clear earlier. We have 60,000 arrests a year. Of
17 those, 70 percent are misdemeanors, 30 percent are
18 felonies. Ultimately, 77 percent of the felony
19 arrests are reduced to misdemeanors. All of those
20 misdemeanor cases we have voluntary early disclosure
21 of all discoverable information. We do it by e-mail.
22 We offer it and assistants send it to the Defense
23 Counsel by email automatically, and for all of those
24 cases, and it's probably 90 percent of those arrests
25

1 that occur in our county, the only defense attorneys
2 we don't send it to are the ones who don't want it
3 digitally, and they have to wait to get paper copies,
4 and that's the culture that we have within Criminal
5 Court. Among cases that remain felonies, between 45
6 and 50 percent are resolved by superior court
7 information without going to the Grand Jury. That's
8 the plea policy that Ms. Luongo was talking about and
9 that she took fault with. Discovery, there's almost
10 no formal calendar calls. Everything is done in a
11 conference room setting, and the defense attorney
12 gets to meet as many times as they want with either a
13 Bureau Chief or a Deputy to discuss the strengths and
14 weaknesses of the case. And what we found as an
15 unintended consequence of that since we put that
16 policy in place in 1996 is that we have had virtually
17 no claims of wrongful conviction since that date,
18 because in the conference room setting when plea
19 bargains are being offered, the evidence is being
20 discussed, if-- I know when I did it I would ask is
21 there something wrong with the offer, and the defense
22 attorney would say, "No, it's generous. It's just
23 that my guy didn't do it." I'd say, "Your guy didn't
24 do it? What do you got? Let's talk about it." And
25

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2 together we would go out and get the employment
3 records, the surveillance video, check for hospital
4 records, check for school records, all the things
5 necessary, and in real time within 90 days after the
6 arrest that was where the defendant was cleared. And
7 that's the best way of stopping a wrongful conviction
8 without a wrongful indictment.

9 CHAIRPERSON LANCMAN: Okay, thank you.
10 Madam Public Advocate, you have a question?

11 PUBLIC ADVOCATE JAMES: So, okay. So,
12 there's just so much to unpack here. Is there a
13 Conviction Integrity Unit in each of the boroughs?
14 Can we start with Staten Island?

15 PAUL CAPOFARI: [off mic]

16 PUBLIC ADVOCATE JAMES: So it's about
17 resources for Staten Island. I know we have one in
18 Brooklyn. Bronx?

19 JULIAN O'CONNOR: yes.

20 PUBLIC ADVOCATE JAMES: Yes. Manhattan?

21 KAREN FRIEDMAN: Yes.

22 PUBLIC ADVOCATE JAMES: Queens?

23 ROBERT MASTERS: Queens, we don't because
24 frankly we have currently three claims of wrongful
25 conviction pending at all, and that is one from the

1
2 1960s and two from the 1980s. All the cases predate
3 the Brown Administration, and frankly because of the
4 tiny number, the District Attorney is able to assign
5 an executive and a staff to work on each individual
6 case. We don't need to dedicate an entire unit to
7 it.

8 PUBLIC ADVOCATE JAMES: And again, do
9 each of the boroughs support or oppose the
10 legislation pending in Albany, Staten Island?

11 PAUL CAPOFARI: [off mic] With the
12 protections to witnesses--

13 PUBLIC ADVOCATE JAMES: Yes.

14 PAUL CAPOFARI: and protections to--

15 CHAIRPERSON LANCMAN: [interposing] Can
16 you use the mic? There's one next to you.

17 PUBLIC ADVOCATE JAMES: Is it fair to say
18 there are three protections from what I gather from
19 the testimony, witness intimidation, work product,
20 and three, just superfluous information such as
21 pictures of-- as was mentioned by Manhattan--
22 children, etcetera, etcetera?

23 PAUL CAPOFARI: With the protection of
24 witnesses--

25 PUBLIC ADVOCATE JAMES: Yes.

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2 PAUL CAPOFARI: We can handle discovery,
3 yes.

4 PUBLIC ADVOCATE JAMES: SO, with some
5 changes you would support legislation pending in
6 Albany?

7 PAUL CAPOFARI: Yes.

8 PUBLIC ADVOCATE JAMES: Brooklyn?

9 LEROY FRAZER: Yes, we still have them
10 under review, but generally speaking, as stated by my
11 colleague, we're concerned about the witness
12 intimidation and some of the bills-- I'm not sure say
13 the legislation that--

14 PUBLIC ADVOCATE JAMES: [interposing]
15 Yeah.

16 LEROY FRAZER: The Governor's bill or
17 Senator, or the Assembly?

18 PUBLIC ADVOCATE JAMES: Let's look at the
19 Governor's bill.

20 LEROY FRAZER: Okay, with the Governor's
21 bill, generally we supported. There are some
22 concerns that we have. One of the things that I will
23 say since you're talking about legislation--

24 PUBLIC ADVOCATE JAMES: [interposing]
25 Yeah.

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LEROY FRAZER: Is we've been for some time talking about witness intimidation, and right now the way the bill is-- the law is set up now, it's almost worth it to intimidate a witness, because there's no mandatory consecutive penalty. So, if in fact I'm going to attempt to intimidate someone and then I'm not going to be penalized even further even if I'm convicted, not by mandatory-- that's something that we've always asked for, and I think that would go a long way toward helping with the witness intimidation issue.

PUBLIC ADVOCATE JAMES: I see. So there needs to be a corollary, a piece of legislation to increase penalties for witness intimidation.

LEROY FRAZER: Yes.

PUBLIC ADVOCATE JAMES: Bronx?

JULIAN O'CONNOR: The Bronx DA's Office recognizes that there definitely needs to be some modernization of our laws, but we do bear in mind that witness safety, privacy interest, protecting ongoing investigations are crucial to maintaining the safety in our community.

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2 PUBLIC ADVOCATE JAMES: So, to sum up,
3 you're basically reviewing the legislation. You
4 don't have a position, is that fair to say?

5 JULIAN O'CONNOR: Our view of the
6 legislation is that if those concerns are
7 memorialized within their proposals, we would be in
8 favor of it.

9 PUBLIC ADVOCATE JAMES: Thank you.
10 Manhattan?

11 KAREN FRIEDMAN: Manhattan's position is
12 very similar to my colleagues in Brooklyn and in the
13 Bronx, that with some changes that protect witness
14 safety and enhance penalties, we also view this as an
15 opportunity to modernize our state discovery system,
16 and we would be able to support, would actually
17 advocate for it with those protections in place.

18 PUBLIC ADVOCATE JAMES: Thank you.
19 Queens?

20 ROBERT MASTERS: And I'm also the
21 District Attorney's Association's representative that
22 goes to Albany. There are separate bills that are
23 out there.

24 PUBLIC ADVOCATE JAMES: Yeah.
25

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2 ROBERT MASTERS: There's the Governor's
3 proposal. There's an Assembly proposal.

4 PUBLIC ADVOCATE JAMES: Yes.

5 ROBERT MASTERS: The Senate Democrats
6 have talked about coming up with proposal. I've yet
7 to see text, but I think that it may well mirror what
8 is the Assembly proposal. I can say that the
9 Governor's proposal, although very well-intended, is
10 greatly flawed in that it accelerates certain things
11 that are impossible for any prosecutor's office to
12 keep up with, selecting of experts within 15 days
13 after arraignments, having search warrants turned
14 over, and confidential informant information and
15 cooperation agreements within 15 days; it's
16 incredibly impractical that we would ever be able to
17 have cooperators and confidential informants if we
18 had to reveal information 15 days after indictment,
19 and it's also likely unconstitutional. It builds in
20 a right of appeal, but with only one Appellate
21 Division Judge. By definition, there can be no
22 appeal unless a panel--

23 PUBLIC ADVOCATE JAMES: [interposing] So
24 it's fair to say that Queens opposes the Governor's
25 bill.

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2 ROBERT MASTERS: We do, and the Assembly
3 provisions, I think, provide very little protection
4 at all to any witnesses. So, we would oppose it on
5 that ground.

6 PUBLIC ADVOCATE JAMES: And lastly, as
7 was mentioned by the Chair, how do the boroughs feel,
8 or each of the-- I'm sorry, each of their respective
9 District Attorneys feel with respect to imperial
10 analysis of our system to determine whether or not
11 there's any abuses. Would you agree to some sort of
12 independent imperial analysis either by the Council
13 or some outside entity to determine whether or not
14 there have been any abuses with respect to our
15 discovery system? Let's start again with Staten
16 Island.

17 PAUL CAPOFARI: [off mic] [inaudible]

18 [laughter]

19 PUBLIC ADVOCATE JAMES: Queens, would you
20 support an analysis?

21 ROBERT MASTERS: Well, from having
22 appeared in front of the Justice Taskforce for the
23 better part of 18 months that resulted in basically
24 the same product as the state bar which was one group
25 in the majority, another group very fervently in the

1
2 minority, I don't know that you're going to wind up
3 with anything else other than the same results--

4 PUBLIC ADVOCATE JAMES: [interposing] Got
5 it.

6 ROBERT MASTERS: we have continually.
7 What I will tell you from going around the state and
8 the difficulty of trying to find a one-size-fits-all
9 proposal is that a set of laws that can apply to
10 major metropolitan area here as well as to a suburban
11 area as well as to a rural area is almost impossible,
12 and many of these laws have in it the fixed trial
13 date, which in New York City is the 12th of never.
14 That is the day that--

15 PUBLIC ADVOCATE JAMES: [interposing]
16 Well, as opposed to--

17 ROBERT MASTERS: is the fixed trial date.

18 PUBLIC ADVOCATE JAMES: the rural, rural
19 counties upstate--

20 ROBERT MASTERS: [interposing] They do
21 have fixed trial dates there--

22 PUBLIC ADVOCATE JAMES: [interposing] No,
23 I understand.

24 ROBERT MASTERS: and that's why it works
25 for them.

1
2 PUBLIC ADVOCATE JAMES: No, I understand.
3 What about an empirical analysis of just the five
4 boroughs? What about that?

5 ROBERT MASTERS: I don't think it's going
6 to reveal anything else other than what we already
7 know, and I don't know how you would empirically do
8 the measurements, because I think that all of these
9 things, I think anybody who is-- any cooperation that
10 would be looked at to try and apply business models
11 would find out that there are so many differences
12 just based within the boroughs and socioeconomic
13 status, basically the ethnicity of each borough would
14 have impacts, the type of crime that impacts each
15 county.

16 PUBLIC ADVOCATE JAMES: Thank you.
17 Manhattan?

18 KAREN FRIEDMAN: We would happily
19 participate in any analysis that anyone would want to
20 do as we always do, but we too participated in Judge
21 Lippman's Justice Taskforce. It's an 18-month review.
22 It had defense attorneys, prosecutors, advocates. It
23 was really comprehensive, and they did an extensive
24 study, and I think that if there was anything left to
25

1 do that wasn't already done, of course, we'd be
2 always happy to participate.
3

4 PUBLIC ADVOCATE JAMES: Thank you.

5 JULIAN O'CONNOR: We formally take no
6 position as to any long-term regression analysis that
7 would involve the five boroughs, looking at the data,
8 and the reason I say I take no position, because I
9 think a better use of our resources would be to fund
10 the actions that we want to occur. Rather than
11 putting that money in a think tank, in an
12 organization to come in and evaluate, we should put
13 money in NYPD in the prosecutor's office so that we
14 can actually act. If you give us the overwhelming
15 resources to have paralegals ready and available, if
16 NYPD has a robust law department where they can go
17 through our claims and turn over Gilio on a regular
18 basis to us timely, I think that's where we will see
19 action as opposed to evaluation.

20 PUBLIC ADVOCATE JAMES: Thank you.

21 JULIAN O'CONNOR: I would just say that I
22 know that DA Gonzales is open to examining and
23 analyzing data and the issues within the criminal
24 justice system. As to what you're describing, I
25 would have to have a conversation with him on that,

1 but I tend to say that we are open to examining,
2 because the goal is to improve and enhance not only
3 on the criminal justice system, but the trust that we
4 want the people of Brooklyn to have within the
5 system.
6

7 PUBLIC ADVOCATE JAMES: Thank you.

8 PAUL CAPOFARI: And I too have not spoken
9 to the DA about this, but I would go with the
10 resources. Give us the resources and then see what
11 we do with them.

12 PUBLIC ADVOCATE JAMES: So, the Bronx and
13 Staten Island it's, "Show me the money." Brooklyn
14 and Manhattan, we're open to it, and Queens
15 basically, "It's not broken so don't fix it." Is
16 that fair to say?

17 ROBERT MASTERS: That's basically the
18 results of my daily practice.

19 PUBLIC ADVOCATE JAMES: Thank you.

20 CHAIRPERSON LANCMAN: Thank you. Council
21 Member Rose?

22 COUNCIL MEMBER ROSE: Thank you. Hi,
23 Paul. You know, Staten Island had had some of the
24 most restrictive open discovery laws, and I'm really
25 excited to hear that, you know, you've adopted an

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2 early action discovery plan. So, I just want to be
3 really clear about what this plan actually is going
4 to do, and so in your proposal, in fact, there was
5 one that you released last week, there was a written
6 stipulation order that only-- was only covered under
7 CPL 240.20, materials, and did that include the
8 Rosario material that comes under CPL 240.44 and
9 240.45?

10 PAUL CAPOFARI: No, what we intend to is
11 continue with our voluntary disclosure form that we
12 give over at arraignment, and then much as Brooklyn
13 does, without the Grand Jury minutes, turn over the
14 rest of the discovery within the 21 days. We haven't
15 implemented it yet. We're going to try to implement
16 it now. It's a matter of collecting up the
17 information and then protecting the witnesses and the
18 victims, and then turning it over. We've been doing
19 the discovery by stipulation in the misdemeanor cases
20 for a number of years now.

21 COUNCIL MEMBER ROSE: And--

22 PAUL CAPOFARI: [interposing] The felony
23 cases, and we're going to make the same exceptions
24 that Brooklyn makes for special victim's cases,
25 murders, and gang cases.

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COUNCIL MEMBER ROSE: And does your proposed order permit the prosecutor that will redact the information without obtaining a protective order from the court first?

PAUL CAPOFARI: We intend to hand over the information redacted, and if we have to we'll seek a protective order.

COUNCIL MEMBER ROSE: And so, will you revise this proposal to remove the expansive power to redact? Being that there is protections already in place for witnesses?

PAUL CAPOFARI: Well, the protections are that we're not going to give away their name or their phone number or their address, and I think it was for the reasons that Mr. Masters pointed out. They can-- the defendant can confront them in court, but this way the defendant also gets the information of, you know, who are your witnesses. Well, it's an eyewitness. It's somebody who heard from somebody else, whatever the police report says.

COUNCIL MEMBER ROSE: But doesn't the existing law already protect, you know, protect the witnesses by, you know, by--

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2 PAUL CAPOFARI: [interposing] The law
3 might prohibit--

4 COUNCIL MEMBER ROSE: [interposing] being
5 able to issue protective orders?

6 PAUL CAPOFARI: The law might protect
7 them by saying people can't intimidate them, but our
8 experience is people are immediately contacted. It's
9 on social media. People take pictures. We've seen
10 Grand Jury minutes posted on bulletin boards.

11 COUNCIL MEMBER ROSE: How many
12 protective-- how many motions for protective orders
13 were brought by your office in 2017?

14 PAUL CAPOFARI: Wow, I don't know. I
15 don't know.

16 COUNCIL MEMBER ROSE: Is that something
17 you could get for me?

18 PAUL CAPOFARI: I could probably ask the
19 DAs, yes.

20 COUNCIL MEMBER ROSE: And so cameras and
21 their recordings are critical evidence to support or
22 contradict testimony in the trials. You stated in
23 your statement that without the resources to sort of
24 process these body cameras and the information and
25 the evidence that you will not participate, or that

1
2 it makes your participation in your own early action
3 discovery plan impossible?

4 PAUL CAPOFARI: Well, we're certainly not
5 going to turn over any body-worn cameras that we
6 haven't looked at.

7 COUNCIL MEMBER ROSE: No, I'm not saying
8 that, but I'm saying that you are saying that without
9 the resources that basically the plan you proposed
10 here today is impossible to expedite, is impossible
11 to execute?

12 PAUL CAPOFARI: It's impossible to
13 promise to turn over all the body-worn cameras until
14 we've identified them, gotten them and watched them.

15 COUNCIL MEMBER ROSE: That's not what you
16 said in your statement. Your statement said, "These
17 resources are needed even without the demands of
18 early discovery deadlines, but with early action
19 discovery or any new discovery law passed by the
20 state, these resources are absolutely critical.
21 Without them early discovery will quite frankly be
22 impossible."

23 PAUL CAPOFARI: I see it as impossible to
24 turn over body-worn cameras to the defense within 21
25 days without additional resources, yeah.

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2 COUNCIL MEMBER ROSE: And in terms of
3 redaction, you said, "I must exercise that the right
4 to redaction is essential to the fair administration
5 of justice, and we cannot and will not proceed
6 without open files without it." So, what you
7 presented to us today is conditional.

8 PAUL CAPOFARI: We're going to redact the
9 identity of the witnesses, yes.

10 COUNCIL MEMBER ROSE: And is-- and that's
11 all that's going to be redacted?

12 PAUL CAPOFARI: We're going to redact
13 anything that identifies the witness. We're trying
14 to protect the witness.

15 COUNCIL MEMBER ROSE: So, the fact that
16 there's going to be redaction, you're only going to
17 redact that which protects the witness.

18 PAUL CAPOFARI: Yes.

19 COUNCIL MEMBER ROSE: You're not going to
20 redact other information that might be presented?

21 PAUL CAPOFARI: I don't know what you're
22 asking me.

23 COUNCIL MEMBER ROSE: Okay, alright. I'm
24 not the lawyer here, so I might not be as clear or--
25 what I am trying to do, though, is to be transparent,

1
2 and I don't want this plan presented as if it's going
3 to be open and-- a complete open file discovery
4 [sic]--

5 PAUL CAPOFARI: [interposing] We're not
6 calling it open file.

7 COUNCIL MEMBER ROSE: when it is not, and
8 I'm trying to ascertain exactly what this-- your
9 plan, being that Richmond County has been the most
10 restrictive so far, I want to know what your plan is
11 actually going to do and, you know, what restrictions
12 are still going to be in place.

13 CHAIRPERSON LANCMAN: How is what you're
14 going to do different from what we commonly refer to
15 as open file discovery? I think that's the question.

16 PAUL CAPOFARI: We're going to redact the
17 name and address and identity of the witness in the
18 police report. We're not going to--

19 CHAIRPERSON LANCMAN: [interposing] And
20 other than that it's going to be--

21 PAUL CAPOFARI: [interposing] We're not
22 going to redact the body of the police report, but if
23 the police report says I live on the third floor in
24 apartment F--

2 CHAIRPERSON LANCMAN: [interposing] Other
3 than-- right, I get it. Other--

4 PAUL CAPOFARI: [interposing] but I
5 looked out the window and saw the crime.

6 CHAIRPERSON LANCMAN: Other than the
7 redaction of the witness information--

8 PAUL CAPOFARI: [interposing] No, we're
9 not going to--

10 CHAIRPERSON LANCMAN: [interposing] what
11 you're producing is synonymous with what we know as
12 open file discovery.

13 PAUL CAPOFARI: And it's the information
14 that gives the defense a chance to see what the case
15 is against them.

16 CHAIRPERSON LANCMAN: Okay.

17 COUNCIL MEMBER ROSE: Okay, and that's
18 what I wanted to know, just how much was going to be
19 redacted in your new plan.

20 PAUL CAPOFARI: Witness identity.

21 COUNCIL MEMBER ROSE: It's only witness
22 identity?

23 PAUL CAPOFARI: Yes.

24 COUNCIL MEMBER ROSE: Alright. Thank
25 you.

CHAIRPERSON LANCMAN: Councilman Ulrich?

COUNCIL MEMBER ULRICH: Thank you. I will be brief, Chair, and I want to thank you. I know we have other hearings, and I'm sure you have other business to attend to today, but I want to thank you all for your testimony. I want to ask a question that came up actually when I chaired the Veterans Committee and we talked about the veteran-- the establishment of the Veterans Treatment Court around the five boroughs, and we discovered that at the time, thankfully it's no longer the case, but the VTC did not exist in each county because it required the consent of the prosecutor and I think the Chief Judge in each court if that's correct. I think that mirrors in a lot of ways some of the questions that are coming up today about the open file discovery and the disparities that exist between each counties. It almost seems illogical to me why the state or the Chief Judge wouldn't come up with a uniform standard that is applied in all the counties and all the courts and that has to be followed by all the District Attorneys. Why don't we just have one set of rules with respect to the discovery practices that applies evenly across the state, or more locally in

1
2 the Criminal Court system in New York City, which is
3 one New York City Criminal Court, but we've got five
4 DAs and five different discovery practices, you know.
5 Why?

6 PAUL CAPOFARI: With all due respect, we
7 have one standards. It's in the Criminal Procedure
8 Law. The state standard is in the state Criminal
9 Procedure Law.

10 CHAIRPERSON LANCMAN: But in practice
11 it's not the case, because the issue is, if I may--

12 PAUL CAPOFARI: [interposing] Please.

13 CHAIRPERSON LANCMAN: there is widespread
14 but not universal recognition that the current
15 discovery statute is inadequate, and some District
16 Attorney's offices, actually all District Attorney's
17 offices have to some degree or another supplemented
18 what is the underlying minimum requirements, and
19 we're here talking about what each office has done,
20 and the belief of most of the people who've asked
21 questions, most of the Council Members, and most of
22 the bar, is that more should be done.

23 ROBERT MASTERS: Mr. Chairman, I think if
24 you went around the state, you'd find out that the 62
25 chefs that are the District Attorneys all season to

1
2 taste. They take the basic recipe of the Article 240
3 of 710, and they add to it, and that's generally what
4 we find as what will satisfy basically local
5 practice, and makes for the fairest system in each
6 county.

7 COUNCIL MEMBER ULRICH: Has-- Mr.
8 Masters, has the Bar Association provided any
9 recommendation for reforming this? Is that--

10 ROBERT MASTERS: They did. In 2015 there
11 was a long taskforce report that basically amounted
12 to a food fight where the defense had a very, very
13 extensive recommendation for change, and the
14 prosecution had, I think, a very heartfelt and
15 reasoned approach for leaving things as they were,
16 and I think these two universes collide on a daily
17 basis about the need for reform for prosecutors, I
18 think, and for the police. Changing discovery is
19 existential. It will change the way we do business.
20 We do believe the domino effect will be that a case
21 that we could bring today, we won't be able to bring
22 tomorrow, that someone will be at liberty that might
23 not be at liberty otherwise, and that ultimately
24 someone will be wounded or killed that wouldn't have

1
2 been wounded or killed if we didn't make these
3 changes.

4 CHAIRPERSON LANCMAN: I would just say,
5 the case for change I think is a little broader than
6 that, and the Bar Association Taskforce that is being
7 referred to came out with a majority recommendation
8 for a broad series of changes, and there were those
9 that had a different view and they produced a
10 minority. It's just-

11 ROBERT MASTERS: [interposing] And--

12 CHAIRPERSON LANCMAN: [interposing] it's
13 a little more--

14 COUNCIL MEMBER ULRICH: [interposing] And
15 next year, when I'm Chair, I could rig a committee
16 that would come out with an opposite result. That's
17 the truth, Mr. Lancman.

18 CHAIRPERSON LANCMAN: I think that the
19 debate is more than prosecutors and defense, being
20 loggerheads or having different points of view, but
21 here's' the report.

22 ROBERT MASTERS: I will--

23 CHAIRPERSON LANCMAN: [interposing] A
24 little light reading for the ride home.

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2 COUNCIL MEMBER ULRICH: Light reading. I
3 will just close, Mr. Chair, by saying that the system
4 is not perfect, but I want to thank you for the great
5 work that you do, each of your offices in keeping the
6 people of this city safe, working with our law
7 enforcement agencies, and really giving our
8 neighborhoods back to the people of this city so that
9 they can live in a safe city and work in a safe city
10 and raise their families in a safe city, and the
11 system is not perfect. There are reforms that I'm
12 sure are worthy of consideration, but I think you're
13 all doing a hell of a job, and I just want to say
14 thank you.

15 ROBERT MASTERS: Thank you.

16 KAREN FRIEDMAN: Thank you very much.

17 PAUL CAPOFARI: Thank you.

18 CHAIRPERSON LANCMAN: With that, I just
19 want to thank the Council Staff, Counsel to Committee
20 Brian Koe [sp?], the Policy Analyst for the
21 Committee, Casey Addison [sp?], my staff, Rachel
22 Kagan [sp?], Josh Levvit [sp?], and Jordan Bierberman
23 [sp?] for helping put this hearing together, and I
24 thank you for all of your participation.

25 ROBERT MASTERS: Thank you.

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COMMITTEE ON JUSTICE SYSTEM

CHAIRPERSON LANCMAN: Thank you.

[gavel]

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COMMITTEE ON JUSTICE SYSTEM

C E R T I F I C A T E

World Wide Dictation certifies that the foregoing transcript is a true and accurate record of the proceedings. We further certify that there is no relation to any of the parties to this action by blood or marriage, and that there is interest in the outcome of this matter.



Date April 1, 2018