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TESTIMONY OF LEROY FRAZER, Jr.
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KINGS COUNTY DISTRICT ATTORNEY'S OFFICE

Before the
NEW YORK CITY COUNCIL
COMMITTEE ON THE JUSTICE SYSTEM
FEBRUARY 27, 2018

Good afternoon Chairman Lancman and members of the Committee on the Justice System. I am Executive Assistant District Attorney Leroy Frazer, Jr. and I am presenting testimony on behalf of the office of Kings County District Attorney Eric Gonzalez. Thank you for the opportunity to speak to you today about our discovery practice.

The Brooklyn District Attorney is committed to a vision of keeping Brooklyn safe and strengthening community trust in our criminal justice system by ensuring fairness and equal justice for all.Without community trust in our system, we are less safe, and indeed our very democracy is at risk.

Procedural justice, or the sense that everyone who comes into contact with our system, whether as a victim, a witness, or someone accused of a crime, is treated fairly by the system, is essential to strengthening community trust. When the community perceives that we as prosecutors have a win-at-all-costs mentality, and engage in gamesmanship for tactical advantage, it negatively impacts their sense that the system is fair. As prosecutors, our duty is to do justice, not just to secure convictions, and DA Gonzalez believes that early discovery in criminal cases is an important part of providing procedural justice.

Failure to provide the defense with all discoverable material in a timely manner may deprive the defense of the ability to: (1) review the material thoroughly; (2) investigate any leads as necessary; and (3) adequately prepare a defense in anticipation of hearings and trial. This inability may in turn lead to a wrongful conviction—a result that confounds our goal of obtaining justice. Open file discovery aims to curtail such instances by apprising the defense early in the case not just of the prosecution's evidence of the defendant's guilt but also of any evidence that the defense would consider favorable to the defendant. Accordingly, the Brooklyn District Attorney's Office engages in "open file" discovery with regard to most matters.

However, we recognize that our commitment to procedural fairness and early discovery must be balanced by a concern for the safety of witnesses and the integrity of the investigative process. Early discovery may, unfortunately, facilitate a defendant's tampering with evidence or interference with an ongoing investigation.. Our greatest concern is that early discovery may lead to witness harassment and intimidation, and by extension, discourage victims and witnesses, in a particular case and in general, from cooperating with law enforcement. The problem has become especially acute in our age of social media and electronic devices. We must be especially vigilant that the search for justice through the adjudicatory process does not endanger the lives of victims or witnesses, or the lives of their families. We take our obligation to protect the safety of victims, witnesses and their families very seriously.

Our Office has practiced open file discovery since the mid 90's. We believe that the practice accelerates the disposition of cases, and that were we to return to routine motion practice, the adjudicatory process would slow down considerably.

As a general matter, in Criminal Court where misdemeanors are prosecuted, we provide open file discovery (or "OFD") on the first court date after the conversion of the complaint to an information. For felonies, the process begins at the defendant's Supreme Court arraignment on an indictment. Much of the discovery is provided at the arraignment -- this allows for defense attorneys to review much of the evidence before their client must accept or reject a plea offer . This is a meaningful effort to provide not only procedural justice but allow for quicker resolution of cases. The bulk of the discovery is then provided on the first adjournment following the Supreme Court arraignment.

The initial open file discovery packet consists of everything that is then in the People's file except Grand Jury minutes. Of course, documents are appropriately redacted to withhold witnesses' contact and personal information. Grand Jury testimony of any witness whom the People intend to call at trial is turned over after the minutes have been inspected and found sufficient by the court.

To the extent that certain items will not be immediately available to the assigned ADA prior to the OFD date (e.g., hospital/medical records, the results of scientific tests, video or audio recordings, etc.), ADAs are instructed to obtain and provide such items as expeditiously as possible after that initial court date.

In the event that the People possess a discoverable item which, if disclosed to the defense pursuant to the OFD timetable, would: (i) jeopardize the safety of a victim/witness, OR (ii) endanger the integrity of physical evidence, OR (iii) adversely affect the legitimate needs of law enforcement (including the need to protect a confidential informant), ADAs are trained to move for a protective order.

Although we engage in OFD with regard to the vast majority of cases, there are a small number of cases where we do not. Generally, we engage in motion practice, and not OFD, in murder cases, gang cases, certain special victims cases, and complex investigative cases. Notably, even in these cases, much discovery is still provided to the defense often well ahead of any statutory deadline.

In addition, ADAs are trained to disclose expeditiously to the defense any information in their possession that is favorable to defense – so-called potential *Brady/Giglio* information.

District Attorney Gonzalez believes that our office could enhance the OFD process and make it more efficient by creating a system for electronic discovery. To that end, our upcoming budget request will include a request for additional funding to accomplish that goal.

DA Gonzalez firmly believes that our discovery policy appropriately balances fairness and public safety, and advances our overarching goal: to keep Brooklyn safe and strengthen community trust in our criminal justice system by ensuring fairness and equal justice for all.

Thank you.

Richmond County District Attorney's Office

Testimony before City Council Committee on the Justice System

February 27, 2018

Good morning, Chairman Lancman and members of the Committee on the Justice System. I am Paul Capofari, the Chief Assistant District Attorney, and I am honored to be here today speaking on behalf of District Attorney Michael McMahon and the Richmond County District Attorney's Office. I would like to thank you for allowing the District Attorney's offices an opportunity to speak and have our perspectives heard on the issue of discovery practice and also importantly on how changes to the law regulating discovery will impact our office and its resources.

The Richmond County District Attorney's Office is committed to seeking justice on behalf of the community and the victims of crime. Every day we work to ensure fairness, efficiency, and transparency within the criminal justice system by protecting the people of Staten Island, preventing crime from afflicting our neighborhoods, putting dangerous criminals behind bars, and simultaneously balancing those responsibilities with ensuring the constitutional rights of defendants, and critically the safety of our witnesses and victims throughout the criminal justice process.

Striking the appropriate balance among safety, efficiency, transparency, and fairness is at the heart of the issue of discovery, which we are all here today to discuss. As you are all aware, discovery policies have been a topic of great discussion among those looking to reform our criminal justice system, including the Governor and state legislature who are considering legislation to change the current statute. If passed and enacted, this legislation would surely impact each DA's office considerably.

Amid this discussion, and in reviewing our own best practices, District Attorney McMahon instructed me a year ago to form a committee within our office to review Staten Island's discovery practices. After numerous discussions on how we can more effectively and efficiently handle our cases by modernizing and bringing greater consistency to our discovery practices, we recently finalized a new office procedure that addresses these goals while also ensuring the protection and safety of our victims and witnesses. This new process, which we have named Early Action Discovery, reaffirms our commitment to a fairer more efficient justice system for all.

I. Early Action Discovery Plan

It must be said at the outset that our office has always been and remains committed to complying with, and exceeding where appropriate, our constitutional, ethical, and statutory obligations with respect to discovery of documents and disclosure of relevant information. Until recently, RCDA's long standing discovery process for felonies was Voluntary Disclosure (VDF) and then pursuant to the Criminal Procedure Law the defense would make a demand for discovery upon the prosecution, who then had a reasonable amount of time to provide the requested material.

Although, in practice, VDF was executed ethically and responsibly in Richmond County, our constructive evaluation found that the evolution of this practice both by the attorneys in our office and the defense bar, may have contributed to extended timelines of discovery.

Since taking office in 2016, District Attorney McMahon has strived to streamline many of the office's processes while being mindful of the oft-quoted words of our first President George Washington: "The true Administration of Justice is the firmest pillar of good government."

With improving the administration of justice in mind, the Staten Island DA's office recently finalized our Early Action Discovery policy, which we believe will speed the resolution of indicted felony matters and allow the defense to make a measured intelligent assessment of the case ahead by accepting a plea or proceeding expeditiously to trial.

Under this new procedure, the prosecution will provide evidence in the case, such as police reports, witness statements, laboratory reports, and search warrants, without first requiring a request, and within 21 days of the Supreme Court arraignment.

Early Action Discovery will be provided to the full extent possible, protecting where needed confidential informants, police undercover officers, and the safety of the public. The protection of victims and witnesses remains a paramount concern of the District Attorney, and any information that could put these individuals in harm's way or jeopardize their safety must be redacted. I must emphasize that this "right to redaction" is essential to the fair administration of justice and we cannot and will not proceed to open our files without it.

The intent of Early Action Discovery is to provide evidence that allows the defense to make an informed decision about his or her case and to move toward a speedy resolution or trial.

Early Action Discovery will place evidence in the hands of the defendant long before the present law or previous procedure requires. In addition, some items, such as witness statements and police reports, are not required by current discovery laws until the day of trial. Recognizing that this late discovery of evidence is a severe impediment to the defense, the new procedure will provide this material much earlier in the process.

As we fine tune this new policy, it is important to note that nothing changes the prosecution's present obligations to disclose evidence favorable to the defense under the *Brady* doctrine. The Staten Island District Attorney takes the obligation to disclose exculpatory evidence very seriously, and will continue to do so. We continually stress this point with our Assistant District Attorneys, and have frequent CLEs to ensure that they honor this obligation.

At the same time, it is our view that early discovery makes the criminal justice system work better, and we look forward to measuring the impact and success of this new procedure with a reduction in case processing times.

II. The Impact of Reform and New Evidence on Discovery and Office Resources

While RCDA is committed to reforming our discovery process and making the system more efficient, it must be said and recognized that these reforms do not happen in a bubble. Changes to policy and changes to statute have ripple effects and require resources and personnel to manage and implement them. Nothing exemplifies this more than the significant impact that body worn camera footage

worn by NYPD officers is having on our office, and will continue to have on any reforms to the discovery process. Body worn cameras only partially and recently arrived on Staten Island, but with them have come massive amounts of footage to collect and catalogue for evidence – a responsibility that falls on our staff. The amount of footage we now have to organize, redact where appropriate, disclose, and review is burdensome and requires more resources – more staff, more storage space, and more other than personnel funding for sharing materials (dvds, jump drives). These resources are needed even without the demands of earlier discovery deadlines, but with Early Action Discovery or any new discovery law passed by the State these resources are absolutely critical. Without them, earlier discovery will be, quite frankly, impossible.

The men and women of RCDA work hard every day to keep the people of Staten Island safe. We are facing many issues in our borough, including the tragic heroin, opioid, and fentanyl epidemic that continues to claim lives at a rapid pace. At the same time, the serious problem of domestic violence continues to plague the lives of so many victims. While we have dedicated many resources to fighting these issues, we can only do so much with what we are given.

Discovery reform is a responsibility we all must shoulder, and that requires a promise from the City to ensure the DA's offices have the necessary tools and resources to accomplish this task. The District Attorney and his colleagues here today have a shared goal to bring fairness, efficiency, and transparency to the justice system, but we cannot do it alone.

Working together, RCDA can better ensure that cases are handled in the most fair, balanced, and open way possible under the law. Early Action Discovery will accomplish this goal as we continue in our mission to protect the people of Staten Island, the City, and State of New York.

Thank you for your time and consideration. District Attorney McMahon and the Richmond County District Attorney's office look forward to continuing to work with all of you to better serve the people of the City of New York.

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CENTER FOR HEALTH, EQUITY, AND JUSTICE

Discovery Oversight Hearing Testimony
New York City Council, Committee on Justice System

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Submitted to: New York City Council, Committee on Justice System
Rory I. Lancman, Chair

Submitted on: February 27, 2018

katal

CENTER FOR HEALTH, EQUITY, AND JUSTICE

Discovery Oversight Hearing Testimony
New York City Council, Committee on Justice System
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Good morning everyone. First, I would like to thank the committee on Justice System and Councilmember Lancman for holding this hearing on a very important part of our justice system- discovery in criminal cases.

My name is Marie Ndiaye; I am the Senior Policy Manager at the Katal Center for Health, Equity and Justice. The Katal Center is a non-profit organization with a mission to advance practical and transformative reforms to systems, policies, and processes to strengthen health, equity and justice for all. Ending mass incarceration, over criminalization and the war on drugs is one of our main goals. In the past that has led us to co-found and co-direct the close Rikers campaign through its victory of getting Mayor de Blasio to announce closure as official city policy. We are pursuing changes to pretrial justice issues – bail, speedy trial, and discovery – in order to reduce the number of people incarcerated pretrial and ultimately close jail facilities like Rikers. Prior to joining the Katal Center, I was a public defender with the Legal Aid Society for 5 years, right here in Manhattan, where I represented over 2,000 indigent New Yorkers on misdemeanor and felony cases. I am submitting this testimony armed with the experiences of my clients over those five years.

This is a very important time for New Yorkers when it comes to criminal justice reform. Our Mayor has committed to closing the Rikers Island jail complex. Our governor has supported the call to close Rikers, and to do so sooner than the mayor's ten-year timeline; the governor has also committed to ending race and wealth based disparities in our criminal justice system. We currently have a proposed executive budget in Albany, which includes changes to our bail, speedy trial and discovery laws –along with Senate and Assembly packages also calling for pretrial justice reforms. Thank you all for joining that call in organizing this hearing.

With regards to discovery, in a criminal case, discovery materials include evidence collected during the investigation and prosecution of the charges, such as police reports, statements of witnesses, scientific testing reports, video recordings, and exhibits. While the law requires that some of this evidence be disclosed within 15 days of the defense asking for it, disclosure within that time frame seldom occurs. However, that's not even the biggest problem with our discovery rules.

New York's current law does not require District Attorneys to turn over certain discovery materials to defendants *until the day trial actually begins*. The withheld evidence, commonly known as "Rosario material," refers to memorialized statements of testifying witnesses, such as police reports, grand jury minutes, and statements of eyewitnesses –

basically, the most important evidence in any criminal case.

A person charged with a crime in New York does not even have a right to learn who is accusing them. And prosecutors, especially in Manhattan, often choose to withhold that information.

Here is how application of the current law manifested in my five years of practice in Manhattan. I have reviewed grand jury minutes on the date that the case is supposed to be tried, which is months after the start of a case, and discovered that the minutes were insufficient leading to dismissal of that charge. I have been told by prosecutors, on numerous occasions, that I could not receive discovery like police reports or other witness statements unless and until we were in a trial part. That meant that despite both parties being ready to try a case, I could not begin to prepare with the discovery until we were in a trial part ready to start. It also meant that if we did not get a trial part, the case would be adjourned again without me receiving the evidence. I have been handed a stack of material and given a couple of minutes to review them at the defense table before starting a hearing or trial. I've been handed video of my client at the police precinct for a DWI arrest at the same time that the prosecutor was answering ready for trial on that case, and yelled at for asking for an adjournment to review that video with my client.

This was not just on "victim cases" where the prosecutors claim to be worried about witness safety. This happened in cases without civilian witnesses; in petit larcenies; and in DWIs; and even in farebeats! And in cases where the accused and the complainant are known to each other.

This is not about witness safety. This is about a culture of maintaining an advantage by withholding evidence. It is a power play, and unfortunately that power comes at the expense of people who are innocent until proven otherwise.

As a public defender, I had many frustrating conversations with my clients that went like this:
Who's saying I stole from them? I don't know.
What does the police report say? I don't know.
What are the police saying I did? I don't know.
What was said to the grand jury? I don't know.
Do they have video? I don't know.
Can I see the evidence against me? No.

And on and on it went. The 'I don't knows'; and the 'nos'; the 'I don't have this paper', and 'no I can't get it.' These interactions undermine our justice system at every turn. It completely eviscerates attorney/client relationships and leaves the accused, who then often victims themselves or witnesses to crimes, extremely reluctant to cooperate with law enforcement and prosecutors. People's experiences as defendants inform how they will behave as victims and witnesses. That is the real public safety issue.

Without essential information, my clients were often presented with an impossible choice – accept a plea deal, without actually knowing the evidence against them, or wait for the evidence to be shared at trial. And since we know that in New York, 97% of criminal cases are resolved through plea bargains, it is clear that most have chosen the former. But that is not always without some form of coercion. We know that our cash bail system and speedy trial rules do not lend to or facilitate waiting for your day in court.

In New York City, 70% of the people in jail are there pretrial. Those who decide to wait for their cases to be resolved face severely lengthy delays, often times in jail, putting their families and livelihoods at risk and at a cost to taxpayers.

New York is among the four states with the most restrictive discovery rules – along with Louisiana, South Carolina, and Wyoming. And Manhattan is one of the boroughs with the most restrictive practices in the five boroughs. It is time to bring our discovery practice in line with the rest of the country, including states like Texas, North Carolina and Missouri, where defendants can receive police reports at arraignments. It is important to note that of the states with the most progressive discovery rules like North Carolina and Texas, not one State has rolled back their discovery disclosure because of witness intimidation or any other witness safety issue. In this city, the Brooklyn DA's office has been providing discovery with no issues. The time has come with a uniform discovery practice in the city that is fair and fosters a culture of transparency, not secrecy.

Again, I want to thank you for using your platform to shine a light on this problem; but we must do more, and we can do more. Currently, the Senate Democrats and the Assembly majority have released criminal justice packages with proposed changes to bail, speedy trial, and discovery practices. Both house discovery bills: S.7722 sponsored by Senator Bailey and A.3056 sponsored by Assemblyman Lentol provide a fairer and more just way forward. We urge you to reach out to your colleagues in the State Assembly and Senate and encourage them to pass the best discovery bill possible. We would ask you to throw your support behind these bills and issue a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to repeal the Criminal Procedure Law Article 240 and replace it with a law mandating early, open, and automatic pre-trial discovery, like the one previously passed by the Committee on Courts and Legal Services.

It cannot be overstated; the City, Mayor De Blasio, and Governor Cuomo cannot achieve their goal of closing Rikers without critical changes to our pretrial justice practices- including discovery.

Right before leaving the Legal Aid Society a supervisor of mine gave me a piece of advice, and he gave me permission to share it. He said, when you are talking to people about criminal justice you should tell them that the criminal justice system should operate more like chess and less like poker.

The time for pretrial justice reform is now. Thank you.

Committee on Justice System
Oversight - Issues with criminal discovery practices
Chair Rory Lancman
February 27, 2018

FOR THE RECORD

Hello Council Member Rory Lancman and Members of this Committee. Thank you for welcoming my testimony today.

My name is Aaron Cedres and in September 2013 I was arrested for a crime I didn't commit. You may have read about this in Beth Schwartzapfel's New York Times article last August.

I was accused of brutally beating a man outside the nightclub where I was working as a bounce for the past several months. I was 25 years old and living with my gf and our new baby girl. That was the first time I had ever been arrested before.

From the moment I met my lawyer from The Legal Aid Society I told her I was innocent. The fight occurred several days before I was arrested and I remember breaking up a fight between some people at the club but I only punched one person one time before we were able to break it up. I told my lawyer there were cameras outside the nightclub that should show everything. I begged her to get those tapes and help me clear my name.

In the meantime, I was charged with attempted murder and my bail was set at $25,000.

Luckily between my savings and help from my family I was able to post the bail. Once I was released I told my lawyer I wanted to testify in the Grand Jury. I was convinced I could clear my name.

My lawyer spoke to the prosecutor and he told us that they had the video but they wouldn't let us see it. He told us the video was bad for us and we should take a plea. He offered me five years in prison. I said no.

My lawyer, Kristin Bruan, fought for months to get the video but the prosecutor told us the video had been destroyed. Something told her to keep trying. Thank god she did.

In the meantime, my security license was suspended and I lost my job. Unable to pay rent my girlfriend and my baby girl moved in with her mother. My family had no money left for me after helping me pay my bail and they were beginning to doubt my innocence. I was jobless and homeless and for the first time in my life, I felt powerless and alone.

I spent the next several months living on buses and in parks and occasionally staying homeless shelters. I was arrested for jumping the turnstile and trespassing and ended up with a criminal record for it. It was the lowest point in my life. I started to consider taking that plea deal because I saw no way out.

Then after my lawyer demanded that the judge dismiss my case because the prosecutor destroyed the video that held the evidence to prove I didn't do it, the prosecutor miraculously found a working copy of the video and gave it to us. It was a year after I was first arrested thanks to New York's restrictive discovery laws that allow prosecutors to withhold evidence till the last minute.

Sure enough, the video showed me standing outside the nightclub while a group of people chased a guy down the street and beat him up. The man I punched wasn't even the guy who was beat up. It was totally unrelated to the guy who I was charged with attempting to murder.

I don't know what I would have done if my Legal Aid Society lawyer didn't stay on the prosecutor and uncover that video. I'd probably still be sitting in prison.

It's funny how they say a man is innocent until proven guilty because in my experience, a man has to fight for his freedom with all he's got.

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Article for reference:

NY Times: Defendants Kept in the Dark About Evidence, Until It's Too Late
https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html

The Bronx Defenders | Redefining public defense.

New York City Council, Committee on Justice System
Chair Rory Lancman
Hearing on Issues with Criminal Discovery Practices
February 27, 2018

Written Testimony of The Bronx Defenders,
By Scott D. Levy

My name is Scott Levy. I am Special Counsel to the Criminal Defense Practice at The Bronx Defenders. Thank you for the opportunity to testify today.

The Bronx Defenders provides innovative, holistic, client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people of the Bronx. Our staff of over 300 represents approximately 30,000 individuals each year. And in the Bronx and beyond, The Bronx Defenders promotes criminal justice reform to dismantle the culture of mass incarceration.

We welcome the opportunity to testify before this Committee about the need for real, meaningful discovery reform in New York City and across the State.

THE NEED FOR DISCOVERY REFORM

In 2013, Steven Odiase was convicted of a 2009 Bronx murder based on the testimony of a single eyewitness. The jury convicted Mr. Odiase, despite a lack of physical evidence linking

Mr. Odiase to the shooting and the fact that the sole eye witness admitted that he was "buzzed" from smoking a marijuana cigarette at the time of the incident. Last April, Mr. Odiase was released from prison after serving almost six years of his sentence of 25 years to life when it was discovered that the prosecutor in his case had purposefully withheld critical information from him and from the jury.

Specifically, an investigation by Mr. Odiase's post-conviction counsel revealed that the Bronx Assistant District Attorney in the case had intentionally redacted information from a police report that supported Mr. Odiase's innocence: During a canvas of the building where the shooting occurred, detectives had interviewed a woman who described the shooter as a "tall, dark skinned male" with a "heavy beard" -- Mr. Odiase was short, light-skinned, and beardless. The eyewitness also claimed to have gone to high school with the shooter and even gave the detectives a copy of a yearbook photograph of the man. None of this information was ever turned over to Mr. Odiase's trial counsel. The Assistant District Attorney later told the *New York Times* that the "redaction was intentional."[1]

A functioning system of discovery in the Bronx would likely have prevented the devastating miscarriage of justice in Mr. Odiase's case. And, sadly, without significant reform of our discovery practices, we can expect to see more stories like his in the future.

"Discovery" refers to the pre-trial disclosure of evidence. In most states across the country, discovery rules in criminal cases require prosecutors to disclose names and contact

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[1] Jim Dwyer, *The Case of the Missing Murder Witness*, The New York Times, April 18, 2017, https://www.nytimes.com/2017/04/18/nyregion/a-witnesss-account-of-a-bronx-killing-might-have-helped-if-it-hadnt-vanished.html; *see also* Jennifer Gonnerman, *A Woman's Quest to Prove her Brother's Innocence Leads to a Discovery*, The New Yorker, April 17, 2017, https://www.newyorker.com/news/news-desk/a-womans-quest-to-prove-her-brothers-innocence-leads-to-a-discovery; National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5220.

information for their witnesses; statements of those witnesses; police reports; surveillance video; and any other physical evidence that the prosecutor may use at trial. Defense attorneys reciprocate. The accused then makes a reasoned, informed decision whether to plead guilty or go to trial based on the evidence in the case.

In New York, by contrast, people charged with crimes make one of the biggest decisions of their lives completely in the dark. They must decide whether to go to trial, and risk years in prison if convicted, or plead guilty and voluntarily accept punishment for a crime they may not have committed, frequently without seeing any of the evidence in the prosecutor's possession. They may make this decision ignorant of the fact that the prosecutor has evidence that exonerates them. Often, people do not even know who has accused them: for example, the charging document may say nothing more than "a person known to the NYPD" reported that the accused stole an iPhone. Prosecutors in New York are not even required to disclose basic police reports and witness statements until the day of trial, if at all. New York's discovery rules act more as a blindfold than a guarantor of justice.

PRINCIPLES OF DISCOVERY REFORM

New York's discovery law--Criminal Procedure Law Article 240--is among the most restrictive and regressive in the country. It requires only minimal disclosure of information, and virtually no mechanisms to ensure that information is turned over in a timely manner, if at all. Years of practicing under the "Blindfold Law" have created a culture defined by a lack of transparency among prosecutors and courts in which critical evidence is regularly withheld and basic principles of due process and fairness are rarely enforced.

To change New York's discovery culture, we must guarantee that discovery is fair, early, and automatic. And because over 95% of cases resolve before trial, we must ensure that discovery is turned over *before* people are asked to plead guilty.

Fair Discovery

Fair discovery means complete discovery. Prosecutors must not be able to pick and choose which pieces of information to disclose and which pieces to withhold. Disclosure must be the default. Fair discovery must include all materials not protected by privilege or court order, including names and contact information of witnesses, whether or not they will be called by the prosecution to testify; witness statements; police reports; videos; photographs; and test results. These materials must be unredacted, with only limited exceptions. Incomplete discovery prevents defense attorneys from fulfilling their core functions--investigating the case, giving meaningful advice on the merits of a plea bargain, and preparing for trial--and leads to wrongful convictions, like the murder conviction of Steven Odiase.

Prosecutors should also be required to file certificates of compliance with the court to ensure that they have complied with all of the their disclosure obligations. Moreover, they should not be able to state "ready" for trial under New York's "prosecutorial readiness rule," C.P.L. § 30.30, until they have certified compliance with their discovery obligations.

Early and Automatic Discovery

Discovery must be disclosed as early in the court process as possible. Under New York's current discovery law, a prosecutor may wait until *after the trial begins* to turn over most of

their evidence, including witness names, statements, and criminal records.[2] Criminal Procedure Law § 240.20 theoretically requires the prosecutor to disclose a paltry amount of evidence--such as the defendant's and co-defendant's statements, photographs, and electronic recordings--within 15 days after the defense's written request, which itself may only be made within 30 days after indictment. Long before this exchange, however, prosecutors make pre-indictment plea offers--which expire at indictment. Innocent and over-charged people plead guilty out of fear of the unknown. Even after indictment, prosecutors routinely ignore the statutory deadline, not providing discovery until months later. Criminal Procedure Law § 240.20 does not afford any meaningful remedy to the defense or any sanction with teeth to dissuade prosecutors' abuse. Defendants need discovery early enough to make informed decisions, investigate their cases, and prepare for trial.

Moreover, discovery must be disclosed automatically, without the need to exchange boilerplate papers which serve only to promote delay and create busywork for both sides. For those awaiting trial on Rikers Island, every delay is another day in jail--another day away from family, another day closer to losing a job or an apartment. This is of particular importance In the Bronx, which experiences the longest pre-trial delays in the city.

Indeed, despite the Bronx District Attorney encouraging front-line prosecutors to disclose more evidence earlier, criminal discovery in the Bronx is a rather haphazard affair. Often, materials are not disclosed for months, after multiple trial dates have passed. Cases regularly drag on for months, if not years, due to outstanding discovery and the lack of enforceable timetables.

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[2] C.P.L. § 240.45.

Pre-Plea Discovery

Only a tiny fraction of cases in the criminal justice system ever see a trial. The vast majority of cases are resolved by guilty plea. Because New York's discovery rules do nothing to guarantee transparency, hundreds of thousands of New Yorkers serve jail and prison sentences and/or are subjected to collateral consequences such as deportation, loss of employment, ineligibility for student loans, and eviction, without ever having seen the evidence in their cases. Meaningful discovery reform must require prosecutors to turn over information *before* any guilty plea so that the accused can make an informed decision about whether to plead guilty or go to trial.

A discovery system that follows these principles will not only increase fairness, transparency, and equality, but will promote early and efficient resolutions in cases by eliminating uncertainty and allowing plea negotiations in appropriate cases based on a shared set of facts. These early resolutions will, in turn, contribute substantially to the City's goal of reducing the jail population and closing Rikers Island as quickly as possible.

COMMON SENSE WITNESS PROTECTION

Contrary to the claims of prosecutors--the District Attorneys Association of New York, in particular--reforming our discovery laws will not endanger witnesses. New York is among only four states--New York, Wyoming, South Carolina, and Louisiana--that allow the prosecution to hide almost all information until the day of trial. The experience of numerous other states shows that prosecutors' concerns about witness intimidation are vastly overblown.

Forty-six states mandate disclosure of the prosecution's witnesses, with reasonable exceptions for common sense security measures--such as protective orders issued by judges. No state has ever repealed a broad discovery statute or replaced it with a more restrictive one. Early adopters, such as New Jersey (enacted in 1973) and Florida (enacted in 1968), have operated under liberal, expedited discovery statutes for over 40 years[3]. Other states, seeing the results, have followed suit as recently as 2004 (North Carolina), 2010 (Ohio), and 2014 (Texas).[4] If broad discovery had resulted in a wave of witness intimidation, as prosecutors in New York claim, surely some of these states--or even one of them--would have restricted discovery in response. No state ever has.

The city's prosecutors need look no farther that Brooklyn for an example of a workable open-file discovery policy. For years, the Brooklyn District Attorney has provided broad discovery early on in most cases. Contrary to the dire warnings of other prosecutors, Brooklyn has not seen a rash of witness intimidation.

THE CITY COUNCIL'S ROLE IN DISCOVERY REFORM

The City Council must be a leading voice in advocating for meaningful discovery reform. To that end:

- **The Council should support robust discovery at the State level.** There are currently bills pending before both the State Senate (S.7722) and the Assembly (A.4360-A) that would make New York a leader in discovery. Both bills would broaden access to evidence for the defense and the prosecution; require automatic discovery to take place early in the

[3] New York State Bar Association Task Force on Criminal Discovery, Report of the Task Force on Criminal Discovery 2 (2015).
[4] *Id.* at 3.

criminal process; and, critically, mandate that discovery by turned over before the accused accepts a guilty plea. Both bills also include commonsense mechanisms to protect witnesses whose safety would be jeopardized, including protective orders which, upon a showing of necessity, prohibit defense attorneys from sharing sensitive information with their clients. The Council should do what it can to support these bills in Albany.

- **The Council should encourage the city's district attorneys to adopt open-file discovery practices.** In the meantime, the Council should be a leading voice in holding the city's district attorneys accountable to the principles laid out here. There is nothing preventing the city's five prosecutors from adopting fair, early, and automatic discovery practices tomorrow. Indeed, the Kings County District Attorney's Office has voluntarily provided open-file discovery in most cases for years, demonstrating that it is a workable model of ensuring equal access to information.[5] The Council should urge the city's prosecutors to adopt a standard practice of turning over information early in a criminal case, and, specifically, before any guilty plea.

Ultimately, what is required is a change in culture. This hearing is an important first step.

Thank you again for the opportunity to testify today.

[5] While The District Attorney in Brooklyn does provide broad discovery in most cases, the open-fil policy does not extend to certain cases, including homicide cases and sex offense cases. The Council should encourage the Brooklyn District Attorney to adopt open-file discovery for all cases.

nycds
Fighting for your rights, one person at a time

Stanislao A. Germán, Executive Director
Carolyn P. Wilson, Director

2/27/2018 CITY COUNCIL HEARING

T2018-1171

Oversight – issues with criminal discovery practices

TESTIMONY OF NEW YORK COUNTY DEFENDER SERVICES

Once again New York inexplicably finds itself far behind the national curve on a critical criminal justice issue. This time the question is discovery; that is, the disclosing of evidence by the prosecution to the most relevant party in any criminal prosecution, the accused. That such a fundamental practice should engender any controversy, let alone the current level, is astounding. Frankly, it's a testament to the success prosecutors have enjoyed for decades in creating a toxic uneven playing field in this cities courtrooms, but not where civil litigation is concerned, only where one of the parties is facing the loss of liberty and is already burdened by a vast disparity in resources.

This city's current criminal discovery practices are deplorable. I have been a public defender in Manhattan for over twenty years. Much has changed during that time, mostly for the better, but one thing that's remained consistent is the Manhattan District Attorney's Office prizing strategic advantage over fundamental fairness and procedural dignity. In Manhattan, a person facing criminal prosecution is purposely kept in the dark regarding the proof against them in a manner that invariably shocks those who are unfamiliar with our criminal justice system and its norms.

Imagine being arrested and charged with a crime. You face the terrible tumult that a criminal prosecution entails and instinctively come to appreciate the great disparity in resources between you and those of the prosecution and its four billion dollar police force. Eventually you will likely come to ask how it is possible that the criminal prosecution against you can proceed for months, years, even to the verge of trial, without the prosecutor having disclosed to your attorney some of the most elemental aspects of your case. Here I'm referring to material of obvious and great relevance like the police reports of the officers involved in the arrest, the prior testimony of witnesses, and even the very identity of the person accusing you. The answer is that the New York prosecutor has been gifted an illegitimate statutory

advantage and they have made a strategic decision to press that advantage in contravention of their duty of fairness and of your constitutional rights.

Because that's what this city's current discovery practice essentially is. It is a widespread, longstanding, and programmatic violation of the constitutional rights of mostly indigent people of color and it is indefensible. My entire indigent defense career, and that of the many brilliant attorneys who devote themselves to this work, is based on the premise that the attorney on a case matters. It is through their attorney that those facing the horror of incarceration exercise their most critical and fundamental constitutional rights. So much so that the right to the effective assistance of counsel is itself enshrined as perhaps *the* fundamental right that the state must ensure for anyone accused of a crime.

But this guarantee is meaningless if the attorneys charged with this sacred responsibility are then purposely hamstrung in their ability to represent their clients. Criminal defense entails many responsibilities but none greater than the duty to fully investigate the claims against one's client. Too often, the criminal defense practitioner in Manhattan is placed in the untenable position of not being able to even begin discharging this responsibility because of the paucity of available information.

Another word for attorney is counselor but how do you counsel someone effectively on one of the most important decisions they'll ever make when you have intentionally been kept in the dark by a prosecutor intent on using his or her far greater access to information for leverage? In sum, the system is rigged to reduce the efficacy of the defendant's attorney. The result is hundreds of thousands of poor people a year effectively being denied their Sixth Amendment right to counsel and by extension their right to a fair trial. In the context of our criminal justice system, where we as a society recognize that petty gamesmanship and strategy must defer to higher notions like due process, constitutional safeguards, and fundamental fairness, this is grossly unjust.

This injustice then infects the entire system. People plead guilty, even to serious crimes, without having read a single police report or sheet of grand jury testimony against them. Or worse, they rot on Rikers Island on bail they cannot afford while critical information that might secure their release or a more favorable plea deal is withheld from them and their lawyer. To say nothing of the way this pervasive and improper secrecy greatly increases the risk of wrongful convictions.

It all serves mainly to reduce respect for our system. I know from vast experience that it drives a wedge between attorneys, their clients, and the friends and family of that client. It does this because people who find themselves enmeshed in

the criminal justice system simply cannot fathom that the person responsible for protecting their rights within that system can be so ill-informed six, seven months into the litigation. They become frustrated and angry and they attribute bad faith and apathy to their counsel when in fact genuine blame resides with lawmakers and the prosecutors they closely align with.

It is long past time for change. Anyone objecting to meaningful reform must explain what is so unique about New York that it must have a more restrictive discovery statute than Texas, Alabama, North Carolina, and forty-three other states. Our society is finally beginning to come to grips with the devastation mass incarceration has wrought. New York City should be leading the way in criminal justice reform not continually underreacting with half-measures. Addressing the decades-long travesty of justice that is our criminal discovery practice is not only a good place to start but also an ethical mandate.

Sergio De La Pava
Director of Special Litigation
New York County Defender Services

BROOKLYN DEFENDER SERVICES

TESTIMONY OF:

Lisa Schreibersdorf – Executive Director

BROOKLYN DEFENDER SERVICES

Written with Andrea Nieves, Senior Policy Attorney

Presented before

The New York City Council Committee on Justice System

Oversight Hearing – Issues with Criminal Discovery Practices

February 27, 2018

Introduction

My name is Lisa Schreibersdorf and I am the Executive Director of Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy in nearly 35,000 cases in Brooklyn every year. I thank the City Council Committee on Justice System and Chair Rory Lancman for the opportunity to testify today about discovery practices in Brooklyn and the need for statewide statutory reform.

As we discuss the unfairness of our New York's discovery statute, it is important for me to first recognize that the Kings County District Attorney's Office has a two decade long commitment to providing a wide range of discovery to defense counsel in a timely manner.

Yet even a good policy is no substitute for legally required discovery that will ensure early, complete discovery with consequences to individual prosecutors who fail to comply with the

statutory requirement. New York is one of the four states with the most restrictive discovery laws in the country, along with South Carolina, Wyoming and Louisiana. The time to reform our discovery statute is long overdue. I hope the Council will work with us to improve disclosure in all five boroughs and to advocate for comprehensive reform at the state level.

Client Accounts[1]

Johnny – Innocent of Robbery, Case Dismissed at Trial

Last year, BDS represented Johnny, a Brooklyn man who was wrongfully accused of attempted robbery of a taxi cab driver. The driver alleged that Johnny pulled a gun on him and attempted to rob him during the cab ride. Johnny adamantly refuted this, insisting that, in fact, the cab driver had pulled the gun on him. Johnny always asserted his innocence and his criminal defense attorney took the case to trial, even though he had not been able to find any evidence to support Johnny's account.

Midway through trial, Johnny was vindicated. The Assistant District Attorney on the case informed BDS that she had only just spoken with the witness who called in to 911 to report the crime. Even though we had received the 911 call transcript under the Brooklyn D.A.'s open-file discovery policy, the witness's name and contact info were redacted. After placing the 911 call, the witness told the prosecutor that she saw the driver pull the gun out and threaten our client. The prosecutor informed BDS and the case was dismissed. Our innocent client was able to walk free after months of unnecessary litigation.

Under New York law, the prosecutor was not required to turn over the names and contact information of witnesses, in stark contrast to most other states that would have required such disclosure to defense counsel. If Johnny had not insisted upon a trial, and had the witness not come forward during that trial, he would have become another *innocent* New Yorker, serving a prison sentence and saddled with a lifelong criminal record.

Jason – Prosecutors Turned over Relevant Discovery and it Resulted in a Fair Outcome

Jason was charged with the burglary of a bodega for conduct that was clearly related to his ongoing and serious substance abuse problem. Jason was accused of taking a dozen soft drinks, four packs of cigarettes and money from the case register. Our client initially insisted that he was innocent because he had no recollection of the events. However, two months into the case, during which Jason had been detained at Rikers and chose to fight the charges, the prosecutor turned over video surveillance footage, a videotape of his confession, and police reports. The prosecutor then made an offer of two to four years in prison. Upon viewing the discovery together with his defense attorney, Jason was able to see confirmation that he did stumble into the bodega and take the soft drinks and cigarettes. He appeared visibly intoxicated in the video. Critically, the surveillance footage did not confirm the bodega's assertion that he took money from the cash register. The videotaped confession showed Jason that he did, in fact, confess in detail to taking the cigarettes and soft drinks and that he did it so he could resell the items to support his drug habit.

[1] All names have been changed to protect our clients' confidentiality.

Because he was able to see the evidence, Jason had more confidence in his defense attorney and agreed to work with a social worker. Working together, the defense attorney and social worker were able to get Jason into an inpatient drug treatment program. Because the video showed visible intoxication and that Jason had not gone into the cash register, the defense team was able to negotiate a more appropriate plea: drug treatment in lieu of incarceration. Seven months after arrest, Jason was released from Rikers Island into treatment. A year later, he has been sober for the longest period of time since he was 15 years old. In this case, discovery resulted in a more appropriate disposition.

Discovery in New York

New York State's current discovery statute, C.P.L. 240, passed by the state legislature in 1979, does not require disclosure of the most critical evidence until a jury has been sworn, directly implicating the ability of people accused of crimes and their attorneys to investigate the allegations and mount an effective defense. It is no surprise that this "trial by ambush" practice has led to a slew of well-documented wrongful convictions in New York, with new exonerations every year.[2] But most people in Brooklyn, as in most jurisdictions, do not go to trial. They accept negotiated plea bargains. And often this happens without the benefit of knowing the detailed allegations against them.

Even in Brooklyn, where there is a strong commitment to open file discovery, there are many cases where plea bargains are offered prior to any evidence having been turned over. Some of these offers take place prior to indictment, a procedure that is currently being encouraged by the Chief Judge. In such situations, the defense has no information about the case other than what the District Attorney has expressed verbally at the arraignment or otherwise. Yet these types of offers are naturally time limited and must be accepted the same day or they are withdrawn. Other types of offers take place at early stages in the case and may precede the provision of discovery. In many cases, the discovery is incomplete because certain items have not been provided to the District Attorney by the police yet.

The majority of states, including those in which most major cities are situated, have passed open file discovery laws over the past 40 years. Broad discovery is provided to defendants in cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego, and Newark. New Jersey enacted expedited and liberalized criminal discovery in 1973; Florida did so in 1968. Texas and North Carolina enacted open discovery statutes in 2014 and 2004, respectively, and Ohio made its relatively broad discovery rules even more inclusive and open in 2010. No state that has enacted more open discovery rules has later gone back to impose more restrictive ones.

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[2] *See, e.g.,* Innocence Project, *Press Release: Brooklyn Man Exonerated After Nearly Three Decades in Prison; Declared "Actually Innocent" by Brooklyn D.A. Conviction Review Unit*, Dec. 20, 2017, available at https://www.innocenceproject.org/brooklyn-man-exonerated-after-nearly-three-decades-in-prison-declared-actually-innocent-by-district-attorney-offices-conviction-review-unit/; *see also* Murray Weiss, *Wrongful Convictions in Brooklyn Due to 'Systemic Failures,' DA Says*, DNA INFO, April 18, 2016, available at https://www.dnainfo.com/new-york/20160418/gramercy/wrongful-convictions-brooklyn-due-systemic-failures-da-says.

Discovery reform is long overdue in New York and is a priority issue for BDS in 2018. Even if the state legislature does not act, the City can and should do more to encourage prosecutors to turn over all of the evidence in the case early and automatically. In part, this requires NYPD to do a much better job of turning their reports and other evidence over to the DA's office.

Brooklyn-Specific Concerns

Discovery by Stipulation Policy

The Kings County District Attorney's Office has an official "Discovery by Stipulation" (DBS) policy. In lieu of written motion practice, prosecutors provide discovery to the defense on an ongoing basis.[3] The DBS policy has now been in effect in Brooklyn for over two decades and has improved outcomes for clients and streamlined court efficiency. A few years ago, we reviewed our internal data and found that, on average, open file discovery in a case reduces the length of time between arraignment and disposition by six months as compared to cases where we do not receive discovery. The current District Attorney has agreed to continue and improve the timely disclosure of evidence and we support those efforts.

However, because assistant DAs in Brooklyn are not statutorily required to turn over discovery, there are a few problems with the voluntary policy of our DA's office.

1. *Delays occur because prosecutors have no mandated timelines for disclosure.*

It can take weeks or months for prosecutors to turn over all the information such as police reports, forensic evidence, grand jury minutes, search warrant materials, and Rosario[4] material. This is particularly true for evidence that exists outside of the police file (for example, medical or school records maintained by third parties). While disclosure is delayed, many of our clients are awaiting trial on Rikers Island or making multiple visits to court, resulting in missed time at work and school and other harmful consequences for our clients. Opportunities to investigate and prepare the case are delayed or lost entirely as well.

2. *Discovery is turned over in a piecemeal fashion.*

Prosecutors in Brooklyn turn over discovery piecemeal at various points over the duration of a case. This contributes to cases where certain documents are never turned over. At times it seems as if the burden is on defense attorneys to point out gaps in the discovery to the courts and prosecutors in order to ensure complete compliance. In other states, the

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[3] New York County Lawyers' Association, *Discovery in New York Criminal Courts: Survey Report & Recommendations* (2006), available at https://www.nycla.org/siteFiles/Publications/Publications227_0.pdf.

[4] Rosario material includes any statements of a witness who will testify at trial. Police forms that summarize a witness statement, a signed statement by a witness, and paperwork prepared by a testifying police officer are examples of Rosario materials. Under CPL 240, Rosario material must be given to the defense before the opening statements at trial. *See People v. Rosario*, 9 NY2d 286 (N.Y. 1961).

burden is on the prosecutor, which is where it should be, to obtain all evidence, reports and paperwork and turn over their entire file to the defense. Open file discovery is not a substitute for a similar procedure in New York.

3. *Discovery is not uniformly turned over in all cases.*

For example, certain bureaus, such as the Homicide Unit, are explicitly exempt from the office's DBS policy. In these cases, the DA's office still requires defense attorneys to engage in protracted omnibus motion practice and materials relating to the case may be turned over at the last minute or never at all in the case of a plea bargain.

4. *DA's often do not make forensic evidence and its underlying testing readily or rapidly available, instead requiring us to request access it.*

In order for people charged with crimes to present a full and fair defense in their cases, they need complete and quick disclosure of all of the evidence. This is particularly true in cases involving forensic evidence which "often [has] decisive power in the judicial system."[5] Such evidence, often the key evidence in the prosecution's case, may be withheld from the defendant for months. In our experience, while it is now routine in Brooklyn for final reports or analyses to eventually be turned over, we still often have to litigate, obtain subpoenas, or at least engage in a prolonged back and forth to obtain other critical forensic evidence in the case. Forensic evidence is analyzed by a supposedly neutral party and should be immediately available to both sides of a case.

In cases involving DNA, a defendant cannot effectively challenge the evidence without access to the electronic raw data because that data is subject to interpretation by both the software program which processes it and the analyst who constructs the DNA profile. Yet in our experience, OCME will only turn over this information in response to a court-ordered subpoena. Judges respond inconsistently to defense requests for a subpoena, leading to variability across judges and jurisdictions.

Justice demands that where DNA is at issue in the case, the defendant and his or her expert should have early and automatic access not only to the electronic raw data, but all of the underlying information related to the DNA in his or her case, including a complete record of all bench notes.

5. *Controlled substances are not tested in a timely manner, or prosecutors fail to disclose lab reports that show no evidence of controlled substances in a timely manner.*

There are frequently long delays in turning over lab reports proving that an item recovered from our client is, in fact, drugs. In our experience, there are numerous cases where the lab

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[5] Itiel D. Dror, *Cognitive neuroscience in forensic science: Understanding and utilizing the human element*, 370 PHILOS. TRANS. R. SOC. LONDON B. BIOL. SCI. 1674 (2015).

report shows there was no controlled substance. Unfortunately, many people plead guilty to these cases before the lab report is returned in order to get off Rikers Island.

6. *Examining physical evidence can be difficult.*

Physical evidence can play a critical role in corroborating or contradicting prosecutors' accusations. In other states where prosecutors are required to turn over physical evidence to the defense for inspection and testing, there are regular processes in place to streamline this process. However, in Brooklyn, prosecutors and police are under no such statutory obligation and often present roadblocks to the defense's viewing of the evidence in their client's case. Even if the statute does not immediately change, New York City prosecutors' offices could put policies in place to ensure that such inspection happens early on in the case and in a manner that is easy and accessible for all parties.

7. *We still experience disclosure of critical evidence at the eve of trial or a hearing.*

It is quite common in cases that go to trial, for additional discovery to be turned over at the last minute. This may be because during preparation, the prosecutor realized there were more documents, or finally went through the file in a more thorough manner. Although it is rare, there are also some individual Assistant District Attorneys that intentionally hold back certain documents until they are legally required to turn them over, in violation of their office's policy. Needless to say, these last minute disclosures are apt to cause additional delays as well as serious concern about the integrity of the individual ADA and the perceived efficacy of the DA's policy.

8. *Discovery is often not turned over before prosecutors require a decision on a plea offer.*

More than 98% of cases in New York City never make it to trial; they end in either dismissal or plea bargain. As Jason's case so neatly illustrates, discovery is crucial to ensuring the proper outcome in the case, including the plea bargain that will best serve the defendant and the community. Yet in many of our cases, prosecutors or the judge may demand an answer to a plea offer before they have turned over critical pieces of evidence.

9. *There are no penalties for failure to disclose.*

A robust discovery statute must include penalties for prosecutors if they fail to turn over discovery to the defense in a timely manner. Because DBS is a policy and not a law, defense attorneys and the courts have no legal way to hold the DA accountable so long as they comply with the letter of the deeply flawed C.P.L. 240.

Subpoenas

Something that is not often discussed as it relates to discovery is the subpoena power of the defense attorney. In the 1980's and part of the 1990's, defense attorneys routinely sought police reports through judicially-ordered subpoenas. Sometime in the 1990's, the NYPD started moving to quash these subpoenas, after which a body of case law developed that

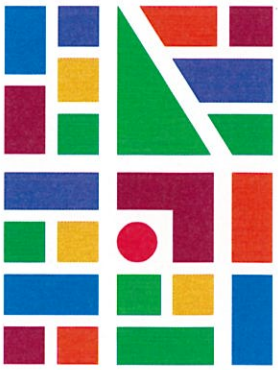
eliminated this method of viewing the police reports. If this were changed by the City Council, some of the most important documentation in our cases could be made available despite the legislature's failure to act on discovery reform.

Conclusion

Brooklyn has a strong history of providing discovery in most cases. Even so there are flaws with a system that depends on hundreds of Assistant District Attorneys to comply with an internal policy.

However, given the state of the law as it exists right now, Brooklyn is a good model for how a prosecutor's office can safely and effectively make the system fairer and we encourage other offices to follow suit.

If you have any questions, please feel free to reach out to me at 718-254-0700 ext. 105 or to & Andrea Nieves, BDS Policy Team, 718-254-0700 ext. 387 or anieves@bds.org.



THE LEGAL AID SOCIETY

TESTIMONY PREPARED FOR:

THE NEW YORK CITY COUNCIL

COMMITTEE ON JUSTICE SYSTEM

Chair Rory Lancman

Oversight - Issues with Criminal Discovery Practices

NEW YORK CITY
Tuesday, February 27, 2018
10:00 A.M.
Council Chambers - City Hall
New York, New York

Presented By:

Justine M. Luongo, Attorney-in-Charge, Criminal Practice

Expertise And Perspective of The Legal Aid Society

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

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

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

The Legal Aid Society's Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our staff represented some 34,000 children, including approximately 4,000 who were arrested by the NYPD and charged in Family Court with juvenile delinquency. In addition to representing many thousands of children, youth, and adults each year in trial and appellate courts, The Legal Aid Society also pursues impact litigation and other law reform initiatives on behalf of our clients.

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

Testimony

Our testimony this morning will address the widely varying discovery practices by the five New York City District Attorneys, and the need for New York to enact extensive reform of its criminal discovery rules. In an Appendix, we also set forth illustrative examples from our clients' cases of inadequate discovery as practiced by these District Attorneys.

Outdated and Unfair Laws: Blindfolding the Accused and Their Attorneys

Under New York State's antiquated criminal discovery statute, Criminal Procedure Law Article 240, people accused of crimes are denied vitally important information that is essential to make informed decisions about their pending cases. In fact, New York is currently one of a handful of States that provides defendants the *least* discovery. The discovery statute does not even require prosecutors to disclose police reports or witness statements until the day of trial.

New York's criminal discovery statute was last revised in 1979. At that time, it was explicitly seen by the legislators who enacted it and the Governor who signed it as the beginning of broader changes. Those changes have not happened. In contrast, nearly every other State has since broadened its discovery. Even Texas and North Carolina – States that we do not normally see as liberal towards defendants – have enacted extremely open discovery statutes that require all police reports and all witness statements to be disclosed early in the case.

Inadequate discovery routinely prevents defense lawyers from fulfilling two of their most important constitutional obligations – investigation of the charges, and giving meaningful advice on plea offers. Without discovery, it is often impossible for defense lawyers to find new witnesses, secure any favorable evidence, challenge the plausibility of the accusations of prosecution witnesses, issue subpoenas, or prepare for a trial. This not only limits counsel's

ability to competently represent the client at trial, it also prevents the lawyer from assessing the strength of the case in order to advise the client about a guilty plea offer.

Unequal Discovery From NYC's District Attorneys

The practices of discovery in the five boroughs of New York City vary widely. For decades, the District Attorneys in Brooklyn have voluntarily provided discovery of police reports and grand jury minutes to the accused in most cases, but the District Attorneys in the Bronx, Manhattan, Queens and Staten Island have not. Thus, a person accused of a crime in Brooklyn receives virtually all of the police paperwork within a fairly short time of arraignment, whereas a person accused of a crime across the East River in Manhattan does not receive any of it until the trial has begun. Open discovery, when used, works in Brooklyn and it will work statewide.

We need to change the law so that all District Attorneys are required to turn over discovery, because justice should not depend on where you are arrested.

In the meantime, the Council should implore the District Attorneys in the Bronx, Manhattan, Queens and Staten Island to adopt voluntary open file policies. It should also urge the District Attorney in Brooklyn to expand its policy to also include categories of cases currently not covered (including all homicide cases, sex offense cases, and others in which the need for broad and early discovery is equally important); and it should call on the District Attorney in Staten Island to expand its open file policy that applies only to misdemeanor cases to also include felony cases.

Mere Rhetoric, Not Real Change

Currently in the boroughs other than Brooklyn, people accused of crimes are regularly denied access to critical materials that are necessary for them to make informed decisions about their cases, to undertake proper investigations, to intelligently assess plea offers, to secure and use exculpatory evidence, and to adequately prepare for trial before the last minute. Far too often the prosecutors turn over police reports or the written or recorded statements of witnesses as the trial begins. This happens even where senior prosecutors or the District Attorney herself – such as in the Bronx – has recommended to trial-level prosecutors that it would be better to disclose evidence more freely. We regularly find that the message neither trickles down nor is enforced from above, and that prosecutors of all levels of seniority instead engage in gamesmanship by withholding materials until close to the last second to gain a competitive advantage.

The common practice of late disclosures of police reports and witness statements must change – and this change will only happen with legislation or with serious measures enforced by the District Attorneys themselves.

We have previously heard the Manhattan District Attorney's Office respond to criticisms of its restrictive and untimely discovery practices by touting an internal office memo sent to all of its Trial Division Bureau attorneys and Unit Chiefs, drafted by senior Assistant District Attorney John Irwin on January 9, 2015, entitled "If It Is In the File – Turn It Over." We assume this memo has been provided in response to the Council's request for such internal office policy documents. We wish to stress what every Assistant District Attorney reading this John Irwin memo and others like it would immediately pick up – *it does not recommend changing the timing for disclosures*. This memo in fact explicitly states: "This new discovery policy does not change

either the timing of our disclosures or our redaction practice." In other words, what the memo effectively means is, when at the time disclosures are required by law, err on the side of inclusiveness in deciding what qualifies. But the most troubling aspect of the Manhattan D.A.'s office's discovery in practice for many decades has been that they turn over the most important type of discovery – witness statements – at the very last moment before trial in the few cases that actually get to that point. The internal memos they tout are not telling prosecutors to do anything different. It is mostly show, not substance.

The same pattern applies in other boroughs as well. For example, just recently, the Staten Island District Attorney proposed voluntary "discovery reform," but it was only for a limited amount of police documents, did not include grand jury minutes of witnesses, and allowed for unfettered redactions by prosecutors. We need real changes, not mere rhetoric.

NYC DAs' Opposition to Meaningful Change

Recently there has been a surge of media attention focusing on this City's District Attorneys and the need for reforming the criminal justice system. Ironically, at this same time, none of the District Attorneys stand behind meaningful discovery reform, and, in fact, they have actively worked with the District Attorneys Association of New York (DAASNY) to impede State legislation.

For many years, DAASNY has responded to calls for meaningful discovery reform by raising apocalyptic predictions of the collapse of the criminal justice system, victims and witnesses no longer reporting crimes, and blood flowing in the streets – all if New York simply joins the national mainstream and adopts early and open criminal discovery rules like those used in most other States. Yet these District Attorneys have offered no explanation for why, if expanded

discovery is really so unworkable and dangerous, conservative States such as Texas (2014) and North Carolina (2004) have recently decided to enact broad discovery systems; why Ohio, which already had fairly broad discovery, recently made its procedures even more broad (2010); or why legislatures around the country – including in California, Florida, Illinois, Massachusetts, Michigan, New Jersey, Pennsylvania and many more – are not scrambling to repeal their statutes (to date, none have). Likewise, these District Attorneys fail to explain how, if broad discovery is too administratively burdensome and jeopardizes reporting of crimes, some of the largest counties in this State, such as Kings County (Brooklyn), have managed to voluntarily turn over open file discovery for decades.

Their position is based on a flawed premise that New York State is somehow exceptional, and that reforms that have worked for decades in the rest of the country would not succeed here. But these reforms are badly needed and long overdue in New York. They would not only help to avoid wrongful convictions, but would enhance the fairness and reliability of our criminal justice system.

Two Especially Problematic Policies

Finally, we wish to highlight two discovery policies in particular – one of the Manhattan District Attorney's Office, and one of the Queens District Attorney's Office – that have especially unjust consequences for our clients with respect to discovery of evidence.

Anonymous Accusations in Manhattan

It is currently standard practice in four of the five boroughs of New York City – and throughout the rest of New York State – for prosecutors to include the name of the individual accusing a

person of a crime in the initial charging document (except in very rare circumstances), even though the law does not explicitly require them to do so. By contrast, it is the routine practice of the Manhattan District Attorney's Office to withhold even the rudimentary fact of the accuser's identity until the beginning of trial in felony cases. An accused person and his or her lawyer are told in the felony complaint and the indictment merely that an anonymous "person known to the District Attorney's Office" or "known to the Grand Jury" has accused him or her of the crimes. There is no way, in practice, to learn the identity of the accuser, let alone to investigate and intelligently assess the case, until trial is underway.

Our discussions with prosecutors, judges and defense lawyers in other States over many years have led us to believe, in fact, that D.A. Vance seems to be *the only District Attorney in the United States* who lets his prosecutors routinely refuse to tell people accused of a felony *who* is accusing them. This way of doing business is repugnant to our basic ideas of a fair criminal justice system, as the uniform practice elsewhere dramatically confirms.

When people accused of crimes in every county of the State but one receive the names of their accusers in the complaint – while those in Manhattan are told only that an anonymous "person known to the District Attorney's Office" has accused them – it creates a public perception that there is not equal justice in this State, and that the system cannot be trusted. The practice of every other District Attorney's Office to disclose complainants' names at the commencement of the vast majority of cases also renders suspect the protestations that such a discovery obligation would result in widespread new interference with witnesses or dissuade their cooperation.

We urge the Council Members to question the Manhattan District Attorney about why this unique – and fundamentally unfair – practice in felony cases is allowed to continue and how it is

justified. The Manhattan District Attorney should voluntarily follow other New York prosecutors in providing this basic information, which is vital for investigating and understanding cases from the outset of the case. All other States that have reformed their discovery rules have recognized this, as did the New York State Bar Association's Task Force on Discovery in an extensive 2015 report that was unanimously adopted by that statewide bar organization's House of Delegates and Executive Committee.

Blind Guilty Plea Decisions in Queens

The Queens District Attorney's Office also has a unique and pernicious office policy in felony cases, which has the effect of forcing guilty pleas without the benefit of any discovery. The Queens D.A. requires that a person charged with a felony must waive his or her right to prompt indictment under Criminal Procedure Law section 180.80 and his or her speedy trial rights under section 30.30 in order to receive a guilty plea offer. The stated policy is that if the case goes to the grand jury and gets indicted, there will be no offer less than the top indicted charges.

Defense lawyers have found that this policy effectively coerces many of our clients to forfeit their discovery rights since discovery is required only after arraignment on an indictment, and to acquiesce in inadequately informed guilty pleas even in cases where a *bona fide* defense might exist or where counsel might advise against the guilty plea if she had a chance to review discovery materials or perform an investigation. Because our sentencing laws provide such high potential sentences, our clients – even the innocent or overcharged – are afraid to gamble by forfeiting the option of plea bargaining from the outset. Defense lawyers are virtually obligated to powerfully stress to their clients the potentially catastrophic risks of forgoing plea bargaining.

And they are effectively forced to advise guilty pleas to their clients with almost no information, based only on something akin to an actuarial assessment of probabilities.

The Queens plea bargaining system has the further unfortunate consequence that it lets *prosecutors* avoid reviewing and scrutinizing their own evidence until far later in the proceedings (if ever) in cases where the defendant has waived prompt indictment. Of course, earlier review of the evidence by the prosecutor frequently results in more appropriate and better informed plea offers, and it causes a more expeditious dismissal or reduction of charges when criminal prosecution is found unmerited or the initially designated highest charges are deemed unfounded. And obviously because the policy requires the accused to waive his or her rights to timely release from custody under Criminal Procedure Law section 180.80, the policy has a disproportionate effect on poor people who cannot afford to pay money bail.

In response to these criticisms, sometimes Queens prosecutors have naively claimed that, if the defense does not like their policy, defense lawyers would not agree to the waivers – and then there would be such a flood of trials that the system could not handle it and they might have to drop their policy. That hasn't happened, so these Queens prosecutors interpret this as "support" for their policy. But this is simply choosing to ignore the obvious explanation. The defense lawyer or a defender organization is ethically bound to defend each client individually. A defender cannot stage a protest action on the backs of her clients – and the first clients to be part of such an action will certainly suffer.

Make no mistake: this is a coercive policy that at times pressures poor clients into hasty pleas without the benefit of informed decision-making for lack of pretrial discovery of evidence. Queens Assistant District Attorneys rely on the policy to lessen their arrest intake workload and

increase plea numbers on the front end, and to unduly punish incarcerated black and brown people who wish to exercise their rights. We at The Legal Aid Society – as defenders of low-income and working-class clients – see the daily inequality of this policy and believe it is not a symbol of fairness we want for our city's criminal justice system. The policy is driven by the force of the D.A.'s office's self-interest at the expense of individual justice.

We urge the Council Members to ask strong questions of the Queens District Attorney about this unique – and uniquely unfair – practice in felony cases, and urge its immediate discontinuation. We also wish to inform the Council that similar problems to the situation in Queens are about to occur citywide, given that the City has announced an unwise plan to set up "Superior Court Information" (SCI) court parts in Bronx County and then in the other boroughs – which will result in systematic pressure on the accused to enter guilty pleas without receiving discovery.

Conclusion

The Legal Aid Society urges the Council to call upon the Bronx, Manhattan, Queens and Staten Island District Attorneys to adopt voluntary policies to provide early and open discovery in all cases, and to cease opposing efforts for meaningful legislative overhaul of New York's outmoded criminal discovery statute. We also ask the Council to call upon the Brooklyn District Attorney to expand its laudatory open file policy to other cases that it currently excludes, in which early and open discovery is equally important. These changes are needed to avert wrongful convictions and to ensure a fair criminal justice system, and there is no sound reason in 2018 for any District Attorneys to refrain from adopting and supporting them.

We thank you for this opportunity to testify.

APPENDIX – Some Examples From Our Cases of Inadequate Discovery By NYC's DAs

Bronx Legal Aid Society Case (*see* "Evidence Hidden From Defendants, Until It's Too Late," *New York Times* 8/7/17): After a fight in a bar, the police recovered video surveillance that exonerated our client, Aaron Cedres. Even so, the DA was offering five years in jail. The defense attorney was unable to advise her client about the strength of the case against him without viewing the video, which had been couched in court as proving the client's guilt! The DA opposed turning over the video for 8 months until a judge confronted the prosecutor—asking if he had actually viewed the video. On the next day the case was dismissed. In those 8 months, Aaron lost his job as a security officer and his apartment. He was forced to move to a family shelter with his girlfriend and newborn daughter.

Queens Legal Aid Society Case: The prosecutor had information from a 911 call that an off-duty firefighter had seen the incident, which was a fight. This information was not turned over to the defense because it is not required that the prosecutor turn over witness information. At a hearing, the judge convinced the DA to give over the contact information for this witness and other 911 callers, although the law does not require that the prosecutor do so. When the defense called the off-duty firefighter, he remembered that our client was being attacked by the complainants, not the other way around. The DA had never revealed this other version of events. The firefighter testified at the trial as a defense witness and the client was found not guilty. This innocent man sat in jail for two years because he could not afford bail, all the while the evidence showing his innocence was in the DA's file.

Manhattan Legal Aid Society Case: Our client was incarcerated for 8 months on an accusation that he stole a cell phone from another person. Unlike most other prosecutors who give the name of the accusing person in the official court papers, in Manhattan, the prosecutor does not name the complaining witness, nor are they required to under the current laws. It is impossible for a defense attorney to follow up on the credibility or reliability of the person making the accusation. After months in Rikers Island, this man's mental health rapidly deteriorated as he was not receiving proper care for his medical condition. Only after a hearing was held on the case did the prosecutor really look into the background of this witness. Then it was discovered that the

complainant had a history of filing false complaints. The case was dismissed when the DA finally asked the complainant a few pointed questions and he admitted he had made the whole thing up. The DA did not choose to prosecute this person for the false allegation.

Brooklyn Legal Aid Society Case: Our client was arrested for possession of cocaine. At arraignment he handed defense counsel his prescription for methadone and insisted that the substance was prescribed methadone. Bail was set that the client could not afford to post, so he remained incarcerated. Despite numerous requests by the defense for the laboratory testing report, which was completed eleven days after the arrest, the report was not turned over until a full month after it had been completed. The prosecutor had not looked at the lab report carefully and allowed this man to stay in jail for a month even though the report clearly confirmed that the substance was, in fact, methadone – just as the man had said from the beginning.

Queens Legal Aid Society Case: The only evidence against our client in the robbery case was the fact that his photo had been selected from the police computer system and then he was picked out of a line-up. After more than two and a half years, the DA finally turned over the police reports and lo and behold the client's photo had been viewed multiple times and neither of the complainants identified him. Furthermore, one of the witnesses had misidentified someone else in the lineup. In this case, the surveillance video also clearly revealed that one of the witnesses barely saw the perpetrator. The client was acquitted of all charges. With this information, the defense could have likely convinced a judge to release the client, could have advocated to the DA to look more closely at the case and possibly dismiss it as well as push for a quick trial rather than using the time to find evidence to exonerate his client.

Manhattan Legal Aid Society Case (*see* "Evidence Hidden From Defendants, Until It's Too Late," *New York Times* 8/7/17): The police claimed that Isaiah Spry tried to take one of their guns when they were arresting him. He was charged with attempted criminal possession of a weapon in the second degree and resisting arrest. Mr. Spry insisted on his innocence. After months on Rikers Island, Mr. Spry was almost ready to accept a guilty plea to attempted possession of a weapon in exchange for a probation sentence solely to avoid further incarceration. The defense is not legally entitled to the police witnesses' statements or their

Grand Jury testimony, which were not turned over to the defense. The Judge does have a legal right to review the Grand Jury minutes and after doing so, without disclosing what was in them, which the Judge is not required to do, the judge stated that he had read the Grand Jury minutes and he believed Mr. Spry should go to trial. Still without any knowledge of why the Judge was suggesting this, Mr. Spry turned down the plea and went to trial, facing years in prison if convicted. At the trial, the defense learned for the first time that the officer whose gun it was never saw, felt, heard or was in any way a witness to his own gun being taken. Another officer at the scene claimed that he saw Mr. Spry grab and struggle for the gun, but that he fought him off. But the way the lieutenant explained it, there could have been no possible way it could have happened without the officer whose gun it was noticing that such a struggle over his gun was occurring. The jury found Mr. Spry not guilty of trying to take the gun from the officer.

Brooklyn Legal Aid Society Case: Our client was charged with attempted murder after a shooting. The police had shown video footage stills to a witness, and got an identification of the client. The DA refused to tell the defense who this witness was. The client insisted he was innocent and passed a polygraph test arranged by defense counsel. After 6 months of adamantly insisting on his innocence while incarcerated, the client was telling his lawyer that he would be willing to "take anything" just to get out of Rikers Island. Luckily that's not how things played out. When the DA learned that our client had passed the polygraph, they interviewed the purported identification witness on the eve of trial. It turned out that he was actually an incarcerated prisoner doing an upstate bid. He told the DA that he had been "uncertain" about the identification. He was under arrest himself at the time he made it, and the police had then forced him to sit with the client's picture for 30 minutes, before he eventually "identified" the client. The DA dismissed case. Had the defense been informed of the witness's identity, counsel could have gone up to the prison to interview him far earlier and obtained the dismissal and the client's release from Rikers Island.

Manhattan Legal Aid Society Case: Our client was a musician. He was charged with selling drugs at a nightclub. For 16 months, the DA repeatedly told the defense that someone "saw" the client dealing drugs, and going back and forth to the trunk of his car, and this person called 911. The DA refused to turn over the recording of the 911 call or the witness's written statements or

police reports until a few minutes before the pretrial suppression hearing began. The reports revealed that the "witness" was actually someone watching a video stream of the club's performances that was physically located in Brooklyn (the club was in Manhattan). The client saw the phone number of the 911 call in this police paperwork – and he immediately realized it was a rival musician who competes with him for gigs at the club. The client also informed counsel that the video stream focused only on the stage, so the claims that he could be visible on it selling drugs or could be seen going back and forth to his car were false.

Bronx Legal Aid Society Case: Our client was charged with possession of a gun in his home. The DA was pushing for a guilty plea and 6 months in jail, and threatened to indict the case on felony charges if the client didn't take the plea. The client refused. The whole time that the DA was seeking this guilty plea, they knew that the police ballistics unit had determined the gun was inoperable – but they hadn't disclosed this *Brady* information. After the client refused the plea, the prosecutor then dismissed the whole case.

Queens Legal Aid Society Case: Our client was acquitted at trial. Had the defense received discovery earlier and not at the start of trial, defense counsel would have discovered at the outset that another individual had been arrested the day before the for two robberies that were initially being investigated as a pattern robbery by detectives. It could have made all the difference in the world and may have saved the client from spending 18 months on Rikers as an innocent man. When the defense finally received the DD5 police reports in the case, they showed that the client's and the other suspect's files had been merged by Queens detectives because they initially were looking for a single suspect for all three robberies. The other person's name appeared in the client's DD5s, which were turned over the day of trial.

Manhattan Legal Aid Society Case: After a shooting at a party, our client was charged with attempted murder. The police focused on the client because the shooting victim had previously slashed the client in the face from his cheek down to his neck, giving the client a motive. The complainant himself initially told police that he didn't know who had shot him, and provided a description of the assailant that did not match our client. He identified the client only after police began to question him at the hospital about his own knife attack on the client. Other witnesses at

the party also had not seen the shooter. The client was remanded to Rikers Island for two years, where he was brutalized and had his jaw broken twice, requiring reconstructive surgery on his face. The DA refused to provide the defense lawyer with police reports or witness statements, yet the judge and prosecutor placed a great deal of pressure on the client to plead guilty to a 15 year sentence. As defense counsel later commented: "Thank God he stuck it out!"

Eventually the DA turned over crime scene photos showing blood on the walls and floor, but without access to the witness statements it was impossible for defense counsel to piece together exactly what she was looking at. She was unable to investigate the case and unable to point out possible flaws in the DA's evidence. Eventually, after our client had been incarcerated for 1½ years, the DA finally turned over police reports and grand jury minutes as the case neared trial. For the first time, it became clear to counsel how flawed the complainant's story really was and how neither the police nor the DA had properly investigated the case. There were incredible inconsistencies in the witness's reports and the blood splatter didn't match up with any version of his accounts. After counsel was able to point out these troubling issues to the DA, the DA confronted the complainant – and the complainant changed his story so many times that ultimately the DA dismissed the case. The client had spent two years in jail and hospitals after his brutalization.

Bronx Legal Aid Society Case (*see* "Cuomo Bid to Relax New York's Discovery Laws Ignites Debate," *Wall Street Journal* 1/22/18): The complainant informed the police that as he was going into a convenience store at 1:30 a.m., three men and two women (whom he called "strangers") pointed a gun at him. They escorted him down an alley into a basement apartment and stole his iPhone and $500. After they let him go, he saw three of the robbers drive away in a BMW and briefly followed them in his car. Later he flagged down police and they returned to the alley.

When the complainant and police got to the building where the robbery occurred, Terrence Wilkerson was standing outside his brother-in-law's first-floor apartment smoking. Mr. Wilkerson is a house painter who is married with three daughters, aged 13, 4 and 2. Although he had nothing to do with the robbery, the complainant identified him to the police as one of the robbers. The police broke down the door and arrested Mr. Wilkerson despite his protests of innocence. The officers then used the "Find My iPhone" app and located the complainant's

stolen phone near a highway on the route the BMW had taken. They returned the phone to the complainant ten minutes after they found it. None of the robbers was caught. Mr. Wilkerson was charged alone with first-degree robbery and jailed on Rikers Island for five days before his family finally was able to post $2500 bail.

While the robbery charge was pending for more than a year, the defense received minimal and incomplete discovery about the case from the prosecution – as current New York discovery law allows. Mr. Wilkerson refused to plead guilty even if the sentence would be probation rather than jail, insisting on his innocence. He had difficulty working due to court dates during the two years the case dragged on. Finally in September 2016, the case was sent to a courtroom for the pre-trial hearing and trial. On that date, the DA turned over an important written witness statement for the first time. It revealed that the complainant had told police that the robbers used his phone during the incident to call a specific phone number, which was listed in the report (347-259-0112).

An unusual issue arose that required the lawyers to file legal memos, so the trial did not begin and defense counsel had time to investigate the discovery materials. In most cases, such investigation is impossible because New York's discovery law allows prosecutors to turn over the discovery on the date of the trial, and they routinely do so.

Given the unexpected chance to investigate, Mr. Wilkerson's defense lawyers immediately subpoenaed phone company records for the number the complainant had told police the perpetrators (who, again, he said were "unknown to each other") had called during the robbery. An internet search also revealed that the number belonged to a very seedy escort service that advertises on Backpage.com. It took three months for the phone company to provide these records. But they revealed that – contrary to the complainant's story – in fact the complainant himself had called the number one hour before the robbery, and then he called it again 23 times during the next two days (including shortly after the police had given him back his phone). The defense also was able to subpoena other important phone records in the months before trial, including cell site tower location records showing the phone associated with the escort's number was at the scene of the robbery.

The DA was seeking a guilty plea with a 6-year prison sentence, and the charge carries a potential post-trial sentence of up to 25 years, but again Mr. Wilkerson refused. When trial finally began in April 2017, the defense was able to prove to the jury that the complainant had told a distorted story about the events to the police, and that he continued to conceal the truth. Apparently the complainant had been robbed by an escort and her pimp and others, perhaps after some kind of dispute about the escort services that he hid from police and prosecutors. He wasn't robbed by Mr. Wilkerson – an innocent man who had no connection to the escort service, and simply had the bad luck to be staying at his brother-in-law's apartment one floor above where the robbery occurred and to step outside for a smoke at the wrong time. The police and the prosecution had conducted no investigation into this crucial evidence. And far from dismissing the case, at trial the prosecutor in fact argued that the jurors should convict Mr. Wilkerson of the robbery and downplayed the key information about the escort service. Fortunately, the jury thought otherwise and acquitted Mr. Wilkerson on May 19, 2017. The jurors insisted on posing for a picture with Mr. Wilkerson and his defense lawyers after ending his two-year nightmare.

Being able to investigate the evidence and to prove to juries that the prosecution's case is unreliable, and to show your innocence, should happen as a matter of right in New York State, not of luck. New York's antiquated criminal discovery rules must be changed so that all accused people have the opportunity to investigate like Mr. Wilkerson's defense lawyers did. The "Blindfold Law" must be repealed.

Additional Examples from New York State Bar Association's Discovery Task Force Report

A Small Sample of Cases that Illustrate How Prosecutors' Withholding of Witnesses' Names Until the "Eve of Trial" Jeopardizes the Integrity of the System:

(1.) In a murder trial, the eyewitness testified that he saw the murder in the company of his girlfriend. The defense lawyer was not given the witness's name before trial, thus precluding any investigation, including of the girlfriend. Our client was convicted. In post-conviction proceedings, the Legal Aid Society appellate attorney tracked down the witness's girlfriend, who emphatically contradicted the witness's story about seeing a murder. The court ultimately vacated the conviction, after the client had spent eight years in prison. The State had to pay $2.4 million for the wrongful conviction.

(2.) In an assault case charged as a violent felony, the prosecutor refused to give contact information for a person who called 911. However, because a phone number was in a report eventually turned over by the prosecutor, the defense was able to speak to the witness. He gave an exculpatory and mitigating account of our client's role in the assault incident. When defense counsel confronted the prosecutor with this evidence, the case was disposed of as a disorderly conduct violation, rather than a violent felony.

(3.) The four-day trial in a felony identity theft case began on Wednesday afternoon. The defense received the name and address of a witness for the first time on that day. Because the trial had not finished before the weekend, there was time for the defense to track down the witness on Saturday and Sunday. The witness testified for the defense on Monday, and clearly exculpated our client. The jury acquitted the next day. Had this trial started on a Monday and thus concluded by Friday, there would have been no opportunity to find and interview the exculpatory witness. Being able to present testimony of exculpatory witnesses to the jury should happen as a matter of right in New York State, not of luck.

(4.) In a first-degree assault and attempted robbery case, the identity of the 911 caller was not disclosed until the eve of trial. Once she had the identity, counsel contacted the caller and interviewed her over the telephone. She witnessed the incident, came to testify and shared that our client was not guilty of the crime he was charged with. The client was acquitted after being incarcerated for 20 months before disclosure of the name of the exculpatory witness.

(5.) Two years after speaking to a witness of an alleged assault, the ADA gave the defense his contact information. The defense called the witness at trial. He was an accountant and a neutral witness, whose objective account of what he had observed contradicted the complainant and her two family members about the altercation near a coffee cart. The judge acquitted our client. The client had had to come to court 17 times over the two-year life of the case. Because of an order of protection during the case, he had to give up his livelihood, the coffee cart, when the complainant installed her cart at the same location.

(6.) In a robbery case, the prosecutor refused to disclose the complaining witness's name until trial started. This prevented the defense from getting court files from his 1998 conviction for gun possession. The witness gave a sanitized version of this incident at trial, claiming that he had merely failed to register an otherwise legal hunting rifle, and that there was no ammunition in his apartment. Two months after trial, the court records of the witness's prior case finally arrived. They revealed that he had actually possessed multiple weapons, including a handgun, ammunition, a bulletproof vest, and a police badge and other police identification that did not belong to him. The jury thus had been given a false version of important information directly bearing on the key witness's credibility, which the defense could not contradict.

(7.) Our client was accused of attempted rape. The complainant alleged that she did not know him, but was attacked by a stranger. The client firmly claimed from the outset that he was being set up by drug dealers. Defense counsel was able to find out the name of the complainant months later. With the name, counsel was able to subpoena phone records that showed that a third party had been calling both the complainant and the client hundreds of times around the time of the reported rape, and revealed other connections between them.

***Examples of How Prosecutors' Withholding of Witnesses' Names Until the "Eve of Trial" Regularly Leads to Conflict-of-Interest Problems and Unfairness*:**

(1.) In a kidnapping case, a jury was selected and only then did the prosecutor turn over the witnesses' prior statements and their identity. The information revealed that a witness was cooperating with the prosecution in order to benefit himself on another matter, and that the witness was represented on that cooperation agreement by the same organization as defense counsel. A mistrial was declared after defense counsel had been working on the case for a year and had completely prepared the trial. Our client was incarcerated for the entire time.

(2.) During a first-degree assault trial, a prosecution witness stopped as he entered the courtroom and greeted the defense attorney. The attorney realized that he had represented the witness on a drug sale the year before. When informed of the conflict, the court had to declare a mistrial and relieve defense counsel.

(3.) On the eve of trial on a case where our client was incarcerated, defense counsel was removed from the case due to a conflict because it was only then that he learned the name and school of the complaining witness. The client already had been in jail for 5 months by that point and now had to wait many more months for his new attorney to prepare for the case.

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I represent: Katal Center for health, equity & justice

Address: 147 Prince St.

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Name: Lisa Schreibersdorf, Executive Director

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I represent: Brooklyn Defender Services

Address: 177 Livingston Street, Brooklyn NY 11201

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I represent: The Bronx Defenders

Address: 360 E 161st St.

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Date: _____

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Name: Rebecca Brown

Address: 415 St. Johns Pl., Brooklyn, NY

I represent: Innocence Project

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