

March 16, 2020

Hon. Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Hon. Andrea Stewart-Cousins
Majority Leader, New York State Senate
188 State Street LOB - Room 907
Albany, NY 12227

Hon. Carl Heastie
Speaker, New York State Assembly
New York State Capitol Room 349
Albany, NY 12227

Dear Governor Cuomo, Majority Leader Stewart-Cousins, and Speaker Heastie:

During this time, we hope that you and your loved ones are safe and well. We also know that, despite the looming health crisis we all face, various policy conversations are continuing and write to you in that spirit. This letter is a response to an effort by several District Attorneys to roll back new discovery laws, which took effect on January 1 of this year. The dedication to justice and fairness exhibited by New York's lawmakers in enacting these carefully crafted laws, after many years of input by all stakeholders, was commendable. Now, we must protect the integrity of the reforms to ensure their continued success and reject rollbacks.

The new discovery laws represent a giant leap forward for justice in New York -- one that most other states had already taken, and that had been blocked by District Attorneys wielding political power for decades. Even the most modest reforms to discovery were rejected by District Attorneys as recently as 2018. Now, while purporting to mostly "support" the enacted reforms, they propose changes that would critically undermine them and recreate the unfair dynamic this legislation was intended to address, namely by restoring prosecutorial discretion about what evidence must be shared with the defense.

Preserving Fair Standards for Evidence-Sharing

In particular, we oppose prosecutors' calls to replace the current disclosure standard, which requires them to turn over "all items and information that relate to the subject matter of the case," with any form of "relevance" or "materiality" standard, which would give prosecutors any

gatekeeping or discretion regarding what evidence should be turned over. Such a major change would resurrect the exact problem the discovery laws were designed to eliminate and would bring us back to a time of an epidemic of wrongful convictions and plea bargaining with incomplete information. Indeed, many of New York's wrongful convictions were enabled by prosecutorial discretion with respect to *their* interpretations of what evidence is, in fact, material. Any effort to introduce materiality or relevancy would place back the blindfold that you successfully lifted.

Given the natural inclination to focus only on establishing their own theory of guilt, prosecutors are likely to underestimate the importance of what the defense might regard as exculpatory material. The standard that was adopted in the new discovery law no longer allows prosecutors to anticipate what other evidence may be introduced and then guess whether the evidence at issue would affect the entire case.

Rejecting a relevancy or materiality requirement will serve as an important protection against wrongful convictions by ensuring that innocent defendants are provided all exculpatory evidence prior to plea agreements and well before trial, enabling them to adequately prepare their defense and to help guarantee that convictions are grounded in vetted evidence.

Protections for Victims and Witnesses

Speaking with witnesses is a fundamental responsibility of a criminal defense attorney, and an indispensable principle of a fair and reliable criminal justice system.¹ Indeed, the American Bar Association's published standards for conduct of defense counsel state that "Defense counsel or counsel's agents should seek to interview *all witnesses*" in a criminal case.² Defense counsel must be able to investigate whether a witness to an incident was able to see the incident and/or if the witness had a motivation to fabricate or exaggerate the events in question. It is a bedrock legal principle that witnesses do not "belong" to either party. Receiving names and contact information of witnesses is often essential to carrying out an attorney's duty to meaningfully investigate (unless there are credible safety concerns, when courts will allow withholding of such information).

¹ As the U.S. Supreme Court has stated: "The traditional counterbalance in the American adversary system" for prosecutors' pre-trial interviews with and access to witnesses "arises from the equal ability of defense counsel to seek and interview witnesses himself." See *U.S. v. Ash*, 413 U.S. 300 (1973); see also *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *People v. Townsley*, 20 N.Y.3d 294 (2012) ("a lawyer's interviewing a witness in the hope of getting favorable testimony . . . is not in the least improper. It is what good lawyers do"); *People v. Greene*, 153 A.D.2d 439 (2d Dept. 1990) ("a witness is not the property of either party").

² American Bar Association, *Criminal Justice Standards for the Defense Function*, Standard 4-4.3: Relationship With Witnesses, Fourth Edition (2017) (emphasis added) available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

For decades, the vast majority of states have had rules that require the timely disclosure of witness names and addresses to defense counsel while keeping survivors and witnesses safe. These rules would not have continued in place if they jeopardized witness safety or impeded the reporting of crimes. Open discovery is not an experiment.

Specifically, states that require DAs to disclose witness names and/or addresses early in the case include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. Several other states require that witnesses be listed on the indictment or be given prior to arraignment, including: Georgia, Indiana, Iowa, Kansas, Kentucky, South Dakota, Tennessee, Texas, and Utah.³

To be sure, the new discovery laws protect witness safety and incorporate safeguards recommended by the New York State Bar Association’s Task Force on Discovery. For example, the new discovery laws empower judges to issue a protective order so that any and all evidence is withheld from people facing criminal allegations and their attorneys in the cases in which witness safety may be at risk. In fact, under the new laws, judges have expanded grounds to make this determination. This Task Force included prosecutors, defense attorneys, judges and academics and addressed the need for both safety and disclosure of evidence. The Task Force specifically endorsed exchanging names and addresses at an early stage.

Retaining Early Disclosure

While prosecutors have raised objections to new discovery timelines in New York, it is important to remember that other states have similar timelines.⁴ These states and now New York recognize the need to investigate cases early while witnesses’ memories are still fresh and so that evidence does not get lost or destroyed. Additionally, because a vast majority of cases resolve with guilty pleas, early discovery allows defense attorneys to give meaningful advice to their clients so that they can make truly knowing and informed decisions.

³ See NYSBA, “Report of the Task Force on Criminal Discovery” (2015), fns. 4, 16, 17.

<https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf>

⁴ “Article 245” requires DAs to disclose evidence within 15 (or 45) days of the first court appearance. This has been shown to work, since many other states require full discovery within a comparably short time period, including: Arizona (30 days after arraignment), Colorado (21 days after first appearance), Florida (within 15 days of demand), Hawaii (within 10 days of arraignment), Maryland (within 30 days after arraignment), Michigan (within 21 days of demand), Missouri (within 10 days of demand), New Hampshire (within 30 days of not guilty plea), New Jersey (within 7 days of unsealing of indictment), New Mexico (within 10 days of arraignment), Rhode Island (within 30 days of arraignment), Texas (as soon as practicable after receiving a timely request). See NYSBA Report, “Report of the Task Force on Criminal Discovery” (2015), fn. 66.

Moreover, anyone with an open criminal case may suffer a range of serious consequences before trial, from pre-trial detention to lost employment, suspension from school, orders of protection that separate families, deportation and thousands of other consequences that significantly interfere with people's lives and can be difficult to recover from. One goal of timely discovery is to allow for early resolution of cases and help avoid some of these consequences. The timelines, including exceptions, were carefully considered before being enacted. Already we have seen that DA's offices *are* able to do so and have been diligent in following the new law. There is no reason to change a system that is already working as intended.

Why New York Reformed its Discovery Laws

Under the old discovery law, innocent New Yorkers were routinely coerced into pleading guilty without having access to the evidence in their cases. If a person was incarcerated, it was often the most rational choice to take a plea in order to get out of jail.

According to the Innocence Project, over 10% of the more than 367 people across the nation *proven innocent* through post-conviction DNA testing, plead guilty to crimes as serious as rape and murder. Furthermore, according to the National Registry of Exonerations, 18% of all known exonerees, which include people who were exonerated on the basis of non-DNA evidence *and* DNA evidence, numbering more than 2,500, plead guilty to crimes they did not commit. And these shocking numbers do not even capture the full picture, as they largely exclude misdemeanor crimes because most resources for post-conviction litigation are dedicated to cases involving serious, violent crime. The pressure to plead guilty in misdemeanor cases is often higher, especially if the person is incarcerated.

Prior to these landmark reforms, New York had one of the four worst discovery statutes in the country, leading to terrible injustice. Consider the case of Paul Gatling, a Brooklynite sentenced to 30 years to life for murder in 1964.⁵ His conviction relied primarily on a single eyewitness. It took until 2014, *50 years later*, to uncover evidence that had not been disclosed to Gatling's defense attorney which inculpated that very eyewitness who sent him to prison in the first place. Keith Bush's Suffolk County murder and attempted sexual abuse convictions were finally overturned when his lawyers found evidence that pointed to a more likely suspect in prosecutors' files 40 years after Bush's trial.⁶ Josue Ortiz was convicted of manslaughter in Buffalo in 2006; his innocence likely would have been revealed earlier if Erie County prosecutors had not

⁵ Maurice Possley, National Registry of Exonerations - Paul Gatling, THE Univ. OF Cal. IRVINE NEWKIRK Ctr. FOR Sci. & SOCIETY, Univ. OF Mich. LAW SCHOOL & Mich. STATE Univ. Coll. OF LAW, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4881>

⁶ Ken Otterbourg, National Registry of Exonerations - Keith Bush, THE Univ. OF Cal. IRVINE NEWKIRK Ctr. FOR Sci. & SOCIETY, Univ. OF Mich. LAW SCHOOL & Mich. STATE Univ. Coll. OF LAW, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5570>.

suppressed exculpatory crime lab evidence for a decade.⁷ These tragedies might very well have been prevented had the new discovery laws been on the books at the time of these men's arrests.

Further, beyond the unspeakable trauma the New York criminal justice system has inflicted on people like Paul, Keith and Josue, the old laws also had a tangible price tag. Over the past 30 years, New York taxpayers have paid an astonishing \$670 million in civil and statutory compensation to wrongfully convicted people.

Before reform, New York's discovery laws caused direct harm to poor people and people of color, reduced public safety, convicted the innocent, and costs taxpayers hundreds of millions of dollars. This transformational new law is too important to too many people. We cannot allow misinformation to drive any rollbacks and influence how justice is administered in New York. Last year's laudable reform is already altering many lives for the better. We ask that you continue to defend the critical reforms you brought to the Empire State.

Sincerely,

Bend the Arc: Jewish Action
Black and Pink NYC
Brooklyn Community Bail Fund
Brooklyn Defender Services
Center for Community Alternatives
Center for Law and Justice
Chief Defenders Association of New York
Citizen Action of New York
Close Rosie's
Color Of Change
Genesee County Public Defender
Human Rights Watch
Innocence Project
Jim Owles Liberal Democratic Club
John Brown Lives!
A Little Piece Of Light
Mental Health Association of Nassau County
NAMI Huntington
NAMI NYS Criminal Justice
National Action Network Network-Second Chance Committee
New Hour for Women & Children LI
New York County Defender Services

⁷ Maurice Possley, National Registry of Exonerations - Josue Ortiz, THE Univ. OF Cal. IRVINE NEWKIRK Ctr. FOR Sci. & SOCIETY, Univ. OF Mich. LAW SCHOOL & Mich. STATE Univ. Coll. OF LAW, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4633>.

New York State Association of Criminal Defense Lawyers
New York State Defenders Association, Inc.
NYSCTF
Prison Action Network
Public Interest Resource Center, Fordham Law School
Release Aging People in Prison Campaign & Parole Preparation Project
Robert F. Kennedy Human Rights
Schenectady County Public Defenders Office
Social Justice Committee, Unitarian Universalist Fellowship of Poughkeepsie
The Bronx Defenders
The Legal Aid Society of Nassau County
The Legal Aid Society of Westchester County
United Voices of Cortland
Urban Justice Center
Village Independent Democrats
VOCAL-NY
WNY Peace Center
Women's Health and Reproductive Rights (WHARR)

cc: Members of the New York State Senate and New York State Assembly