TESTIMONY OF:

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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

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

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.

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

[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.

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.

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.*

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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).

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 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] 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).

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 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.