



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

Yung-Mi Lee – Supervising Attorney, Criminal Defense Practice

BROOKLYN DEFENDER SERVICES

**Presented before
The New York City Council Committee on Courts and Legal Services
And
Committee on Public Safety
Hearing on
Wrongful Convictions: Using Evidence-Based Procedures and Technology
to Keep Innocent People Out of Jail**

September 23, 2015

My name is Yung-Mi Lee. I am a Supervising Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). I have practiced as a criminal defense attorney in New York and New Jersey for over 22 years. I currently represent misdemeanor and felony clients in Brooklyn criminal and Supreme Court.

BDS provides innovative, multi-disciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 40,000 clients in Brooklyn every year. We thank the City Council Committee on Courts and Legal Services and the Committee on Public Safety for the opportunity to testify about wrongful convictions in New York City.

Wrongful Convictions in Brooklyn

More than a dozen people prosecuted in Kings County have been exonerated in recent years.¹ Common factors in the wrongful convictions of these innocent men include unreliable witness identifications, false confessions, and prosecutor's withholding of evidence from the defense.

Evidence-based procedures and technology can play a critical role in protecting against false confessions and mistaken or improper eyewitness identifications. The electronic recording of interrogations, from beginning to end, is the single best reform available to prevent wrongful convictions caused by false confessions. Complete recording improves the credibility and reliability of authentic confessions, while protecting the rights of innocent suspects.² In addition, the Innocence Project endorses a range of procedural reforms to improve the accuracy of eyewitness identification. These reforms have been recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of double-blind identification procedures, for example, are corroborated by over 30 years of peer-reviewed comprehensive research.³

As the Innocence Project notes, numerous states have implemented evidence-based practices as standard procedure to prevent wrongful convictions. There is no doubt that New York City should join these jurisdictions. That being said, some bar associations, including the New York State Association of Criminal Defense Lawyers, among others, have expressed significant concerns about the Statement and Identification Integrity Act introduced over the last few years before the NYS legislature.⁴ One major concern that defense attorneys have with the proposed legislation is that the bills do not reform harmful and outdated discovery procedures. *It is no surprise that the majority of states that have enacted double-blind interrogations and/or mandatory recorded interrogations are also states that have modern discovery statutes.*

As defenders who practice every day in Brooklyn courtrooms, BDS recognizes the impact that improved ID procedures and complete recordings of interrogations could have in our cases. **But that evidence is only useful to us if the discovery attendant to those practices is turned over by the prosecutors.** Under current state law, prosecutors are not required to disclose critical evidence against our clients until the eve of trial. This requires us to advise the vast majority of clients on plea agreements without the benefit of full discovery,

¹ See, e.g., Colleen Wright, "Another Exoneration in Brooklyn Brings Total Since Last Year to 14," N.Y. TIMES, Aug. 4, 2015, available at <http://www.nytimes.com/2015/08/05/nyregion/another-exoneration-in-brooklyn-brings-total-since-last-year-to-14.html>.

² Innocence Project, "False Confessions and Admissions," available at <http://www.innocenceproject.org/causes/false-confessions-admissions/>.

³ Innocence Project, "Eyewitness Identification Reform," available at <http://www.innocenceproject.org/eyewitness-identification-reform/>.

⁴ See *Testimony of the New York State Association of Criminal Defense Lawyers before the New York City Council Committee on Public Safety re: Res. No. 979* (April 6, 2016).

or, in the rare cases that do proceed to trial, to sift through thousands of pages of evidence like witness interviews, or phone or social media records mere hours before selecting a jury.

Mr. R, a BDS client, was charged with the attempted murder of two people. His arrest and prosecution for the case were based on a single eyewitness identification. In this case, the prosecutor chose not to turn over discovery for over a year, until the Friday before trial. The discovery turned over included reports of a photo array which included our client's picture. The two shooting victims viewed the photo array. The first did not choose our client as the shooter. The second offered only an equivocal identification, saying he thought our client might have been the shooter. The discovery package also revealed that our client was not a suspect at the time of the photo array. His photo had been randomly inserted into the array. The day after the equivocal photo identification, the police conducted a line up and the second witness identified our client. Furthermore, the discovery package revealed critical ballistics evidence that showed that the same gun had been used in another shooting involving different people, not our client. This necessitated additional investigation and discovery and required pushing out the trial date again at the last date. Mr. R may have benefited from evidence-based identification procedures. Indeed, he never would have been implicated in the case but for the improper photo array. But a double-blind eyewitness identification procedure would not have ameliorated that initial taint. The only way that defense attorneys can challenge improper or illegal actions that occur at any stage of the case is when we have complete discovery. If Mr. R had not proceeded to trial, and simply taken a plea because he was tired of sitting on Rikers Island for more than year, none of this information would have come to light.

Additionally, while the Brooklyn DA's office has more recently been turning over videotapes of interrogations, we remain concerned about the police interaction prior to the video interrogations. We have had plenty of cases where oral statements have been taken from our clients and then because the "cat's out of the bag" the police or prosecutors begin videotaping the confession. Oftentimes, our clients have already been in custody for a lengthy time and are not even aware that their arrest may have been illegal. What is most critical in a false confession case is the events that lead up to the confession and in order for defense attorneys to properly litigate the legality of these confessions, we must have complete and early discovery.

Justice requires that prosecutors turn over all of the evidence in the case to the defense as early as possible and automatically. **If City Council is truly committed to preventing wrongful convictions, you must work with defenders and other community groups to publicly push prosecutors to provide full disclosure in all cases and call upon the state legislature to pass comprehensive discovery reform.**

Recommendations

The solution to New York's discovery issues is already available. The New York State Bar Association (NYSBA) brought together a diverse committee of judges, law professors and

lawyers to examine the statute and propose changes. Their 2015 report⁵ provides a model for reform that should be adopted by the state legislature to bring New York's discovery requirements in line with the rest of the nation.

City Council should pass Res. 430-2014 (King), a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to amend the Criminal Procedure Law Article 240 and replace it with a law mandating early, open, and automatic pre-trial discovery. Passage of the resolution would send a strong message to the legislature of the urgency of reform.

City Council should also work with the Mayor's Office of Criminal Justice and local prosecutors to encourage those in boroughs with outdated and draconian policies to turn over discovery in its entirety as soon as they obtain it. Justice demands nothing less.

Conclusion

There is no doubt that misidentifications and forced confessions impact New York City residents. The hundreds of people who have been wrongfully convicted can attest to that. But reform on these issues must proceed in tandem with discovery reform. Evidence-based procedures and technology are only useful to defendants if their attorneys receive this information early on and completely. We look forward to working with City Council to determine how we can ensure justice in our communities by reforming current discovery policies across the five boroughs and throughout the state.

⁵ New York State Bar Association, *Report of the Task Force on Discovery* (2015), available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572>.