



**BROOKLYN
DEFENDER
SERVICES**

MEMORANDUM OF SUPPORT

Comprehensive Discovery Reform

A.4360-A (Lentol) – The 2018 Assembly One-House Discovery Bill

S.7722 (Bailey)/A.10135 (Blake) – The 2018 Senate Democratic Conference Discovery Bill

S.6848 (Avella)/A.7292 (Lentol) – The NYS Bar Association Discovery Bill

April 16, 2018

Brooklyn Defender Services (BDS) calls on the legislature to pass comprehensive criminal discovery reform this session. We strongly support three bills before the legislature that would all go a long way towards bringing about necessary reform to our criminal legal system. In contrast, Governor Cuomo’s discovery proposal in the FY19 Executive Budget represents a step backward, further exacerbating the harms and injustices built into our current discovery system. We strongly oppose his current proposal.

BDS provides multi-disciplinary and client-centered criminal defense, family defense, immigration and other civil legal services, social work support and tools for self-advocacy to more than 30,000 indigent Brooklyn residents every year. Over the past 22 years we have represented close to half a million people in criminal matters in Kings County, New York.

I. THE PROBLEM

In New York, unlike most of the rest of the country, prosecutors and police are not required to provide police reports and other crucial evidence, or “discovery,” to people facing criminal allegations or their attorneys until trial begins – months or years after an arrest, pursuant to New York State Criminal Procedure Law Article 240.

Under our current criminal discovery law, people accused of crimes in New York are 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. The denial of discovery until trial begins has unsurprisingly resulted in chronic case delays and wrongful convictions across the state.¹ More than one-third (38%) of the 234 overturned wrongful convictions in New York involved non-disclosure of exculpatory evidence, according to the National Registry of Exonerations.²

Dozens of other states have employed systems of broad access to both parties' evidence at an early stage of criminal cases for many years. Broad discovery is currently turned over early and readily in New Jersey, Massachusetts, Pennsylvania, and 35 other states.³ Prosecutors in these states consistently say broad discovery works – they are satisfied with it, they have the tools to protect witnesses, the process is fairer and more efficient.

New York's antiquated criminal discovery laws stand in stark contrast to the law in civil cases, where only money is at stake, not someone's liberty. In New York civil cases, both parties are required to turn over all of the evidence in the case well in advance of trial to ensure fairness in the proceedings. People facing jail or prison time and a criminal record deserve, at the very least, the same protections as civil litigants.

II. CLIENT STORIES⁴ – REAL PEOPLE SUFFER UNDER THE CURRENT STATE OF THE LAW

In Brooklyn, unlike most of the rest of the state, the Kings County District Attorney's Office has a policy to provide discovery to the defense on an ongoing basis.⁵ The policy has now been in effect in Brooklyn for over a decade 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 Eric Gonzalez has agreed to continue and improve the timely disclosure of evidence and we strongly support those efforts. However, because assistant DA's in Brooklyn are not statutorily required to turn over complete discovery as they would be in most other states, in many cases our clients still suffer. These case examples illustrate the importance of turning over all discovery, in all cases, promptly and as a matter of law.

a. *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

¹ See Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES, Aug. 7, 2017, available at <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?mcubz=1>.

² Beth Schwartzapfel, *New York Courts Say: Hand It Over*, MARSHALL PROJECT, Nov. 8, 2017, available at <https://www.themarshallproject.org/2017/11/08/new-york-courts-say-hand-it-over>.

³ New York State Bar Association, *Task Force on Criminal Discovery Final Report*, Dec. 1, 2014, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54071>.

⁴ Names changed to protect client confidentiality.

⁵ 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.

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.

b. 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 cash 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.

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.

III. CONCERNS WITH THE GOVERNOR'S DISCOVERY PROPOSAL

While the need for reform is acute, the Governor's proposal is not the answer. Rather than making our system more transparent and just, this proposal would authorize prosecutors even more unilateral power to hide evidence from people accused of crimes and their defense teams.

Major concerns with this bill include that it:

- Does not comport with constitutional due process because it requires the defense to turn over discovery even before we know the nature of the prosecution's case.
- Allows prosecutors to unilaterally cross out (redact) any and all materials without meaningful judicial oversight, categorically undermining any positive aspects of the bill.
- Greatly limits discovery that would ordinarily be turned over – even under our current discovery laws.
- Allows prosecutors to continue to hide potentially exculpatory evidence such as witness names and statements from the defense simply by not calling that person as a witness at trial.
- Allows prosecutors to withhold grand jury minutes and other key evidence until fifteen (15) days before trial. This is problematic because the vast majority of cases resolve pre-trial and defendants in those cases would never receive this critical evidence.
- Bill would not require evidence to be turned over prior to a plea agreement.

The Governor's proposal does not significantly expand the information required to be shared, while simultaneously allowing prosecutors to withhold information for virtually any reason, and potentially violating the constitutional rights of people accused of crimes. Under this bill, our clients like Johnny and Jason would continue to be denied the critical evidence in their case and the most appropriate resolution. Brooklyn Defender Services strongly opposes this proposal.

IV. SOLUTION

New York must adopt open, early and automatic discovery in criminal cases. There must be clear statutes that prescribe a robust discovery process on a clear and fair timeline.

- Evidence must be turned over before someone is required to take a plea.
- Prosecutors must not be the gatekeepers of information and must not be allowed to redact or withhold information.
- If any information is sensitive, only a Judge should decide what should and should not be provided to the defense.
- There should be no delay in the transfer of information to the defendant and defense counsel.
- The law must hold prosecutors accountable when they fail to comply with the rules.
- There must be a continuing obligation for the prosecution to turn over evidence they acquire during the pendency of a case.

There are three bills currently before the legislature that would go a long way towards bringing about the necessary reform of our criminal discovery laws. While they differ in their approaches, BDS supports all three.

a. A.4360-A (Lentol) – The 2018 Assembly One-House Discovery Bill

The Assembly One-House Discovery bill includes the essential components of fair and effective criminal discovery reform. The bill:

- Requires the automatic disclosure of all necessary discovery in a timely manner.
- Comports with the constitutional due process requirements regarding notification of the defense of any redacted and withheld evidence and allows for appropriate judicial intervention.
- Requires disclosure prior to guilty pleas so that pleas are truly knowing and voluntary.
- Requires disclosure prior to the defendant's testimony before a grand jury.

- Provides for remedies in cases of non-compliance, including preclusion and dismissal

Enacting A.4360-A (Lentol) will reduce wrongful convictions, cut down court backlogs, and improve fairness for all.

b. S.7722 (Bailey)/A.10135 (Blake) – The 2018 Senate Democratic Conference Discovery Bill

The Senate Democratic Conference bill includes these same essential components, but would also:

- Ensure that prosecutors begin turning over evidence as soon as the case commences.
- Allow the defense to conduct depositions of lay and expert witnesses, as in civil cases.⁶

For these reasons, we strongly support S.7722 (Bailey)/A.10135 (Blake).

c. S.6848 (Avella)/A.7292 (Lentol) – The NYS Bar Association (NYSBA) Discovery Bill

In 2013, the NYSBA put together a Task Force on Criminal Discovery, a nonpartisan group of criminal law experts including judges, criminal defense attorneys, prosecutors, and law professors. Over two years, the Task Force reviewed the criminal discovery laws in all fifty states and the District of Columbia. The bill took into account the concerns of District Attorneys on the Task Force regarding the protection of witnesses in criminal cases and incorporates every measure for protecting witnesses (as needed) that has been used in the 50 states. The Task Force's final proposal, which is the basis of this bill, was adopted unanimously by the NYSBA House of Delegates in 2015.⁷

The NYSBA discovery bill is less robust than the Assembly and Senate Democratic Conference bills. Critically, it would not require prosecutors to turn over discovery prior to a plea agreement. However, BDS recognizes that this bill would still move New York towards a much fairer system than currently exists, and for that reason, we support it.

V. CONCLUSION

Prosecutors in New York have fought hard not to change the discovery laws, even as most other states have embraced reform. They would say it is because they are concerned about witness safety. But in reality, this is a scare tactic designed to preserve an unfair advantage. In states with broad discovery, courts can and do limit the disclosure of information if the prosecution is concerned about witness intimidation. Many cases do not have a "victim" at all — in cases involving traffic stops, or possession of drugs or weapons, often the only witness is a police officer. Yet prosecutors consistently rely on this argument to stymie long overdue reform.

⁶ Florida has allowed for depositions of witnesses without a court order for more than 40 years. A 1989 report by the Florida Supreme Court's Criminal Discovery Commission found that taking of depositions was not cost prohibitive, and it made a "unique and significant contribution to a fair and economically efficient ... criminal process." The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review*, p. 9, available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

⁷ A copy of the NYSBA Report of the Task Force on Criminal Discovery (2015) is available here: <http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572>.

One of the most significant changes the governor and state legislators can make during this legislative session is to create a fair system that reflects the reality of plea bargaining as the primary manner in which cases are resolved today.

Brooklyn Defender Services urges the legislature to pass and the Governor to sign comprehensive discovery reform this year.

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