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BROOKLYN DEFENDER SERVICES

TESTIMONY OF:
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Presented before:
The New York State Senate Standing Committee on Codes

Hearing on Potential Legislative Changes to Section 50-a of the Civil Rights Law

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My name is Jacqueline Caruana and I am a Senior Staff Attorney in the Criminal Defense Practice at 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, for over 30,000 clients in Brooklyn every year. I thank Chairperson Jamaal T. Bailey and members of the New York State Senate Committee on Codes for their leadership on improving police oversight and accountability.

Under Civil Rights Law 50-a (CRL 50-a), the secrecy of police disciplinary systems conceals and perpetuates misconduct and precludes public scrutiny of accountability mechanisms for law enforcement officers or, more likely, the lack thereof. This law also undermines public defenders' ability to fairly defend their clients by blocking courts from reviewing prior misconduct and criminal activity by police officers who are actively making arrests. As a result, police misconduct goes unchecked and unchallenged, fueling the scourge of wrongful arrests, wrongful convictions, and the unlawful incarceration of innocent New Yorkers. The crisis of impunity for police must end. Brooklyn Defender Services supports repealing CRL 50-a to establish basic transparency and accountability for police.

BACKGROUND

The national media focus on police killings of unarmed people has sparked outrage across the country, yet the same attention has not been paid to the non-fatal punitive law enforcement interactions many New Yorkers, particularly Black and Latinx people, experience each day. The lack of consequences for these interactions emboldens racially

biased police tactics that target Black, Latinx, and immigrant communities of color. Even now, as the existence of police body worn camera footage confirms multiple incidents of police misconduct, courts, policymakers, and the public can be blocked from accessing to police disciplinary records that could provide necessary context and show a pattern of bad acts.

New York City's reliance on broken windows policing, in which officers proactively arrest people for the most minor offenses without receiving any particular complaint, has a major impact in the courtroom. Many, if not most, cases rely on the testimony of a single police officer alone, rather than a civilian-generated complaint. Excessive prosecutorial power and discretion, coupled with sentencing guidelines that mandate long prison sentences, have made trials nearly extinct. Over 95 percent of convictions are the result of plea bargains. (Many other cases end in an Adjournment in Contemplation of Dismissal or an outright dismissal.) With little to no evidence shared with the public defender, the outcome of a case—and in many cases someone's freedom—is dependent on the credibility and integrity of a single police officer.[1] Police officers have become the most common witnesses in our criminal legal system, and a nearly ubiquitous presence in the everyday lives of low-income people of color. Yet, our communities, public defenders, and journalists have absolutely no access to information about police officer misconduct or mechanisms to hold police accountable.

BDS supports repealing CRL 50-a and appreciates Senator Bailey's efforts to get it enacted. CRL 50-a unjustly prevents defense attorneys from presenting evidence that would prompt judicial review of police misconduct, criminal activity by police officers, or challenge the credibility of an officer. Though the law allows disclosure when "mandated by lawful court order," some judges hold subpoenas of potential police officer misconduct to a heightened standard of scrutiny and precariously rely on prosecutorial discretion to investigate and disclose misconduct, making the provision in the statute weak.[2]

On January 25, 2019, the Report of the Independent Panel on the Disciplinary System of the New York City Police Department strongly recommends that NYPD support legislative efforts to amend Civil Rights Law Section 50-a.[3] This bolsters what advocates have been saying for decades. We believe the only change that should be made to 50-a is to completely repeal it.[4] To be clear, the current exemptions under the Freedom of Information Act sufficiently filter access to police disciplinary records without the need for CRL 50-a.

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[1] Gaby Del Valle, *Most Criminal Cases end in Plea Bargains, not Trials*, August, 7, 2017, The Atlantic, available at: https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=tzbk66dp.

[2] Under *Brady*, prosecutors have a constitutional duty to disclose to the defense any favorable, material evidence known to the prosecution team. Jonathan Abel, *Prosecutors' duty to disclose impeachment evidence in police personnel files: the other side of police misconduct*, available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/11/prosecutors-duty-to-disclose-impachment-evidence-in-police-personnel-files-the-other-side-of-police-misconduct/?noredirect=on&utm_term=.7d38aafc1fa9

[3] The Report of the Independent Panel on the Disciplinary System of the New York City Police Department, January 25, 2019 available at: https://www.independentpanelreportnypd.net/

[4] New York City Bar, *Report on Legislation*, available at: http://documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency_Advocacy.pdf.

HOW CRL 50-a OPERATES IN LEGAL PRACTICE

When defense counsel's request for police disciplinary records is denied pursuant to CRL 50-a, the client's constitutional right to present a defense and confront his accusers has been greatly infringed upon. In practice, the inability to access these police records severely limits the ability to impeach and cross examine police witnesses. This is particularly concerning because New York courts have found that a defendant's right to impeachment material can outweigh a witness' right to privacy through sealing of records.[5]

Furthermore, the United States Supreme Court recognizes that the prosecution has a continuing duty to disclose any information that could prove favorable to the defendant. This duty extends not only to specifically exculpatory information, but to all favorable information, including information that will be used for impeachment. Evidence of prior misconduct by a specific police officer is relevant for impeachment purposes where proof of guilt turns largely on acceptance of that officer's testimony.[6] While it is clear that prosecutors are aware of prior incidents of police misconduct, disclosure of this information to defense counsel has been inconsistent and sporadic, at best. [7]

When prosecutors fail to disclose evidence of police misconduct, defense counsel is beholden to the unconstitutional requirements of CRL 50-a in order to obtain access to these records. The police department actively opposes access to disciplinary records and the courts routinely deny defense counsels' requests. As a result, police officers in New York are granted a special privacy right that no other professional or civilian witness is granted.

We ask the committee to consider this: If a doctor were to engage in misconduct that would bring harm to a patient, no one would trust that doctor enough to be their patient; if a teacher were to lie to parents about the care of their child, no parent would trust that teacher to care for their child. Their disciplinary records are either available online or through FOIL. Yet police officers are repeatedly engaging in misconduct, including providing false information while under oath, and instead of acknowledging these serious issues, the City of New York and local governments across the state willingly overlook it and instead allow these officers to remain employed, paying out countless millions of dollars in lawsuits to civilians on their behalf. Critically, law enforcement is the only profession authorized to use lethal force, and therefore they should be held to a higher standard of transparency and accountability, not lower.

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[5] *See* People v. Rodriguez, 152 Misc. 2d 328 (N.Y. Sup. Ct. 1991); People v. Rahming, 26 N.Y.2d 411 (N.Y. 1970); People v. Vidal, 26 N.Y.2d 249 (N.Y. 1970).

[6] Brady v. Maryland, 373 U.S. 83 (1963); *See* Puglisi, 44 N.Y.2d at 749; People v. Morales, 97 Misc. 2d at 740.

[7] "Bronx Prosecutors Release Secret Records on Dishonest Cops."https://gothamist.com/news/bronx-prosecutors-release-secret-records-dishonest-cops

CLIENT STORIES

Mr. S – Prosecution is aware of officer misconduct and opposes access to disciplinary records: Mr. S was charged with misdemeanor offenses. The Prosecution filed a memorandum in the case, disclosing that the detective involved on the case had been previously disciplined by the NYPD for faulty investigation procedures and as a result, had undergone "retraining." This same detective had also been sued 7 times as a result of civil rights violations made by the detective. Mr. S's attorney filed a motion with the court to access the detective's disciplinary records with NYPD. Despite the prosecutor's awareness the existence of relevant disciplinary records, they opposed the request for records, calling it "a foray into a witness' confidential records in the hope of finding some unspecified information that can be used to impeach the witness." The judge agreed with the prosecution and denied access to the detective's disciplinary records. Several months later, the prosecution dismissed the case against Mr. S. This detective is still employed by NYPD.

Mr. J – NYPD is aware of officer misconduct and opposes access to disciplinary records: Mr. J was charged with a felony offense as a result of an investigation and identification procedure conducted by a detective with NYPD. That particular detective had been the subject of multiple lawsuits that were settled by the City. Mr. J's defense attorney requested the detective's disciplinary records and NYPD opposed access to the records. In their opposition papers, the attorney for the detective acknowledged that this detective had been subjected to civil litigation and failed to "properly document investigative activity," but argued that did not demonstrate a "history of actual misconduct," because the number of lawsuits attributed to the detective, is "miniscule when compared to the number of police interactions in which [the detective] has been involved." The judge agreed with NYPD and denied access to the records. To us, this was not a defense but a call to action to reinvestigate those other cases. This case is still pending and Mr. J faces up to 25 years in prison and lifelong barriers to success if he is convicted of this felony offense.

Mr. C – No Evidence or Mechanism to Prove Client's Claims: My client Mr. C for assaulting a police officer. Mr. C stated that Officer B falsely stopped, detained, and arrested him for disorderly conduct. Mr. C denied assaulting Officer B and claimed that, in fact, he was harassed and assaulted by Officer B and his partner. The police—whose credibility will be squarely at issue during trial—claimed that Mr. C appeared to have an unknown "heavy object" in his sweater pocket, fled from police, and was disorderly. The police officers later claimed that Mr. C assaulted Officer B by head-butting him. However, there was no evidence that Officer B suffered any injuries and Mr. C's attorney had no means of knowing about the credibility of the officers, any evidence against the client, or exculpatory evidence supporting the client's claim.

The only method by which to obtain police disciplinary records is to file a motion with the court and request that the court order the police records to be turned over to the judge to review. Absurdly, in this motion, the defense is required to make "a clear showing of facts sufficient to warrant the judge to request police records for review."[8] We cannot make that

[8] The Court of Appeals in People v Gissendanner (45 NY2d 543, 547-548 [1979]

claim without access to police records; therefore, these motions are usually unsuccessful. In the case of Mr. C, he was eventually given an ACD.

Mr. H – Evidence of Wrongdoing, but No Accountability: Mr. H was charged with assaulting a corrections officer. Mr. H. denied committing any of the charged offenses and violations and further contended that Corrections Officer R wrongfully assaulted him and arrested him. The police reports, Department of Corrections' reports, and initial discovery disclosure indicated very clearly that Corrections Officer R conducted an unlawful strip search of Mr. H and unlawfully used excessive force on Mr. H while he was detained. Corrections Officer R and other officers alleged that Mr. H was refusing to be strip searched. According to Mr. H, Corrections Officer R provided no basis or reason for why they were conducting this search. Additionally, several correction officers removed Mr. H to a private room, supposedly without video cameras, to conduct this search. Corrections Officer R alleged that Mr. H had a sharpened piece of plastic in his pants pocket and that when Corrections Officer R attempted to retrieve this object, Mr. H allegedly bit his Corrections Officer R's finger. Mr. H was injured and received treatment at the detention facility where he was being held.

Mr. H adamantly contended that he was not preventing Corrections Officer R from performing any lawful duty; in fact Mr. H contended that Corrections Officer R violently attacked him along with other officers and that any injury that CO R may have sustained was the result of Corrections Officer R's own actions. Moreover, Corrections Officer R and the other officers fabricated their versions of what happened inside the detention facility on that day to erase the unlawful force used by Corrections Officer R and the other officers to wrongfully accuse Mr. H of having a weapon in order to justify Corrections Officer R's assault on Mr. H.

Corrections Officer R's credibility as well as his motive to fabricate were central to this case at trial. Such issues, including Corrections Officer R's propensity for violence and use of force, specifically excessive force, as well as his bias against Mr. H and his motive to fabricate his story were both material and relevant to this case.

A motion was filed with the court to obtain Corrections Officer R's disciplinary record but was denied because the judge determined that the defense did not make *a clear showing of facts sufficient to warrant the judge to request police records for review.*

Mr. H's case went to trial where it was revealed during the trial that Corrections Officer R and other Corrections Officers forged paperwork and planted evidence. Mr. H was acquitted by a jury; however, Corrections Officer R still works at the same detention facility.

RECOMMENDATIONS

We thank Senator Bailey, along with his co-sponsors, for advancing S.3695/A.2513. This bill would repeal of section 50-a of the Civil Rights law and help address the lack of transparency in police departments across the state, as well as the inconsistent, arguably non-existent, accountability for police misconduct. This, of course, is only the beginning of

the work that needs to be done to mitigate discriminatory policing tactics and finally hold law enforcement agents accountable for their misconduct and criminal activity, but it is a critical step forward.

We respectfully urge the Senate Committee on Codes, as well as the remainder of the Senate and the Assembly to support and vote for the passage of S. 3695/A.2513 and repeal Civil Rights Law 50-a.

We thank the Committee for the opportunity to speak on this issue and hope you will view BDS as a resource as we continue to fight for a more fair and just state.

If you have any question, please feel free to reach out to Jackie Caruana, Senior Staff Attorney, at jcaruana@bds.org.