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Defending yourself in the dark under N.Y.'s unfair discovery laws

BY SERGIO DE LA PAVA

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Unbalanced (SIEGELJEFFERSON)

Once again, New York inexplicably finds itself far behind the national curve on a critical criminal justice issue. This time the question is discovery — the disclosing of evidence by the prosecution to the accused.

Our laws in this area are terribly outdated and allow prosecutors to withhold that evidence until the last possible minute.

Gov. Cuomo has proposed a fix in his state budget. But it's still far from what is necessary to bring us up to the standard set by other states and the federal government. Incredibly, even his tepid proposal is meeting resistance.

That such a fundamental practice should engender any controversy, let alone the current level, is astounding. It's a testament to the success prosecutors have enjoyed for decades in creating a toxic and uneven playing field in this city's courtrooms, where one of the parties is facing the loss of liberty and is already burdened by a vast disparity in resources.

I have been a public defender in Manhattan for over 20 years. Much has changed during that time — some for the better — but one thing that's remained consistent is the majority of this city's district attorney offices prize strategic advantage over fundamental fairness and procedural dignity.

In Manhattan, for example, people facing criminal prosecution are purposely and routinely kept in the dark regarding the proof against them in a manner that invariably shocks those who are unfamiliar with our criminal justice system and its norms.

Imagine being arrested and charged with a crime. You face the terrible tumult that a criminal prosecution entails and instinctively come to appreciate the great disparity in resources between you and those of the prosecution and its \$5 billion police force.

Eventually, you will likely come to ask how it is possible that the criminal prosecution against you can proceed for months, years, or even to the verge of trial, without the prosecutor having to disclose to your attorney some of the most elemental aspects of your case — like the police reports of the officers involved in the arrest, the prior testimony of witnesses, and even the very identity of the person accusing you.



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Trends To Get Behind.

Precisely this question is pointedly asked of us by our clients every day, and there is no satisfactory answer. Horror stories abound about the role untimely disclosure or nondisclosure of evidence can play in wrongful convictions, but still some prosecutors continue to hand already overburdened defense attorneys significant amounts of discovery material just prior to jury selection. Or they demand that criminal defendants decide whether or not to accept a plea bargain without access to this material — all in full compliance with our retrograde discovery statute. How have base tools like secrecy and leverage come to gain prominence over core principles like justice and due process?

It's simple. Over the generations, New York prosecutors have been gifted an illegitimate statutory advantage and they have made a strategic decision to press that advantage in contravention of their duty of fairness and of your constitutional rights. The result is our current discovery practice. It is a widespread, longstanding and programmatic violation of the constitutional rights of mostly marginalized people of color and it is indefensible.

My entire indigent defense career, and that of the many brilliant attorneys who devote themselves to this work, is based on the premise that the attorney on a case matters.

It is through their attorney that those facing the horror of incarceration exercise their most critical and fundamental constitutional rights.

But the right to effective assistance of counsel is meaningless if the attorneys charged with this sacred responsibility are systematically hamstrung in their ability to represent their clients. Criminal defense entails many responsibilities but none greater than the duty to fully investigate the claims against one's client as early as possible.

The system is rigged to reduce the efficacy of the defendant's attorney. The result is hundreds of thousands of poor people a year effectively being denied their Sixth Amendment right to counsel and, by extension, their right to a fair trial. This injustice then infects the entire system. People plead guilty, even to serious crimes, without having read a single police report or sheet of grand jury testimony against them. Worse, they rot at Rikers Island on bail they cannot afford while critical information that might secure their release or a more favorable plea deal is withheld from their lawyer.

It is long past time for change. Anyone objecting to meaningful reform must explain what is so unique about New York that it must have a more restrictive discovery statute than Texas, Alabama, North Carolina and 43 other states. New York should be leading the way in criminal justice reform, not continually underreacting with half measures. Addressing the decadeslong travesty of justice that is our criminal discovery practice is not only a good place to start but also an ethical mandate.

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