Testimony of

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Before the

Senate Standing Committee on Codes

Public Hearing on the Implementation of Pre-trial Discovery Reform

September 9, 2019

My name is Sergio De La Pava and I am the Legal Director at New York County Defender Services (NYCDS). We are a public defense office that represents around New Yorkers in 20,000 cases in Manhattan's Criminal and Supreme Courts every year. I have been representing clients accused of crimes in this city for more than twenty years. Thank you to Senator Bailey for holding this hearing today and inviting us to testify about the implementation of pre-trial discovery reform passed during the state budget process.

NYCDS, along with other defenders and community groups from across the state, advocated for years for the comprehensive reforms that were written into the budget this year. We know that the new reforms to our discovery statute will have a significant impact on our clients' lives and improve fairness in our courts. We are in conversation with other New York City defender offices to strategize training our supervisors and staff on the new laws, which is our key priority in ensuring that the new laws achieve their stated goals on day one.

Decarceration should be at the center of all of our implementation goals moving forward. The legislature made clear during their discussion of these bills on the floor that they voted in favor of bail, discovery and speedy trial reform in a concerted effort to roll back some of the harm created by stop and frisk and mass incarceration of communities of color. We hope the Senate remains as committed as public defenders and our grassroots partners are in staying true to this intent.

Implementation is Eminently Feasible

As one of the very last states to adopt broad criminal discovery requirements, New York has the benefit of learning from the dozens of other states that have employed systems of broad access to discovery at an early stage of criminal cases for many years. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark.[1] There is no reason that New York State officials should not be able to create a system that works for our communities and complies with the law.

We have advocated before the New York City Council and the Mayor's Office of Criminal Justice for the adoption of an electronic discovery system that will allow all parties to easily upload discovery materials with timestamps so that all parties know when exactly discovery obligations were fulfilled. The system must be straightforward to use, so that all of the parties required to upload documents can use the system with minor training and technical support. Training thousands of system actors could become very costly, unless the technology is straightforward so that existing IT staff can easily explain the process and support employees. The more difficult the system is to use, the less likely people will be able to upload information expeditiously, and it will be our clients who suffer.

North Carolina courts began rolling out a criminal court e-discovery platform more than a decade ago.[2] The state's Discovery Automation System (DAS) is generally well regarded by defense counsel, law enforcement and ADAs alike.[3] The system allows prosecutors and law enforcement agencies to upload files directly to the system, where the evidence is timestamped, Bates stamped, and saved as a text-searchable PDF. Audio and video files can also be uploaded. Defense counsel and prosecutors can then download and/or print out the materials for their own files. The whole process also facilitates judicial oversight, allowing judges to see what evidence was turned over, by whom, and when. Most importantly, the system allows defense attorneys to easily share evidence with the accused to help them make a timely informed decision on how best to proceed in their case. We are not advocating any particular system, including the North Carolina Discovery Automation System (DAS). Rather, we urge New York City officials and stakeholders to act quickly to ascertain what are the best options for our courts, knowing that this is one potential model.

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[1] New York State Bar Association, *Report on the Task Force of Discovery* (2015), available at http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.

[2] North Carolina Courts, *Discovery Automation System*, available at https://www.nccourts.gov/assets/documents/publications/Technology_DAS_Facts.pdf?o70KpOvf9FhgDOSuSaU36Iz0vRQt4TFn.

[3] *See, e.g.*, North Carolina Commission on the Administration of Law and Justice, Technology Committee, *Summary of Public Comments on Interim Report* (2016), available at https://nccalj.org/wp-content/uploads/2016/09/Tech-Public-Comments-Overview.pdf.

Discovery Should Be Disclosed Immediately for Pending Cases

We urge the State Senate to call on prosecutors to begin turning over discovery in existing cases immediately, whether an electronic discovery portal exists yet or not, to ensure that all of our current clients have the discovery they are entitled to under CPL Article 245 on January 1, 2020. We worry that if they wait to turn over discovery, the first few weeks of January will be a logistical nightmare, especially if we are forced to continuously go to court to compel prosecutors to turn over the evidence in ongoing cases. This can be avoided if prosecutors begin turning over everything they have now.

The Costs of Implementation

Because discovery reform has a substantial technological component, we anticipate that there will be significant new costs for defender offices. We were disappointed to learn that last year the legislature did not allocate any funding for the pre-trial reforms passed in the budget.[4] We hope that next year you will consider funding technology upgrades along with increased staffing to meet our ongoing technology needs. In New York City we are hopeful that the City will contribute all or most of the funds necessary to implement discovery reform. This unfunded mandate will be even more challenging for smaller counties and cities to meet, and we worry that accused people will be the ones to suffer if the reform does not receive fiscal support from the state in the next budget.

Our funding concerns fall largely into three categories: technology, equipment, and staffing.

1) Technology

We need to increase our server capacity to hold the enormous amounts of information that we anticipate receiving beginning January 1, 2020. Unlike other parts of the state, New York County prosecutors have one of the worst track records in terms of providing pre-trial discovery. That means that even today we receive only a small amount of the discovery in each case that we anticipate receiving next year. When we do receive discovery now, most of it is hard copy, or printed on disks, and so is not uploaded to a cloud. Where we currently might receive a burned DVD of surveillance footage, we anticipate that next year it will be uploaded to an e-discovery system and we will be required to download it on to our internal servers.

We also expect to see an uptick in the use of police body cameras. Those files can be extremely large. If multiple officers respond to a scene, we may receive multiple large, high-definition video files.

Upgrading our current server capacity will be a significant portion of our discovery-related costs in the new year.

[4] *See, e.g.*, David Lombardo, "No new funding for NY's criminal justice overhaul," *Times Union*, April 14, 2019, available at https://www.timesunion.com/news/article/No-new-funding-for-NY-s-criminal-justice-overhaul-13760065.php.

2) Equipment

The state passed comprehensive discovery reform to ensure that people accused of crimes have the opportunity to view and assess the evidence against them. This requires not only downloading the prosecution's discovery from an e-discovery system to our own internal servers, but then making that discovery available to our clients. This will likely require us to print and/or photocopy every piece of discovery to share with our clients, or downloading evidence such as videos or photos onto tablets or laptops that we can take to the courthouse or jails, if our clients are detained pre-trial. We anticipate that we will need to purchase a large amount of new equipment to ensure that every client has the opportunity to review their discovery.

3) Staffing

Discovery reform means that our attorneys will now be reviewing, analyzing and potentially challenging a significant amount of evidence that was previously denied to our clients. We anticipate that this means that they will spend more time on their cases, and particular on complex cases that involve large amounts of discovery. We will also have to be photocopying and downloading all of this data, organizing and maintaining it, and ensuring that we meet our new reciprocal discovery timelines. All of this will require additional staffing to ensure that every client receives the highest quality defense.

We are currently putting together a comprehensive training program for our attorneys and other relevant staff to get them up to speed on the new law and prepare them for the transition. We have already made a significant commitment of supervisor time to ensure that our staff receives the training they need and that our clients deserve.

Finally, if prosecutors intend to use the court system to stall these reforms and keep evidence away from our clients, as they have so far indicated, we are prepared to litigate and fight to protect the rights of our clients under the new law. This will also require the investment on our part of attorney and staff hours to litigate protective orders and discovery timelines.

In short, we anticipate that our staffing needs will be significant, but that with access to all of the evidence in the case, we will be better equipped to fight for the best possible outcome for our clients and defend their rights.

<u>Concerns about Plea Bargaining</u>

One major concern we have at NYCDS is proactively countering the danger that prosecutors will stop offering fair plea deals once the new discovery requirements go into effect. A large portion of our cases are resolved early to the benefit of all parties involved. This frequently occurs prior to a felony indictment or before the prosecutor has expended many resources on the case.

We advocated vigorously for comprehensive discovery reform. But we also fear it may result in the unintended consequence of prosecutors no longer offering the kinds of pleas that benefit everyone. The reason is that prosecutors will now be required to do the work of reviewing and turning over discovery prior to any plea agreement. Inappositely this obligation may actually

disincentivize them from seeking a speedy and fair resolution on the theory that an early resolution no longer results in less prosecutorial effort. This would be a harmful and unjust result of reforms intended to promote justice and fairness.

The situation is especially dangerous given the well-established and excessive power prosecutors have in shaping plea bargaining. One important way to counteract this danger is to make the discovery disclosure process extremely simple, as is done in North Carolina. Another is to monitor and hold prosecutor offices accountable if they start to offer fewer or worse plea bargains because of the new reforms. A prosecutor's duty is to do justice, not to penalize accused people for law reform enacted by state legislators. We will carefully monitor this issue to ensure that such unintended consequences do not occur.

Court Capacity

In New York County, we already experience a shortage of trial parts when both the defense and the prosecution are ready for trial. We anticipate that as an outcome of the reforms passed this session, we may see more trials than we did in the past. But our courts are not currently equipped with sufficient personnel for all the trials we have now, much less increased volume.

The Office of Court Administration should ascertain how many court parts, judge and personnel are available in each borough and what the deficits, if any, currently exist in expeditiously bringing cases to trial. It is our understanding that this is already a problem in Queens, where they have even fewer judges and courtrooms than in Manhattan.[5] We hope that the State Senate and Assembly will ensure that OCA has the funding they need to ensure that the people we represent are not denied their right to a speedy trial.

Conclusion

Discovery reform is eminently feasible and long overdue. We are doing our part to fight for the resources we need to implement CPL 245 and protect the rights of our clients. NYCDS looks forward to working with the State Senate and Assembly and other system stakeholders to ensure that we quickly put into place the necessary technology and requisite funding in advance of January 2020.

If you have any questions about my testimony, please contact me at sdelapava@nycds.org.

[5] Christina Carrega, *Staff Shortage Grinds Wheels of Justice to a Halt*, QUEENS DAILY EAGLE, Nov. 13, 2018, available at https://queenseagle.com/all/2018/11/13/understaffing-grinds-wheels-of-justice-to-a-halt.