



Testimony of

Sergio De La Pava

Legal Director

New York County Defender Services

Before the

Committee on Public Safety

Oversight Hearing – Examining NYPD Investigative Procedures
and Safeguards Relating to Wrongful Convictions

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My name is Sergio De La Pava and I am the Legal Director at New York County Defender Services (NYCDS). NYCDS is a public defense office that represents New Yorkers in thousands of cases in Manhattan’s Criminal Court, Supreme Court, and Family Courts every year. Since opening our doors in 1997, NYCDS has represented more than 300,000 clients in their criminal matters and witnessed firsthand the myriad ways that the criminal legal system abuses and harms our clients. Thank you, Chair Salaam, for holding this important hearing and allowing us the opportunity to testify about steps that NYPD and other city agencies can take to prevent wrongful convictions going forward.

I. Background and Overview

New York is a national leader in wrongful convictions. Since 1989 more than 300 people have been exonerated in our state, resulting in a collective 3,068 years of life lost to wrongful convictions. Our state ranks third highest in the country in numbers of wrongful convictions, behind only Texas and Illinois.

New York County Defender Services

100 William St, 20th Floor, New York, New York 10038 | t: 212.803.1500 | f: 212.571.6035 | nycds.org

NYCDS is based in New York County, an epicenter of criminal convictions and wrongful convictions. No one understands this more keenly than Chair Salaam, the Council Member for Harlem, who is also one of the Exonerated Five. Exonerations occur in New York County every year, frequently from convictions obtained in the 1980s and nineties. Some recent exonerations include Eric Smokes and David Warren (2024), Jabar Walker and Wayne Gardine (2023), Steven Lopez (2022), Aziz A. Muhammad and Khalil Islam (2021), and Rafael Ruiz (2020).¹ But as trial attorneys on the front lines of the criminal legal system, we know that wrongful convictions are not a mere relic of the twentieth century.

Queens, for example, has recently produced two very troubling cases implicating New York's wrongful convictions problem. Prakash Churaman was only 15 years old when NYPD officers burst into his bedroom in 2014 and arrested him for a murder he did not commit. He was not exonerated by the Queens District Attorney until 2021.² Less fortunate is Chanel Lewis, a recent graduate from a high school for developmentally delayed students, who was convicted in 2019 of killing a Howard Beach jogger in 2016. Over 40,000 people have signed a petition demanding justice for him on the grounds that he is innocent. Yet Mr. Lewis is still fighting to clear his name.³ These cases are a powerful reminder that the injustice of wrongful convictions remains an ever-present threat that we must continue to fight against with every weapon at our disposal.

In 2021, the District Attorneys in Brooklyn, Manhattan, and the Bronx vacated hundreds of criminal convictions in cases where purported evidence of guilt had been produced by corrupt former NYPD Detective Joseph E. Franco.⁴ At the time, our office issued a statement urging all five DAs to review all of their convictions in which officers with histories of misconduct played a role.

Just a few months ago our office received notice from the Manhattan DA's Office about the removal of four criminalists from case work in the Office of the Chief Medical Examiner, Forensic Biology Lab, and the subsequent discovery that three of those analysts also violated certain procedures related to casework. These kind of bombshell disclosures are occurring with greater and greater frequency and increasingly they are not related to DNA. In this case, it was forensic biology. Previously, we received a similar disclosure related to latent fingerprints. In 2021 it was

¹ The National Registry of Exonerations includes 52 exonerations from Manhattan. These are the most recent additions to the list. National Registry of Exonerations, New York County Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=ST&FilterValue1=NY&FilterField2=County%5Fx0020%5Fof%5Fx0020%5FCrime&FilterValue2=New%20York&SortField=Exonerated&SortDir=Asc> (last viewed 2/23/23).

² Max Rivlin-Nadler, "Prakash Churaman, Locked Up for Years on Charges the Queens DA Has Since Dropped, Sues NYC for \$25 Million," *Hellgate*, Jan. 30, 2023, available at <https://hellgatenyc.com/prakash-churaman-lawsuit>.

³ Bill Parry, "Attorneys say Chanel Lewis' murder conviction in killing of Howard Beach jogger based on 'racial dragnet'," *QNS.com*, Aug. 23, 2023, available at <https://qns.com/2023/08/chanel-lewis-murder-conviction-howard-beach-jogger/>

⁴ Graham Rayman, "NYC Medical Examiner crime analysts suspended from casework in misconduct probe," *NY Daily News*, Dec. 14, 2023, available at <https://www.nydailynews.com/2023/12/14/nyc-medical-examiner-crime-analysts-suspended-from-casework-in-misconduct-probe/>.

a disclosure about a corrupt officer (Det. Franco). These high-profile instances of systemic malfeasance make evident that we need a statutory framework that truly appreciates the risk of innocent people being convicted and imprisoned and doesn't simply rely on the benevolence of District Attorneys offices, many of which do not even have conviction integrity units, to occasionally address these grave injustices.

NYCDS is committed to ending the scourge of wrongful convictions in New York State through legislation. We co-lead a campaign to pass the Challenging Wrongful Convictions Act (S.7548/A.2878A) which would create a working pathway to exoneration in New York State. But separately New York City can and should do more to prevent future wrongful convictions. So we offer the Council the following recommendations.

II. Policy Recommendations

A. Properly Fund and Implement Discovery Reform

One major reason New York State is among the leaders in wrongful convictions is that, until 2020, police and prosecutors were not required to turn over all of the discovery or evidence in a criminal case until a jury was sworn.⁵ Since only 2% of criminal cases in New York State end up going to trial, this meant that the vast majority of accused people were prevented from ever viewing the entirety of the evidence against them. Thus a great majority were forced to make a decision about pleading guilty with only incomplete information about the evidence in the case. The old discovery law was known in the community as the Blindfold Law because it forced people accused of crimes to make life-altering decisions while essentially blindfolded.⁶

In 2019, the legislature repealed the Blindfold Law and put in its place a new automatic discovery statute, Criminal Procedure Law Article 245. Under the new law, prosecutors are required by law to turn over all of the evidence in their case early and automatically. Now accused people and their counsel can review the evidence and make an informed decision about how to proceed, including whether or not to plead guilty.

While the law has been in place for more than four years now, implementation remains a challenge. One of the greatest challenges is cooperation and buy-in from the other primary actor besides prosecutors, the NYPD.

⁵ “The pre-reform discovery statute (CPL Article 240) required prosecutors to fulfill discovery obligations only after the defense attorney had made a demand in writing. In addition, it did not establish early time frames for when demanded materials should be turned over. For instance, regarding witnesses’ written statements, recordings, criminal records, and pending criminal actions, the pre-reform statute did not require prosecutors to turn over commencement of trial, which limits a defendant’s opportunity to properly investigate and respond to such information.” Krystal Rodriguez, *Discovery Reform in New York: Major Legislative Provisions* (Data Collaborative for Justice, 2022), p. 2, available at https://datacollaborativeforjustice.org/wp-content/uploads/2022/05/Discovery-Reform-in-New-York_Revised-2022_6.2_FINAL.pdf.

⁶ See, e.g., Robert Anello, “Blindfold Removed from Justice in State Criminal Cases in 2020,” *Forbes*, Jan. 8, 2020, available at <https://www.forbes.com/sites/insider/2020/01/08/blindfold-removed-from-justice-in-state-criminal-cases-in-2020/?sh=70f0aedb207c>.

A common experience for New York City public defenders is this: the prosecutor says that all of the discovery has been turned over. We therefore begin to proceed to trial. But on the eve of the trial we are provided with new discovery that the prosecutor says was not previously given to them by the NYPD. This places the defense in a difficult spot. Do we cut short our constitutionally-mandated investigation of this new evidence and proceed to immediate trial or do we ask for a continuance and prolong our client's pretrial detention on Rikers Island, further delaying their day in court and possibly harming their mental health and physical safety? It is a lose-lose situation, and it is one that our clients and their attorneys face regularly.

NYPD needs a better system in place to ensure that all discovery in their possession is turned over well before trial. Specifically, they must very early on fully gather and review all material related to an arrest and ensure that all of this information is immediately provided to the prosecutor. The fact that prosecutors so often show up with new evidence on the eve of trial suggests that far more needs to be done to ensure that NYPD complies with the law. As one expert put it, "Sharing more information requires more effort."⁷

Courts have been watching this issue (police compliance with discovery laws) very closely. In a 2023 opinion out of the Bronx, *People v. Chimborazo*, the Judge openly criticized the intentional roadblocks put in place by the NYPD to prevent the disclosure of evidence as required by statute. In that case, the judge ordered discovery to be turned over, but despite the judicial order, the NYPD then demanded that the prosecutor not only turn over the minutes from the hearing but also seek a protective order concerning the information in the documents. The judge ultimately denied the motion for the protective order, describing it as a "ransom payment to the NYPD." In so doing, Judge Bowen called out the actions of the NYPD explicitly:

"Also concerning is the People's self-admitted kowtowing to these purported NYPD demands. The People cannot be made to jump through a series of NYPD-crafted hoops to receive discoverable material that the New York State Legislature deems to be in the People's possession — unless the People allow themselves to be made to so jump. Whatever laudable intentions may be ascribed to the NYPD, e.g., a desire to proactively protect the privacy interests of its rank and file, the fact remains that its demand for concessions from the People in exchange for allowing material to "flow" is anathema to the discovery statute schema. Whatever the policy, bureaucratic, interpersonal, moral and/or other reasons undergirding the People's accommodating reaction to the NYPD's unauthorized demands, the court cannot be complicit in such a perversion of the statutory order."⁸

This hearing is an important step forward in holding NYPD to account for their actions in failing to disclose evidence as required by state law. But more must be done.

⁷ Rodriguez, *Discovery Reform*, p. 12.

⁸ *People v. Chimborazo*, 2023 NY Slip Op 23290, Bronx Crim. Ct, (decided Sept. 27, 2023), available at <https://law.justia.com/cases/new-york/other-courts/2023/2023-ny-slip-op-23290.html>.

B. Addressing the Technology Gap between Public Defenders and Police and Prosecutors

On January 29, 2020 I testified before the City Council Committee on Justice System on the need for increased funding for public defenders around technology. In that hearing, I advocated for defender offices like ours to receive funding to help us better defend our clients and prove their innocence. The hearing was held in response to a *New York Times* article about the Legal Aid Society's first-in-the-nation defender technology lab that invested \$100,000 in technology that allows defenders to make precise copies of computer drives or a person's phone in a format that holds up in court.⁹ Four years later that technology is still outside our reach.

In court, it is the prosecutor's burden to prove that an accused person committed the crime beyond a reasonable doubt. But in practice, and especially if trying to convince a prosecutor to dismiss a case, it falls on our clients to prove their innocence. This is especially hard for a person to prove when that person had nothing to do with the alleged crime. Technology like that discussed in the article and others are crucial tools in helping us to clear our client's names before we ever get to trial, but they require substantial funding investments. This would never bring us on par with the NYPD and their 5.5 billion dollar budget, but it would be a long-overdue step in the right direction.

C. Ensure POST Act Compliance with Additional Legislation

In 2020, the City Council passed the POST Act, which requires NYPD to disclose to the public the types of surveillance technology that they use against New York City residents. The law has failed to fulfill its promise, and we ask the Council to act again to pass legislation to shore it up.

NYCDS supports the legislation on the agenda of the 12/15/23 Committee on Public Safety Hearing, including Int. 1193-2023 (CM Farías), Int. 1195 (CM Hudson) and Int. 1207-2023 (CM Won). We urge passage of all three with the amendments recommended by the Legal Aid Society on pages 27-31 of their written testimony for the 12/15/23 hearing.¹⁰

D. Pass Reso. 0479-2023 (calling on the New York State Legislature to pass, and the Governor to sign, S215, the Challenging Wrongful Convictions Act, which would amend state law to provide an authentic legal pathway to criminal conviction exoneration)

The City Council should support passage of the Challenging Wrongful Convictions Act, a bill that would create a working pathway to exoneration in New York State. Fifty percent of New York

⁹ Kashmir Hill, *Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone*. N.Y. TIMES, Nov. 22, 2019, available at <https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html>.

¹⁰ New York City Council, *Hearing Testimony - Oversight Hearing – NYPD's Implementation of the Public Oversight of Surveillance Technology (POST) Act*, Dec. 15, 2023, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6420984&GUID=447408E8-05D2-4346-BD24-6D7ECCA1C37C&Options=&Search=>.

counties have never had an exoneration.¹¹ We know this cannot be true, but it exemplifies the challenges of successfully vacating a conviction in many counties across the state.

This legislation is long overdue to bring New York’s post-conviction law in line with other states. Specifically, the bill will fix the following issues with the existing law:

- In New York, 98% of convictions are the result of a plea deal, but the Court of Appeals ruled in *People v. Tiger* (2018) that people who pled guilty cannot qualify for relief without DNA evidence of innocence. This is the rule that left people like Steve Lopez precluded from relief for his wrongful conviction, even after the Exonerated Five case proved his innocence.¹² This shameful and harmful judicial decision requires a legislative fix.
- New York is one of five states without a right to counsel in post-conviction cases, behind states like Alabama and Texas.
- Discovery reform passed in 2019 did not provide for post-conviction discovery. This blindfolds people trying to prove their innocence and vacate wrongful convictions.
- The Challenging Wrongful Convictions Act includes a decriminalization fix, ensuring that people convicted of acts that are no longer crimes (such as gravity knife or marijuana possession) can seek vacatur post-decriminalization.

We strongly urge the Council to pass CM Hudson’s resolution in favor of the passage of this state law this session. The bill passed both houses of the legislature last year but shamefully, the Governor vetoed the bill, citing Republican talking points. The Council’s support is critical for bringing this law across the finish line to fix our broken post-conviction system.

E. Support the Youth Interrogation Act

All young people under the age of 18 deserve to have a lawyer if they are being questioned by the police. The experience of the Exonerated Five is a well-known, glaring example of how desperately our most vulnerable young people need more protection than is currently provided, but there are many others. Thirty years of research by psychologists, sociologists, and neurologists make it clear that even under controlled circumstances, children lack the capacity to fully appreciate the meaning and significance of the right to remain silent, and to appreciate the almost certain repercussions of waiving that right.¹³ Add the stress and tension inherent in a custodial interrogation, and the prospect of a knowing, intelligent and voluntary waiver of the right to remain silent becomes a myth. Instead, young people will often say whatever they think will immediately get them out of the interrogation room.

¹¹ VOCAL-NY, *Fact Sheet: New York’s Piecemeal Exoneration Process is Inadequate and Fundamentally Unfair* (Aut. 24, 2023), available at <https://www.vocal-ny.org/resource/factsheet-new-yorks-piece-meal-exoneration-process-is-inadequate-fundamentally-unfair/>.

¹² Tandy Lau, “Guilty after proven innocent: the challenge of challenging wrongful convictions (Part II),” *Amsterdam News*, Jan. 25, 2024, available at <https://amsterdamnews.com/news/2024/01/25/the-challengens-of-challenging-wrongful-convictions-part-ii/>.

¹³ Zelle, H., Romaine, C. L. R., & Goldstein, N. E. S. “Juveniles’ Miranda comprehension: Understanding, appreciation, and totality of circumstances factors,” *Law and Human Behavior*, 39(3), 281–293. (2015). <https://doi.org/10.1037/lhb0000116>; see also <https://psycnet.apa.org/record/2014-55451-001>.

Despite young people's well-documented developmental incapacity, under New York law, police are still allowed to interrogate a child without a parent or guardian present, and to lie to a child to coerce them to waive their *Miranda* rights. Moreover, police are not required to allow a child to meet and talk with their parent or guardian before the police read the child their *Miranda* rights, nor are police required to explain to the child – or the child's parent or guardian – what the police want to question the child about, or to advise the child, parent or guardian that the child can stop answering questions any time they choose.

As a result, approximately 90% of youth who are arrested waive the right to remain silent. This police practice - of interrogating youth without providing them an attorney - has a disproportionate effect on Black or Latinx youth from over-surveilled schools and low socioeconomic communities. These youth, who make up the majority of those interrogated, lack the protection provided to their more affluent peers who typically have hired attorneys. It is time to level the playing field and provide every youth under the age of 18 with an attorney before they are interrogated. Other states have already enacted similar legislation including California, Washington, Maryland, and Hawaii. New York State must do so as well.

The Youth Interrogation Act would provide the protection our children need. When police determine that interrogation of a child is necessary, the bill would require that the child first consult with counsel (by phone, video or in person) before any questioning could take place. Consultation with a lawyer would be a non-waivable requirement that would exclude any statement taken in violation of the rule from being entered into evidence against the child.

In addition to safeguarding children's constitutional rights, this bill would help to protect the State and localities from expensive lawsuits by individuals who were wrongfully convicted based upon false confessions they made as children. Thirty-four percent of all exonerees who made false confessions from 1989 to 2020 were under 18 years old at the time of the alleged offense. Exonerees in New York who were wrongfully convicted for alleged offenses when they were under 18 have won almost \$77.5 million in compensatory civil damages since 2011.

Importantly, the NYPD could ensure that parents and counsel are available to youth during interrogations, but they choose not to do so. The City Council can urge the NYPD to change their tactics, regardless of a change in state law.

Additionally, we urge the City Council to throw their support behind the Youth Interrogation Act (S.1099A - Bailey/A.8923A - Hevesi) by passing a resolution in the bill's favor. The Youth Interrogation Act has garnered wide-spread support among members of both the Senate and the Assembly. It currently has 30 co-sponsors in the Senate and 48 co-sponsors in the Assembly. 2024 is the year for passage of this crucial legislation.

F. Protecting Evidence (Erie Basin Storage Facility Fire)

On June 20, 2023, NYCDS submitted written testimony related to the Erie Basin Storage Facility Fire for the City Council Committee on Public Safety Joint Oversight Hearing. The NYPD's handling of the Erie Basin Facility Fire in December 2022 raises deep concerns within our office about the safety and protection of all evidence in the NYPD's custody, not only at the Erie Basin

warehouse, but at police precincts and in other evidence storage facilities as well. In that testimony, we urged the NYPD to adopt evidence tracking systems successfully utilized by other jurisdictions.

NYCDS still demands that the NYPD disclose the full scope of the damage at the Erie Basin Storage Facility so that we may assess to what extent critical, possibly exonerating evidence in our clients' cases is permanently destroyed. More broadly, we demand to learn to what extent the Erie Basin fire was due to the NYPD's negligence. The Erie Basin Fire raises more serious concerns about the basic competence of the NYPD to safeguard vitally important evidence and property in its custody.

III. Conclusion

Thank you, Chair Salaam, for putting this hearing on the agenda and hearing our concerns about the ways that the NYPD continues to fall short of preventing wrongful convictions. We appreciate the Council's support in holding them to account and pushing them to do better by considering our policy recommendations.

If you have any questions about my testimony, please feel free to email policy@nycds.org.