Law Enforcement & Public Safety Committee
Special Meeting Minutes

DATE & TIME:	March 25, 2019 – 6:45 PM
LOCATION:	KL Binder Library, 6th Floor, County Office Building
PRESIDING OFFICER:	Chairwoman Lynn Eckert
LEGISLATIVE STAFF:	Jay Mahler, Deputy Clerk
PRESENT:	Legislators Bartels (left at 7:40 PM), Collins, Haynes & Ronk
ABSENT:	Legislator Heppner
QUORUM PRESENT:	Yes

OTHER ATTENDEES: Andrew Kossover – UC Public Defender, Cliff Owens – UC Assistant District Attorney, Director Schmidt – UC Probation, Sheriff Figueroa, Under Sheriff Benjamin, UCSEA President Matthew Russell, UCSEA Vice President Charles Swacuri – UC Sheriff's Office, Mr. Tom Kadgen – League of Women Voters

Chairwoman Eckert called the meeting to order at 6:52 PM.

Chairwoman Eckert thanked Public Defender Kossover for attending the meeting and stated that he was asked to attend to provide a different perspective on a number of the concerns with proposed criminal justice reforms highlighted by District Attorney Carnright at the committee's regular meeting on March 4th. She reminded the members that District Attorney Carnright presented his concerns with bail reform, and changes to speedy trial and discovery provisions proposed for inclusion in the NYS Budget.

Chairwoman Eckert turned the meeting over to Mr. Kossover. Mr. Kossover introduced himself, thanked the members for the opportunity to speak and informed them that he has served as the Ulster County Public Defender since 2000. He added that he is quite familiar with the proposals in Albany through his service as the Chair of the New York State Association of Criminal Defense Lawyers.

He provided the members with materials (appended to these minutes) which included: a compilation of articles on Criminal Justice Reform, information from the Repeal the Blindfold Coalition, a NYS Association of Criminal Defense Lawyers document supporting Discovery Reform, and a draft Memorializing Resolution calling on the NYS Legislature to overhaul pretrial laws. He added that a number of counties in New York have adopted similar memorializing resolutions.

He informed the members that there are a number of criminal justice reform measures being discussed in Albany in addition to the "big three" (Bail Reform, Discovery Reforms and Speedy Trail Reforms) such as solitary confinement rules and regulations and parole reforms.

Mr. Kossover stated that the current bail system is two tiered, adding that one tier is represented by individuals with money and the other tier is represented by those without. He explained that the current system has a disproportionately negative effect on people of color and poorer people. He informed the members that the elimination of cash bail will require an increase of pretrial services, which the county currently manages through the Probation Department. He advised the members that the county should not experience an increase in cases of people not appearing for court dates, as there

have been numerous studies demonstrating that most cases of non-appearance are because people simply forget. He added that Public Defenders have increased notification systems to help address that. He explained that District Attorneys are not supportive of the elimination of cash bail. He informed the members that there is language in the law to give judges discretion in instances where a specific threat to a victim may be present; such as in cases of domestic violence.

Mr. Kossover stated that his primary issue is with discovery. He explained that the current system provides opportunities for District Attorneys to withhold or not provide evidence until days before trials. Mr. Kossover added that proposed discovery reforms will require names of victims and witnesses be provided to the defense. He added that there has long been a disagreement between Public Defenders and District Attorneys about the risks associated with divulging names of victims or witness. He added that judges have the ability to grant protective orders to withhold victim and witness names, and attorneys can draft reports that are indicated as "For Attorney's Eyes Only." He informed the members that 48 other states have the same form of discovery laws as those now being proposed in New York.

He informed the members that he considers proposed reforms to speedy trial as common sense changes. He explained that everyone under the law is entitled to a speedy trail; essentially six months for a felony and ninety days for a misdemeanor. He explained that the clock stops once the District Attorney answers that they are "ready for trial." The proposed reform would eliminate the readiness provision. He advised the members that he has spoken to a number of former prosecutors who are in favor of the discovery reform bills, and asked the members if they had any questions.

Legislator Ronk stated that District Attorney Carnright advised the members that proposed changes to discovery laws could prevent him from trying cases when there are unavoidable delays in receiving results from overextended state crime labs. Mr. Kossover responded that the statute provides accommodations for delays caused by things like crime labs.

Mr. Owens from the District Attorney's Office stated that judges and lawyers alike consider risk of flight as well as an assessment of dangerousness when considering bail. Mr. Kossover stated that most other states consider dangerousness, or community safety, when they set bail. He added that, because of the law's presumption of innocence, judges cannot consider dangerousness when setting bail.

Sheriff Figueroa stated that law enforcement has concerns about reforms to bail taking away a judge's ability to use their knowledge of an individual to set reasonable bail amounts and to consider the safety of the community. The members discussed instances where a violent person could be released and immediately commit another crime, especially in instances of domestic violence. Mr. Kossover stated that the county will likely need to increase electronic monitoring and other pre-trial services. Legislator Ronk commented that, similar to state enactment of Raise the Age, there will be little financial assistance from the state.

Director Schmidt sated that the Department of Probation does not have the ability to instantaneously put someone on electronic monitoring. She added that it is not a fool proof method, especially in a county the size of Ulster. She advised the members that there are a number of areas in the county that do not have cell service, which limits the electronic monitoring abilities. She reported that some larger counties have staff dedicated solely to issuing electronic monitoring equipment, but Ulster does not have the volume of cases that would justify a full-time staff member.

Chairwoman Bartels asked if the Washington DC cashless bail procedure, which has been in place for a while, was reviewed. Mr. Kossover responded that Washington DC as well as laws in California, New Jersey, Colorado and others were considered when drafting the new legislation. He acknowledged that nothing is fool proof, but added that should not prevent laws being reformed to serve the greater good.

Sheriff Figueroa commented that his office does not have the staff to act as "warrant squads" to find individuals who do not appear for court dates.

Chairwoman Eckert explained that after hearing from District Attorney Carnright the members were considering reaching out to state lawmakers as a committee to express their support or opposition to the criminal justice reform proposals. She added that the impetus behind inviting Mr. Kossover was to hear another perspective on the proposed criminal justice reform before deciding what position the committee might take and whether or not to reach out to lawmakers.

Chairwoman Eckert stated that, after hearing from the District Attorney, Sheriff and Public Defender, she remained concerned about effects of the reforms on due process for both the prosecution and defense, as well as the characterization of some of the reforms as being anti-victim. She asked Mr. Kossover if he felt the reforms still offered an opportunity to both the prosecution and defense for true due process. Mr. Owens commented that the District Attorney's Office remains concerned with effects of the proposed reforms to bail and discovery on the public and victim's safety. Discussion ensued on the differences of opinion from the law enforcement and defense perspectives.

Mr. Kossover advised the members that the proposed reforms were debated and drafted by a State Bar and Task Force made up of prosecutors, defense attorneys, and judges. He emphasized that the reforms were developed with a focus on justice and striking a balance between law enforcement and individual rights.

Sheriff Figueroa stated that he has concerns about protecting witnesses with the proposed bail reforms. He added that witness intimidation is of particular concern. Legislator Haynes stated that these reforms are not new and have been introduced in Albany for many years. She added that the recent change in power of the state legislature is why the proposals are likely to be adopted. She commented that she did not believe that these reforms should part of the budget. Mr. Kossover stated that neither the Senate or Assembly felt the reforms should be a part of the budget. She expressed her concern about law enforcement's ability to conduct a sufficient background checks of an individual after arrest but before required release if bail is eliminated.

Legislator Ronk stated that District Attorney's probably agree with seventy percent of the proposed reforms to discovery and speedy trial. He added that he could understand, and most likely support the discovery and speedy trail reforms. He commented that he felt victims were not being given enough consideration in the bail reform proposals. Mr. Kossover stated that advancements in technology have offered many options for pre-trial monitoring. Director Schmidt advised the members that Ulster County has a crime victims program and commended the members for giving so much consideration to victims. She added that Crime Victim's Rights Week begins in two weeks and encouraged the members to participate in some of the activities the county will be offering.

Director Schmidt advised the members that the Probation Department currently works with staff at the Public Defender's Office to coordinate pretrial services, defender based advocacy and alternatives to incarceration programming, including mental health and rehabilitation services. She added that the enactment of bail reform proposals this year will have a measurable effect on the volume of cases her department will be responsible for. The members briefly discussed the overwhelming need for an increase in mental health services across the state and country.

Chairwoman Eckert commented that one of the disheartening aspects of the criminal justice system are racial and class disparities. She asked if Mr. Kossover felt the proposed reforms will do anything to address those disparities. Mr. Kossover responded that issue was one of the foundation blocks of the enactment of the proposed reforms. He added that, unfortunately, there are latent racial inequities in the court system. Chairwoman Eckert expressed her hope that the reforms will begin to level the playing field in the criminal justice system.

Legislator Ronk stated that he was not ready to reach out to state lawmakers against the reforms after hearing from District Attorney Carnright earlier in the month, and was not ready to reach out in support at this time. He thanked Mr. Kossover for making the time to speak to the committee. He added that leaders in both the Senate and Assembly have stated that they were not supportive of including the measures in the budget. Mr. Kossover commented that the Governor was working hard to have the measure included but agreed with Legislator Ronk that hastily crafted legislation can pose many problems.

The members thanked Mr. Kossover, Sheriff Figueroa and Mr. Carnright for taking the time to discuss and provide background on the topic. Mr. Kossover expressed his gratitude for the members' interest

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Chairwoman Eckert advised the members that the next regular meeting was scheduled for April 1st and asked if there was any other business, and hearing none;

Adjournment

Motion Made By: Legislator Ronk
Motion Seconded By: Legislator Haynes
No. of Votes in Favor: 4
No. of Votes Against: 0

TIME: 8:23 PM

Respectfully submitted: Jay Mahler, Deputy Clerk
Minutes Approved: May 6, 2019

The New York Times

Opinion

How to Make New York as Progressive on Criminal Justice as Texas

It's time for the state to end the system that leaves defendants in the dark about the evidence against them.

By The Editorial Board

Jan. 15, 2019

In New York, prosecutors operate within a draconian system that gives them free rein to leave defendants in the dark about aspects of their cases for months or even years.

In cases big and small, state law authorizes prosecutors to withhold key evidence from defense lawyers and their clients until the eve or sometimes the day of trial. Prosecutors in New York do not have a legal obligation to turn over in a timely fashion all police reports, witness names, DNA evidence, surveillance footage or anything else from their investigative files.

Though a 1963 Supreme Court decision found that prosecutors have a constitutional duty to turn over anything significant that may exonerate a defendant, that ruling has not been consistently enforced because prosecutors who flout the rule are rarely punished.

Advocates for defendants say this entrenched legal structure in New York puts a "blindfold" over the eyes of defense lawyers and their clients. And it runs up against Americans' basic understanding of how fairness is meant to work in the legal system.

By preventing access to even the simplest information about a pendingcase, prosecutors thumb their noses at the presumption of innocence that is owed to every person accused of a crime. They also run the risk of forcing the accused to make an impossible choice: Plead guilty with little to no information about their case or go to trial and risk an even harsher punishment.

New York's law means that cases take longer to resolve, leading to backlogs; that defense lawyers are unable to advise their clients about the charges against them, let alone guide them through an often life-altering process; and that wrongful convictions can occur, in both extreme and not-so-extreme cases.

Most states, including the law-and-order bastion Texas as well as North Carolina and New Jersey, have changed their laws and procedures to allow open and early disclosure

of evidence in criminal prosecutions, which has led to fairer outcomes and deterred prosecutorial abuse.

Now New York has a chance to join the mainstream on this issue.

By repealing the outmoded statute that allows for 11th-hour evidence disclosure and passing legislation [S.1716/A.1431] that would make access to this information automatic at or near the beginning of a criminal case, New York lawmakers could level the playing field for defendants and bring the state closer to its progressive ideals.

(Attorneys discuss the problems with New York's criminal discovery rules. Video available at: http://justiceisblindfolded.com/)

Prosecutors defend New York's current system not on its merits but with fearmongering, arguing that reforms will leave witnesses and victims at risk. Disclosing the identity of a person with direct knowledge of an incident under investigation, the thinking goes, would hamper the state's ability to protect him or her and to fight crime.

But there are sensible ways of dealing with witness safety concerns. The Brooklyn district attorney's office, which has for decades made its evidence files readily available, shows that reform is possible. Likewise, the states that have left the old model behind have seen no need to go back to it.

It's time for New York lawmakers to bring the rest of the state in line with this essential notion of justice.

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A version of this article appears in print on Jan. 16, 2019, on Page A22 of the New York edition with the headline: Take the Blindfold Off Defendants. Order Reprints | Today's Paper | Subscribe

Editorial available at: https://www.nytimes.com/2019/01/15/opinion/new-york-texas-criminal-justice.html

timesunion

Commentary: Broaden rules of discovery in New York

By Lori Cohen
Published 7:53 pm EST, Thursday, January 31, 2019

New York state's discovery rules in criminal cases, which guide what information in advance of a trial must be shared with the defense, are, as currently written, unfair, unreasonable and counterproductive. New York's criminal discovery procedures are set forth in a state law often dubbed "The Blindfold Law." In criminal cases, the current statutory system denies the defense access to critical evidence until the eve of trial. Police reports, witness statements, scientific data and minutes of grand jury presentations are often withheld from the defense until a trial begins, long past the time to make critical decisions and mount a proper defense based on an authentic investigation.

While discovery in civil cases is generous, criminal defendants are often not entitled to discovery materials until the start of trial. In civil cases, the parties have wide access to evidence possessed by their adversaries. Depositions and examinations-before-trial supply the parties with information that may lead either to a settlement or a decision to go to trial. Defendants facing life sentences are provided far less discovery than the parties in a civil case where penalties may amount to $25,000.

Gov. Andrew Cuomo and the state Legislature have signaled their desire to address the inequities in the present system and the New York State Association of Criminal Defense Attorneys applauds this necessary step toward improved due process. We urge that a statute be enacted granting broad, compulsory rules for discovery, violation of which would be enforced by a judge.

While it is often asserted that New York is a progressive state, in matters of criminal discovery it is, in fact, ranked as one of the states with the most restrictive discovery rules. New York shares the dubious distinction with South Carolina and Wyoming as having the most restrictive discovery rules in the country. By contrast, and in recognition that broad-minded discovery rules are essential for both fairness and efficiency, states including North Carolina and Texas have enacted fairer and more comprehensive rules of discovery.

Attorneys are best able to effectively advise their clients as to whether they should plead guilty or go to trial when the prosecution shares information on which to base that decision. Faced with evidence demonstrating the likelihood of conviction, a defendant may well choose to take a plea. In fact, the chief Resource Center of North Carolina reported that to be a direct result of open file discovery, which North Carolina enacted in 2004. Those findings were supported by a statewide study of North Carolina prosecutions. The New York City Mayor's Office of Criminal Justice has stated "standardized broader and earlier exchange of discovery materials can promote quicker case resolution."

The advantages of broad rules of discovery are clear. Failure to enact such rules would relegate New York state to the bottom of the heap in criminal justice reform. We applaud Gov. Cuomo and the state Legislature for their stated intentions to have New York stand as a progressive leader in criminal justice reform. Broad and full discovery, early in the process ensures there will be fair and equitable due process in New York state.

Lori Cohen is president of the New York State Association of Criminal Defense Attorneys.

December 17, 2018

POLITICO: Advocates for discovery reform plan new push in 2019

By Bill Mahoney
12/17/2018

Advocates for discovery reform will launch a new coalition on Monday in advance of a renewed push in next year's legislative session.

The effort will include a number of groups that are regularly involved in criminal justice reform efforts, such as the Legal Aid Society and Katal Center. But several organizations new to the reform effort have signed on, including District Council 37, Citizen Action of New York, and the New York Hotel Trades Council. Discovery refers to the ability of criminal defendants to know details about the evidence that will be brought against them in advance of a court case. Advocates argue that New York has one of the worst discovery laws in the country, making it harder for defendants to prepare for their day in court.

"Prosecutors can wait until just before trial to turn over the most basic evidence like witness names, witness statements, and police reports," said Rebecca Brown of the Innocence Project. "You're not even entitled to know who is accusing you. And this obviously has huge implications for the innocent, leading them to plead guilty to crimes they didn't commit."

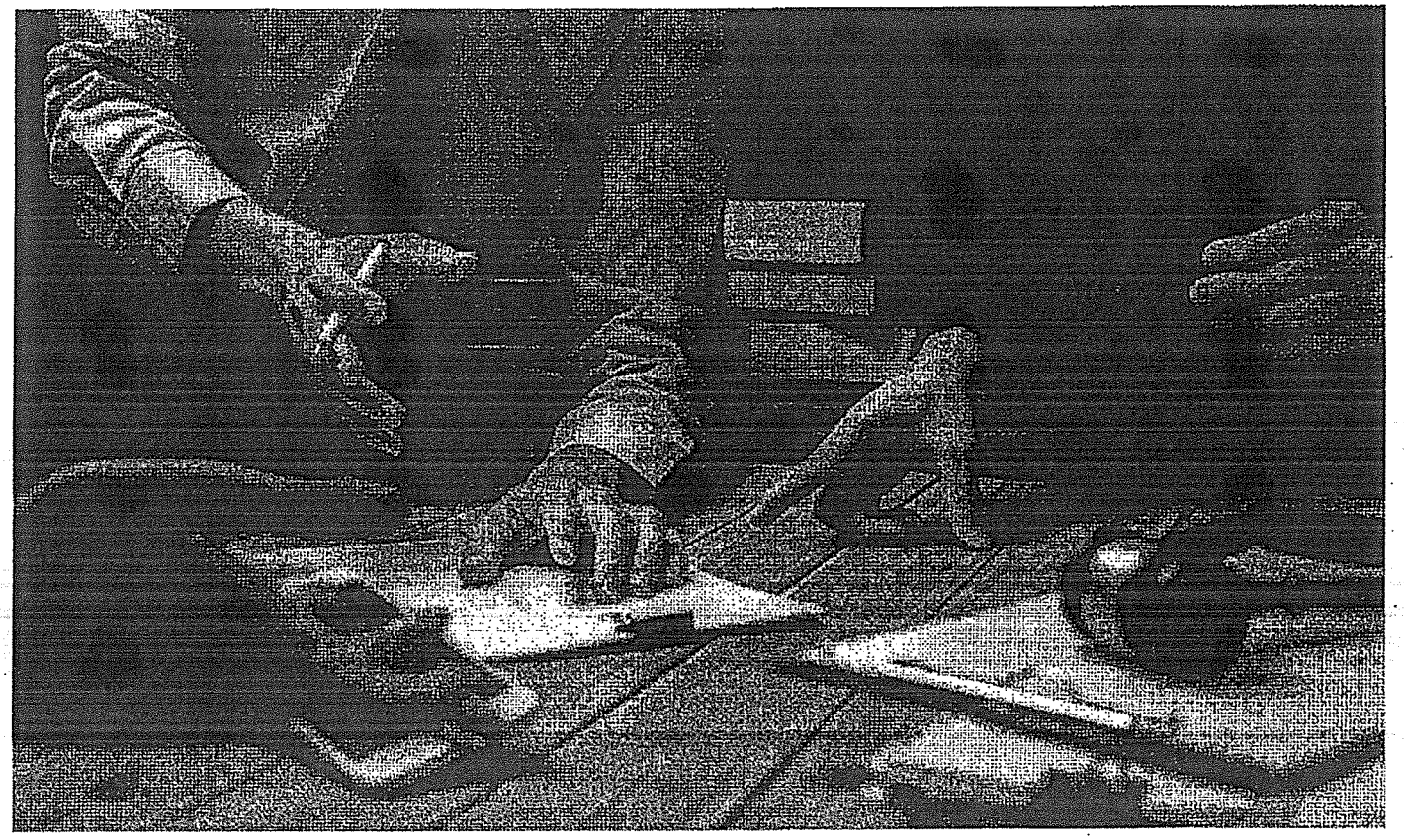
With Democrats poised to take control of the Senate, the odds of passage have gotten better.

The reform bill is sponsored in the upper chamber by Sen. Jamaal Bailey (D-Bronx), who will serve as the chair of the Codes Committee, which deals with criminal justice issues like discovery. Gov. Andrew Cuomo has backed reforms, although the details in a bill he introduced on the topic last year were criticized by advocates. Assemblyman Joe Lentol (D-Brooklyn) sponsored a more popular bill that passed his chamber last year, though it stalled in the Senate.

"We got a very good bill through the Assembly last session, and with the Democrats now in the majority in the Senate, we're confident we can work constructively with them to push similar legislation through that chamber," said Brown. "[We] are engaging all of the parties including the governor."

Supporters have launched multiple unsuccessful campaigns on this issue in recent years. The District Attorneys Association of the State of New York has opposed reform proposals in the past, saying that the legislation might increase the likelihood of witness tampering and intimidation.

CITY & STATE



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OPINION (/OPINION/OPINION)

New York needs a new criminal discovery law

The state's current 'blindfold law' unfairly disadvantages defendants.

By JAMAAL T. BAILEY (/author/jamaal-t-bailey), JOSEPH LENTOL (/author/joseph-lentol) | DECEMBER 26, 2018

In August 2015, Terrell Gills was arraigned on charges for a crime that he did not commit. He spent the next 18 months of his life in jail because of New York's antiquated discovery laws. If he were arrested almost anywhere else in the country, even in North Carolina or Texas, his defense team would have had access to basic evidence that would have proven his innocence and spared him jail time and a trial (https://www.nacdl.org/criminaldefense.aspx?id=31324&libID=31293). The discovery procedures that allow this to happen to thousands of innocent New Yorkers are an abomination.

New York's discovery procedures are outlined in a state law known as "The Blindfold Law," and it allows district attorneys to withhold police reports, grand jury minutes, witness statements and other evidence until the day a trial actually begins (https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html). This law prevents defendants from fully understanding the cases being brought against them, let alone mounting a fair defense against those charges.

Last year, we introduced a bill (S8707/A4360A (https://nyassembly.gov/leg/?bn=S08707&term=2017)) that remedies the effects of this antiquated law by requiring prosecutors to turn over discoverable evidence to the defense in a timely manner. This isn't a radical proposal – it's a common-sense one that almost every other state in this country has adopted, shamefully leaving New York as one of only four states with such outdated and unjust procedures.

As was the case with so many sensible measures, the Republicans controlling the New York state Senate and the powerful District Attorneys Association of New York prevented (https://theappeal.org/movement-to-reform-new-yorks-discovery-statute-faces-a-familiar-foe-prosecutors-4b2bd2f8ac/) our bill from advancing. With Democrats now in charge of the chamber, we have an opportunity to right this wrong.

When Gills was arrested, he was shocked to find out he was being accused of robbing a Dunkin' Donuts in Queens. His bail was set at $10,000 and he spent the next 18 months on Rikers Island. Gills declined any plea, refusing to confess to a crime that he didn't commit.

During that period, his defense attorneys at The Legal Aid Society learned of a string of Dunkin' Donuts robberies at two additional franchise locations in Queens which occurred during the same week that Gills was arrested.

Gills' attorneys repeatedly asked the prosecutor for information about the other two robberies, but each request was stonewalled. Finally, in February 2017, Gills got a break. The DA disclosed that a different person had been arrested for the other robberies and had pleaded guilty in January 2016. This person eventually confessed to the robbery for which Gills was charged.

Had the prosecutors disclosed this critical information about the other robberies to the defense early in the case, Gills' nightmare could have ended sooner. But New York's discovery law allowed prosecutors to withhold key evidence until the last second, blindfolding the defendant, and preventing him from defending himself against false charges without languishing in jail for a year and a half.

New York finally has a chance to catch up with so many other states and cities by instituting overdue reforms to its discovery procedures. We need a statewide, uniform model for these procedures that provides defendants timely access to all the evidence. Without such reforms, we will continue to see New Yorkers like Terrell Gills face wrongful charges, trials and even convictions.

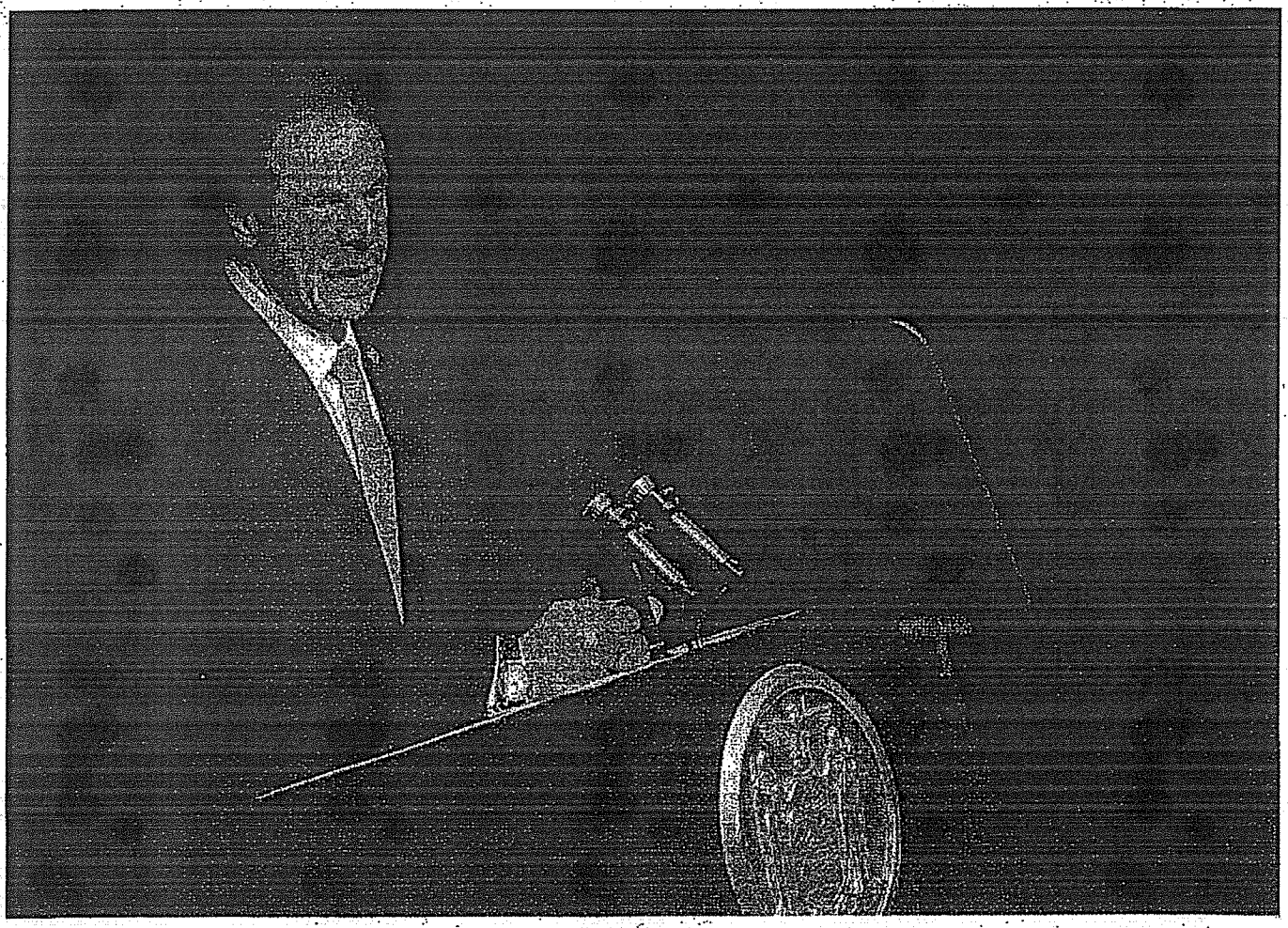
***Jamaal T. Bailey** is a Democrat who represents the 36th District in the state Senate. He represents New York's 36th state Senate District, which covers the Bronx neighborhoods of Norwood, Bedford Park, Williamsbridge, Co-op City, Wakefield and Baychester and the Westchester city of Mount Vernon.*

***Joseph Lentol** is a Democratic assemblyman in Brooklyn and chairman of the Assembly Codes Committee. He has represented North Brooklyn in the New York state Legislature since 1972.*

NEW YORK DAILY NEWS
OPINION

John Grisham: It's time to change New York's discovery laws now

By JOHN GRISHAM
JAN 29, 2019 | 5:45 PM



Let the accused see what they will face. (Hans Pennink / AP)

On Jan. 15, in his annual State of the State speech, Gov. Cuomo articulated his legislative priorities. Later that day, he introduced numerous bills that, if enacted, would codify his proposals into law. For criminal justice reform advocates, this date may prove to be among the most momentous days in the state's history.

That is because Cuomo introduced a bill that would radically change New York's severely outdated discovery laws, which dictate what information must be shared with the defense in advance of a plea agreement or trial.

The existing discovery laws are among the most regressive in the nation. The governor's proposal would mean that as far as New York's discovery rules go, the state would become a national leader overnight. A similar bill introduced on the same day by Sen. Jamaal Bailey of the Bronx and Assemblyman Joe Lentol of Brooklyn would largely have the same effect.

To understand how significant the governor's proposal is, one must understand how outdated New York's current discovery statute, derisively referred to by community groups, defense lawyers and advocates as "The Blindfold Law," is.

These rules keep defendants in the dark about the most basic elements of the evidence against them, sometimes literally until the day a trial begins. Currently only three other states — Louisiana, South Carolina and Wyoming — have more restrictive laws.

Under the governor's proposal, defendants will receive discovery upfront after a number of days from arrest, not months or even years as New York's current rules allow. With this information, defense attorneys would be able to defend their clients in real time and have the opportunity to actually investigate the evidence before trial.

In many cases, this new framework would assist in earlier plea agreements, helping to streamline the process and reduce court congestion.

Most importantly, the proposal would, in many cases, reduce pressure on people to plead guilty to crimes they didn't commit. This pressure is caused by what is known as the "trial penalty," the notion that defendants receive substantially longer sentences at trial than they would have through a plea bargain.

Given the current discovery framework, it is entirely rational for an innocent person to choose to plead guilty rather than go to trial, a much riskier endeavor without knowledge of the evidence that might be used against him or her.

More than 10% of the nation's DNA-based exonerations involved innocent men or women pleading guilty to serious crimes — mainly rape and murder cases — where entering a guilty plea could lead to decades in prison.

With open discovery, all defendants would know the evidence against them in a timely manner. Long gone would be the days where innocent people agree to plea agreements because they don't know what evidence prosecutors have in their

possession.

The politically potent state District Attorneys Association has long been vehemently opposed to any such reforms, citing concerns over witness safety. These protestations ring hollow for several reasons.

First, prosecutors from other states with open and early discovery laws are on record saying they believe in the fairness and feasibility of providing discovery and that they have the tools to protect witnesses.

Second, the governor has thoughtfully addressed these concerns in his proposal, which balances the needs of public safety and due process under our Constitution by enumerating ways in which judges can protect witnesses.

Finally, no state with more liberal discovery rules has rolled them back as their widespread use has actually been shown to benefit all corners of the criminal justice system by clarifying what evidence should be disclosed and when.

The late Mario Cuomo once famously said that politicians should campaign in poetry but govern in prose. The legislature and the governor must turn Andrew Cuomo's potentially transformational prose on discovery into law.

Grisham is author of "The Reckoning" and other books.

DISCOVERY FOR JUSTICE REFORM ACT

JUST BECAUSE JUSTICE IS BLIND, DOESN'T MEAN THAT DEFENDANTS SHOULD WALK INTO A COURTROOM BLINDFOLDED

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.
- More than 95% of cases never make it to trial; they either end in plea deals or dismissals. That means nearly everybody who is charged with a crime might never see all the evidence collected by police and prosecutors. In short, they are blindfolded.
- The "Blindfold Law" contributes to mass incarceration, wrongful convictions and court delays:
  - **Mass incarceration**: On any given day, approximately 25,000 people are held in local jails across New York State, most of whom are detained pre-trial, presumed innocent but unable to afford the bail set by the court. They may spend months or years inside awaiting trial without ever learning the basis of the charges against them.
  - **Wrongful convictions:** New York outpaces almost every other state in the number of wrongful convictions. While some innocent New Yorkers plead guilty to crimes under the threat of long prison sentences, many are wrongfully convicted at trial because their attorneys do not have the ability to investigate discovery materials in advance. In other cases, prosecutors actually withhold evidence that later proves a wrongfully convicted person's innocence.
  - **Court delays:** The Blindfold Law requires defense attorneys and prosecutors to argue over access to evidence in a long series of competing motions, which is time-consuming, expensive and unnecessary. While both sides litigate, witnesses, defendants and their families may be forced to return to court more than a dozen times, missing work or school or—for defendants who can't make bail—waiting out their case in a jail cell.

SOLUTION : Discovery for Justice Reform Act A.1431/S.1716

New York State should follow in the footsteps of every other major jurisdiction and require **OPEN, EARLY, and AUTOMATIC DISCOVERY.** Discovery for Justice Reform Act would improve fairness in the criminal legal system, save the state money, and bring New York in line with best practices around the country.

REPEAL THE BLINDFOLD COALITION

DISCOVERY FOR JUSTICE REFORM ACT

FAQs ABOUT REPEALING THE BLINDFOLD LAW AND ENACTING THE DISCOVERY FOR JUSTICE REFORM ACT A.1431/S.1716

WHAT IS DISCOVERY?

• Discovery is the process by which the law requires the parties in court cases to disclose their evidence to each other prior to a trial. In a criminal case, discovery materials include the evidence collected during the investigation and prosecution of the charges, such as police reports, statements of witnesses, scientific testing reports, video recordings, and exhibits.

• In civil cases when money is at stake, lawyers in New York get complete "discovery" of the opponent's case, and even the chance to interview all the witnesses in depositions. Pre-action discovery is even permitted.

• But in criminal cases where liberty is at stake, New York's current law does not require District Attorneys to turn over to defendants the police reports or witnesses' statements until the day trial actually begins. A person charged with a crime in New York doesn't even have a right to learn *who* is accusing them. This leaves defendants *blindfolded* to the evidence against them.

WHY SUPPORT CRIMINAL DISCOVERY REFORM?

• New York needs to bring its criminal discovery law in line with the rest of the country to ensure fairness and transparency in the criminal justice system. The law must require early discovery of police reports, witnesses and witness statements.

• Without access to discovery, while a person is awaiting trial, their defense attorney is unable to investigate the state's case against them or help innocent people to clear their names.

• Given that more than 95% of criminal cases end in a plea bargain, the vast majority of people accused of crimes may never see the evidence against them when making critical decisions about whether or not to accept a plea.

• New York is so far outside the mainstream that it's currently one of the *four states* with the most restrictive discovery rules – alongside Louisiana, South Carolina, and Wyoming.

• All states comparable to New York have long used broad and early discovery (such as New Jersey,

Massachusetts, and 35 others). This means that they turn over critical information like police reports and witness statement early on in the case, without requiring defendants to make motions to the court to obtain them.

• Traditionally Republican state governments, including Texas (2014), North Carolina (2004), and Ohio (2010), have enacted open discovery statutes in recent years, because they recognize it's essential for both fairness and efficiency.

• No state that has enacted more open discovery rules has later gone back to impose restrictive ones. These are well-tested, mainstream reforms that work.

• A 2016 study compared prosecutors' attitudes toward discovery in Virginia (a restrictive discovery state like New York) and North Carolina (which since 2004 has had open file discovery). 90% of North Carolina prosecutors approve of their open file system, citing increased efficiency, protection against inadvertent non-disclosure of exculpatory evidence, facilitating guilty pleas, and fairness and trust. It also found that "prosecutors in North Carolina tend not to see witness safety as a significant problem with open-file discovery," and that there is "little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice." (73 Wash. & Lee L. Rev. 285.)

• Broad discovery has already been shown to work in New York. The DAs in Brooklyn and a few other counties have *voluntarily* agreed to turn over the police reports and grand jury minutes to accused defendants in most cases for decades. Open discovery, when used, works in Brooklyn and it will work statewide. We need to change the law so that all District Attorneys are required to turn over discovery, because justice should not depend on where you are arrested.

BACKGROUND ON DISCOVERY FOR JUSTICE REFORM ACT A1431/S1716

• People have been fighting for this for over 40 years – why could it actually pass now?

  ▪ For the first time in 40 years, a broad number of organizations throughout the state have formed **Repeal the Blindfold Law Coalition**. The Coalition has united behind a single discovery reform proposal – **The Discovery for Justice Reform Act**. This coalition includes citizens' groups like Discovery for Justice, Vocal NY, JustLeadership USA, Citizens United, It Could Happen to You, Katal, to clergy, former NYPD officers, the Innocence Project, the Chief Defenders Association, Legal Aid, Brooklyn Defenders, Bronx Defenders and many others.

  ▪ The general public will no longer accept New York's being grouped with Louisiana, South Carolina, and Wyoming at the bottom nationally on this core criminal justice issue.

• Is there any Republican support on the issue of criminal discovery reform?

  ▪ Yes! It's been *mostly* a Republican issue nationally in recent decades. The last 3 states to enact broad discovery are Texas, North Carolina, and Ohio.

  ▪ As the Governor of Texas put it: "Texas is a law-and-order state, and with that comes a responsibility to make our judicial process as open as possible." States from every position on the political spectrum

use broad discovery. Fairness and efficiency are bipartisan.

- What would be the economic impacts of the Discovery for Justice Reform Act?

  - When DAs review their evidence earlier, they make fairer plea offers. And when guilty defendants can actually see the evidence against them, they accept pleas earlier in the case.

  - That means great cost savings for the state. Court backlogs clear up, and there's less costly pre-trial incarceration. Discovery reform will also eliminate much pointless paperwork that currently bogs down the system (discovery "demands" and motions).

  - As for the administrative costs of printing, copying and turning over materials, practitioners in other states report that they are outweighed by the great savings as more cases get disposed of by earlier guilty pleas. There's also far less time-consuming litigation over discovery disputes. The DAs offices simply hire a few clerks to print out documents and copy files (except for attorney work-product), and defense lawyers come pick them up.

- Is there data showing broad discovery results in earlier guilty pleas and is more efficient?

  - Because nearly all of the large states (except New York and Virginia) have used broad discovery for decades, it hasn't been studied much in the professional literature and there is virtually no hard data.

  - But there is very broad agreement anecdotally in other states that because the defense lawyer is able to show the defendant the evidence, the common result is earlier guilty pleas. The Chief Resource Prosecutor of North Carolina has reported this was the effect after that state enacted open file discovery in 2004, and that finding is confirmed by a 2016 study that surveyed North Carolina prosecutors statewide. (Note that Brooklyn's voluntary "open file" policy doesn't give good data because there's widespread untimely compliance by ADAs, which results from the lack of any statutory mandate for judges to enforce.)

- Will discovery reform help the Governor's and New York City Mayor's plan to close Rikers?

  - Yes. City and State officials have demonstrated their commitment to ending the horror of the Rikers Island jail, but will need to significantly decrease case processing times in order to move everyone off Rikers Island.

  - After objectively studying the issue, the Mayor's Office of Criminal Justice in NYC agreed in 2017 that "standardized broader and earlier exchange of discovery materials can promote quicker case resolutions."

  - Data from public defenders in Brooklyn show that in cases where discovery is turned over, cases resolve, on average, 6 months faster than in cases where it is not turned over.

  - Efforts to make cases move more quickly through the court system will continue to fail until defendants are entitled to the evidence against them, so that they can properly assess the government's case against them and make a timely and informed decision about a plea.

- Doesn't *Brady* already require discovery for the defense?
  - The *Brady* rule is important – but it's not working. Violations are routine and ongoing.
  - *Brady* also is extremely limited and hard to implement – it asks the DA who believes beyond a reasonable doubt that the defendant is *guilty* to recognize and turn over information showing he may be *innocent*. Discovery reform fixes the main *Brady* problems by removing those judgment-calls and requiring DAs to just turn over the police reports.
- Why can't you litigate this problem in the courts as a constitutional right?
  - Courts have ruled that discovery is up to legislatures – it's not a constitutional right.
- Why does the defense need to be given information about witnesses?
  - Disclosure of witness information is essential for case investigations and for informed decision-making – as every other state that has reformed its discovery rules has recognized. Under current New York law, the defense is required to turn over the names and addresses of its potential alibi defense witnesses early in the case, so that the DA can investigate and interview them. Everyone agrees that's basic to a fair system. The same is true for the DA's witnesses (unless there are credible safety concerns, when withholding would be allowed).
  - The constitution *requires* defense lawyers to try to meaningfully investigate the case – and even under the "Blindfold Law," often the defense is able to locate and interview witnesses. But the "Blindfold Law" creates a wasteful system where taxpayers pay one party to hide the information, and the other party to waste limited resources trying to uncover it. (Witnesses are never obligated to talk to an investigator – but in practice, most witnesses do want to discuss the case, when approached professionally and respectfully.)
- Would repealing the "Blindfold Law" jeopardize witnesses, or reporting of crimes?
  - No. The Discovery for Justice Reform Act was specifically drafted to address those concerns. It includes measure for protecting witnesses (as needed) that have been used in the 50 states. All materials are subject to withholding by "protective order" if any factor outweighs the usefulness of the discovery, and there are many other provisions to ensure witness safety.
  - Broad discovery has been proven to work nationwide, including in large cities such as Los Angeles, Houston, Boston, Miami, Chicago, Newark, Detroit and others. When DAs from states with broad discovery come to New York, they say they strongly support it – it's more fair and efficient, they have the tools to protect witnesses, and they can't understand why some New York DAs still *oppose* it. These rules would not have continued in place for decades if they resulted in widespread problems jeopardizing witnesses or reporting crimes.
  - For example, when the Pennsylvania legislature established a statewide Task Force on witness intimidation in 2013, its report urged prosecutors to provide *even earlier discovery*. No member – in either the majority or dissenting statements – suggested changing the state's broad discovery rules.

- Even in New York, the DAs in every county (except Manhattan) already routinely disclose the name of the complainant in the charging document in nearly all cases – which shows that "witness safety" claims are overblown. The few DAs who sensationalize witness safety risks act as if every case is a "gang" case – but they aren't!

- If the opponents of open discovery truly believe that providing expanded discovery is dangerous, then why aren't they moving to *ban the practice* by their many fellow New York District Attorneys who already provide it (such as the Brooklyn DA and others)?

- What specific things does the Discovery for Justice Reform Act do to ensure safety of witnesses?
  - **ANY DISCOVERY IS SUBJECT TO A PROTECTIVE ORDER.** A showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate.
  - The court may impose as a condition on discovery to defendant that the material or information to be discovered be available only to counsel for the defendant.
  - Good cause under this section may include constitutional rights or limitations; danger to the integrity of physical evidence; a substantial risk of physical harm, intimidation, economic reprisal, or bribery; a substantial risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants; danger to a specified person stemming from factors such as a defendant's gang affiliation, prior history of interfering with witnesses, or threats or intimidating actions directed at potential witnesses; or other similar factors that also outweigh the usefulness of the discovery.
  - A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order, may obtain an expedited review of the ruling by the intermediate appellate court.

- Why does the Discovery for Justice Reform Act require prosecutors to disclose "all" witnesses who have relevant information about the case, rather than only their "intended" witnesses?

  - The Discovery for Justice Reform Act requires disclosure of written/recorded statements by all persons who the prosecutor knows have relevant information about a charged offense or potential defense, regardless of whether the prosecutor considers the content exculpatory or intends to have the witness testify at trial. This standard, which is currently used in several States (*e.g.*, New Jersey; Florida; Minnesota; etc.), is based on recognition that potential witnesses for the defendant who are known to the prosecution should not in effect be hidden from the defense.

  - The effect of this standard is to remove the subjective determination of whether a given statement is exculpatory or not – all relevant statements will be disclosed. This will minimize "gamesmanship" in the discovery process, such as the prosecutor's selectively designating only certain witnesses as "intended" so as to prevent the defendant from obtaining written or recorded statements made by other witnesses. It is also designed to help to avoid constitutional violations, since it requires disclosure of potentially exculpatory ("*Brady*") witnesses.

- Doesn't early discovery let defendants "tailor" false stories?

- That idea is by now widely discredited, and even opponents of repealing the "Blindfold Law" don't argue that. The legislatures in Texas, North Carolina and elsewhere rejected it. Also, discovery takes place after indictment – and before a defendant testifies – anyway.

- Does the Discovery for Justice Reform Act require DAs to disclose their "attorney work product"?

  - No. It keeps an exemption for "work product," just like under current New York law. Opinions, conclusions, and theories of the prosecutor are not discoverable.

- The Discovery for Justice Reform Act repeals the entire statute – isn't there a way to amend CPL 240?

  - The NYSBA Task Force studied this issue and determined that amending the current statute would be impracticable. You can't take a fundamentally restrictive statute and transform it into an open statute.

- Where did the "bottom 4 states" information come from (LA, SC, WY and NY)?

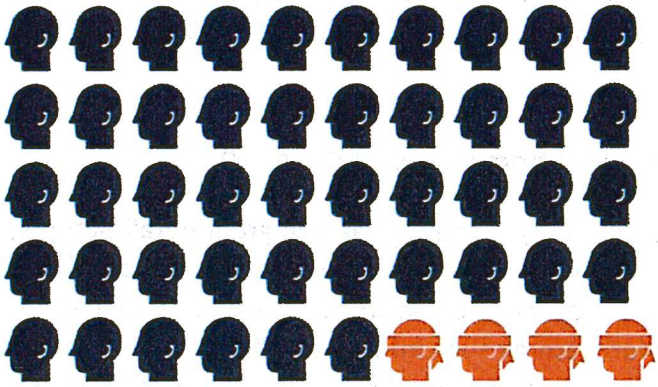
  - The NYSBA Task Force's report examined discovery in the 50 states in great detail. Although a major criminal procedure treatise had put New York in the "bottom 14," the Task Force found that actually in ten states whose main discovery statute does not require DAs to disclose witnesses' names and addresses, other procedures are available for learning such information (*e.g.*, either it must be included in the indictment, or there are required preliminary hearings – unlike in New York) (*see* NYSBA report, footnotes 4 and 17).

- What about the discovery rules in the federal system – how does it work there?

  - The federal system closely resembles New York's "Blindfold Law" – so it's also fundamentally flawed. By now, 35 states have rejected that unfair and inefficient model.

DISCOVERY FOR JUSTICE REFORM ACT

New York Is One of A Handful of States that Provides Defendants the Least Discovery!



New York Is Among the **FOUR STATES** With the Most Restrictive Discovery Rules –

Along With Louisiana, South Carolina, and Wyoming!

New York's Current "Blindfold Law" Does Not Require Prosecutors to Turn Over Police Reports or Other Witness Statements Until the Day A Trial Begins

- Under New York's "Blindfold Law," You Are Not Even Entitled To Know WHO Is Accusing You
  - Currently It Is the Manhattan D.A.'s Standard Practice In Felony Cases NOT To Disclose Even That Most Basic Information, But To Tell Defendants Only That "A Person Known to Grand Jury" Has Accused Them

Nearly Every Other State Has Expanded Discovery

- Even Texas and North Carolina Recently Adopted "Open Discovery" Statutes Requiring Prosecutors to Disclose ALL Police Reports and ALL Witness Statements Early In the Case
- Without Discovery, It Is Often Impossible to Perform A Meaningful and Timely Investigation of the Case to Prepare for Trial or to Secure Favorable Evidence for the Defendant

REPEAL THE BLINDFOLD COALITION

DISCOVERY FOR JUSTICE REFORM ACT

Broader and Earlier Discovery Is Badly Needed for:

- **Meaningful Case Investigations and Trial Preparations**
- **Improving the Reliability of the System**
- **Informed Decision-Making About Pleas**
- **Fairness and Efficiency**

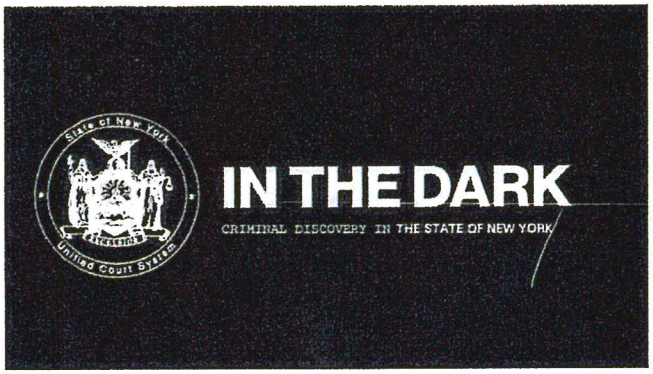
Under the Discovery for Justice Reform Act A.1431/S.1716:

- Certain Items in Prosecution's possession (ex: police reports, witness statements, exculpatory information) would be disclosed at the defendant's first court appearance after commencement of a criminal action.
- For any additional evidence, Prosecutor would be required to disclose as soon as practicable, but no later than **15 days** after the defendant's arraignment (with automatic extensions for certain kinds of information).
- Discoverable evidence will include police reports, expert reports, grand jury minutes, witness statements, witness information, and other items that are routinely used in trials.
- In most cases **prior to a plea deal**, Prosecutor must **disclose all evidence** pertaining to charged offense.
- All discoverable evidence will be required to be disclosed **AUTOMATICALLY.**
- All discoverable evidence will be subject to **PROTECTIVE ORDER.**

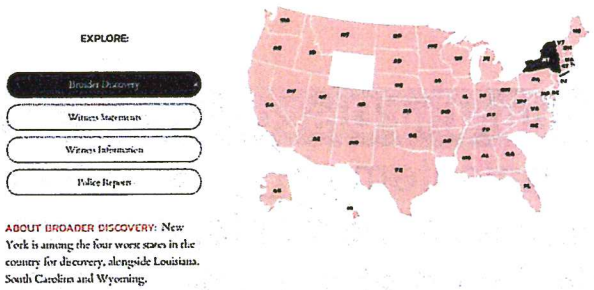
REPEAL THE BLINDFOLD COALITION

VISIT JUSTICEISBLINDFOLDED.COM THE SITE FEATURES:

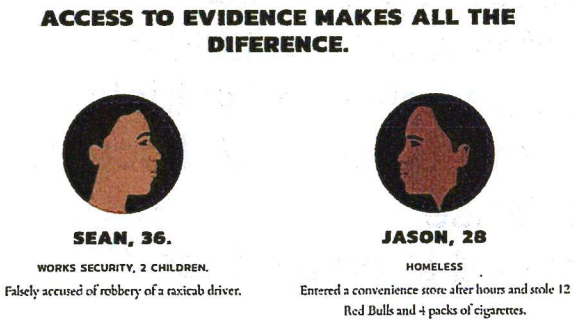
1 Filmed stories from NY public defenders and community members discussing the impact of discovery



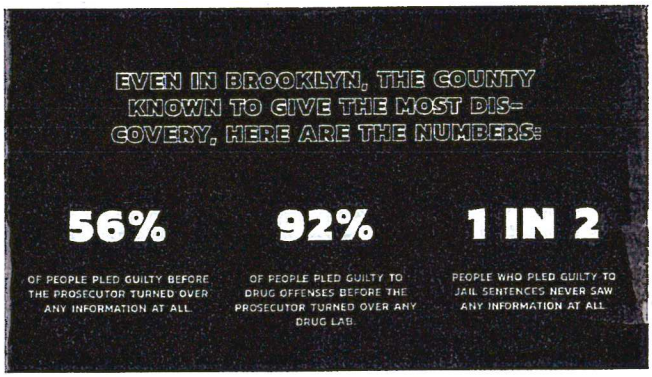
2 Maps highlighting New York's status as having one of the four most unfair discovery laws in the country



3 Side-by-side comparisons of criminal case outcomes with and without discovery



4 New statistics showing the prevalence of pleading guilty without any information



REPEAL THE BLINDFOLD COALITION

NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | *Founded in 1986*

THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Supports A1431/S1716

February 5, 2019

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a statewide bar association responsive to the needs of both private practitioners and public defenders and dedicated to assuring the protection of individual rights and liberties for all. Our membership includes lawyers from throughout the State of New York. Many of our members have held positions of prominence in the New York State Bar Association and National Association of Criminal Defense Lawyers.

NYSACDL supports the drastic need for Discovery Reform in New York State. This one issue continues to be the single most important legislative initiative of our Association. No other issue so fundamentally influences the fairness of New York's criminal justice system. Discovery affects virtually every single case in our criminal courts. It has been 40 years since any meaningful revision to Article 240 of the Criminal Procedure Law, the statute that controls pre-trial discovery in criminal cases. During the past 40 years, we have learned that New York's antiquated discovery rules contribute to wrongful indictments, wrongful convictions, and uninformed guesswork by defense attorneys unable to meet the high standards of representation expected in our profession.

Many are undoubtedly familiar with the robust civil discovery provisions of New York's Civil Procedure Law & Rules (commonly referred to as the CPLR). When money is at stake, New York authorizes pre-trial depositions of the parties to the litigation and even non-parties, such as potential witnesses and experts. All

documentary evidence is exchanged months in advance of said depositions and trials. Conversely, when an individual's liberty is at stake, pre-trial discovery is severely limited. In jurisdictions where the elected District Attorney does not volunteer "open file discovery," criminal cases, as United States Supreme Court Justice William J. Brennan observed, are best described as a "trial by ambush;" not a search for the truth.

It is not uncommon for defense attorneys to be provided hundreds, if not thousands, of pages of paper consisting of police reports, witness statements, scientific data, and minutes of grand jury presentations. This is long past the time to make critical decisions, intelligently assess a case and counsel a client whether to resolve the case by plea disposition, or mount a proper defense based upon an authentic investigation. Yet, that last minute disclosure or "trial by ambush" is what the current law permits. If civil attorneys proceeded in litigation with as little disclosure as currently conducted in criminal cases, it would be considered legal malpractice.

In other jurisdictions where modern-day discovery rules have been adopted, we have seen earlier plea dispositions and fairer proceedings. This provides earlier and more efficient closure to both victims and the accused at less expense than before discovery reform.

The District Attorneys Association of the State of New York (DAASNY) opposes discovery reform based upon their concern for the safety of victims and witnesses if their identification and contact information is disclosed early in the discovery process. As has been the experience in other jurisdictions which have enacted meaningful discovery reform, if there is a realistic threat to a victim or witness, the prosecutor and defense attorney generally will be able to agree to disclosure terms safeguarding the release of the victim's/witness' identity or contact information. In the rare case when the prosecutor and defense attorney are unable to agree, the prosecutor retains the option to seek judicial intervention and request a protective order from the presiding judge to shield the victim or witness from intimidation or harm.

A1431/ S1716 also ensures that evidence can be meaningfully assessed by removing discretionary disclosure decisions prosecutors had to make in the past. Now, all of the guesswork has been removed about what information must be disclosed to the defense, eliminating the inadvertent or intentional suppression of potentially exculpatory evidence, which happens much more commonly than should be acceptable. All one has to do is witness the number of weekly exonerations of wrongfully convicted humans who have spent years behind bars because of the failure of our justice system to provide early and meaningful discovery.

This Bill's early broad and full discovery is a bedrock principle, already adopted by conservative states such as Texas, Virginia, and North Carolina, which would enable fair and equitable due process in New York State, the same as has been proudly achieved in forty-six other states with more modern rules of criminal discovery than currently exists in New York

In such a system, everyone wins, including prosecutors, law enforcement, victims, the accused, and all the citizens of New York State who will be rewarded with greater confidence in the fairness of our criminal justice system.

Draft Resolution

From the Ulster County Legislature
A Resolution Calling on the New York State Legislature to Overhaul Pretrial Laws

WHEREAS on any given day, 21,000 New Yorkers languish behind bars in jails across the state and every year, 162,000 New Yorkers are incarcerated in county jails outside of New York City;

WHEREAS 67% of the people incarcerated in New York's county jails are– legally innocent and overwhelmingly detained pretrial because they cannot afford bail;

WHEREAS, New York's money bail system drives mass jailing and discriminatory wealth- and raced-based detention;

WHEREAS, the presumption of innocence is a Constitutional guarantee that all people have the right to be considered innocent until proven guilty;

WHEREAS New York's current discovery law denies people facing criminal charges access to critical evidence about their case, impedes their ability to make informed case decisions and fails to protect Constitutionally granted rights to a fair and speedy trial and to Due Process;

WHEREAS racial disparity and socio-economic discrimination are rampant throughout the pretrial system and at all points of the pretrial process, and both statistical and qualitative evidence show that even brief periods of pretrial incarceration result in cyclical harm and structural instability for individuals, families and communities;

WHEREAS New York's jail system costs counties across the State approximately $2.5 billion per year;

WHEREAS, in Ulster County, an average 240 people – approximately 62% of whom are pretrial - languish in jail each day at a cost of over 22 million dollars annually;

WHEREAS structural overhaul of bail, discovery, and speedy trial laws in order to address a biased, injustice and misguided pretrial system are all possible through legislative action;

and WHEREAS bail overhaul legislation S.2101/A.2726 and discovery overhaul legislation S.1716/A.1431 are currently before the New York State Legislature,

BE IT RESOLVED that the Ulster County Legislature expresses its support for the bills referenced above and for the principles contained within those bills, including a transformed pretrial system that protects the presumption of innocence and ensures due process for all people; and be it further

RESOLVED that this Legislature urges our State elected officials to support a complete elimination money bail and a pretrial system that treats all people accused of crimes as worthy of release, fairness and the presumption of innocence. Every person whose case is under consideration for detention must be afforded a robust, evidentiary, individualized hearing, with neither broad preventive detention nor harmful technology – like algorithm-based risk assessment tools, electronic and GPS monitoring, etc. – taking the place of money bail.

RESOLVED that this Legislature urges our state elected officials to support a complete overhaul of New York's discovery law so that expanded discovery material is mandated to be turned over, automatically and without redactions, to people accused of a crime at the outset of the criminal procedure process;

Draft Resolution

RESOLVED that this Legislature urges our state elected officials to support the implementation of a true speedy trial law in New York State that captures and fulfills the ideals contained within the 6th amendment to the United States Constitution which guarantees a "fair and speedy trial"; and

RESOLVED that this Legislature urges our state elected officials to support the reinvestment of savings generated by these reforms back into communities most directly targeted or impacted by the criminal justice system in New York State.