The Bronx Defenders Redefining public defense

The New York State Senate
Standing Committee on Codes
Hearing on the Implementation of Pre-Trial Reform
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Testimony of Scott D. Levy, Chief Policy Counsel
THE BRONX DEFENDERS

Chairman Bailey and members of the Standing Committee on Codes, my name is Scott Levy and I am Chief Policy Counsel at The Bronx Defenders. The Bronx Defenders ("BxD") has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 21,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

Introduction

This spring, New York passed historic comprehensive discovery reform. BxD applauds the New York State Assembly, Senate, and the Governor — Senator Bailey and Assembly Member Lentol, in particular — for their commitment to get this piece of landmark legislation passed. The Discovery for Justice Reform Act (DFJRA) repealed one of the most regressive discovery laws in the country and replaced it with a system of open, early, and automatic discovery for all New Yorkers. With the enactment of the Act, New York went from the bottom of the pile to the top of the heap. The reform was made possible by the work over many years of a broad coalition of people directly impacted by the criminal legal system, public defenders, grassroots organizations, and criminal justice advocates from across New York.

As we look forward to implementation of the new law, it is important to remember what brought us to this point. For years, our clients — overwhelmingly people of color — have had to make one of the biggest decisions of their lives, whether to go to trial or plead guilty, in the dark. They have had to

make this decision without knowing who the witnesses in their case are, what the evidence is against them is, and whether there is evidence that helps prove their innocence. Still, as we sit here now, prosecutors in New York are not even required to turn over basic police reports and witness statements until the day of trial, if at all. New York's discovery rules have acted more as a blindfold than a guarantor of justice.

Because of the work of the people in this room, however, on January 1, 2020 all of that will change. Our clients will finally have access to early, open, and automatic discovery in their cases. The DFJRA codifies core principles of a fair and just system of discovery:

- **Discovery must be shared before guilty pleas:** Only a tiny fraction of cases in the criminal justice system end with a trial. The vast majority of cases are resolved by guilty pleas. Under current law, New York's discovery rules do nothing to guarantee transparency, and as a result, hundreds of thousands of New Yorkers serve jail and prison sentences and/or are subjected to collateral consequences such as deportation, loss of employment, ineligibility for student loans, and eviction, without ever seeing the evidence in their cases. The DFJRA remedies this by requiring prosecutors to turn over information before any guilty plea so that the accused can make an informed decision about whether to plead guilty or go to trial.

- **Discovery must be early and automatic:** Discovery must be disclosed early in the court process. Under New York's current discovery law, a prosecutor may wait until after the trial begins to turn over most of their evidence, including witness names, their statements, and their criminal records. People accused of crimes and and their counsel need discovery early enough to make informed decisions, investigate their cases, and prepare for trial. Prosecutors begin assembling a case against the accused before they have even filed charges; they use the material in their possession to make key decisions, such as whether to make plea offers, within the first few days of the case. Those facing criminal charges need that same discovery at the first court appearance so that they, too, can make the essential decisions which will affect the rest of their case and, possibly, the rest of their lives. The DFJRA ensures that people accused of crimes receive all relevant information within 15 days of initial arraignment.

- **Discovery must be open:** Open discovery means complete discovery; in other words, if it is in the prosecutor's file, it should be turned over to the defense. Under the DFJRA, prosecutors must share all relevant evidence with the defense, including names and contact information of all witnesses, not just those who will be called by the prosecution to testify; all witness statements; all police reports; videos; photographs; and test results. These materials must be unredacted unless the material is protected by privilege or court order. Incomplete discovery undermines transparency and trust in the criminal justice system, leads to wrongful convictions, and prevents defense attorneys from fulfilling our core duties — investigating the case, giving clients meaningful advice on the merits of a plea bargain, and preparing for trial.

As we have already seen, this historic victory is already under attack. There is a steady drip of op-eds and other pieces in the media, coming primarily from law enforcement, warning of the chaos that will ensue when the DFJRA goes into effect next year. The primary target of the criticism has been the

DFJRA's requirement that prosecutors share witness contact information with defense counsel. This type of fear mongering is not new. Throughout the years-long debate on discovery reform in New York, opponents have attempted to thwart meaningful change through scare tactics. And every time, these objections have been shown to be baseless. This hearing is no different. We are here today to celebrate an important victory for our clients, their families, and their communities, but also to implore you to protect these hard-fought gains. Looking forward, the Legislature should:

- Encourage prosecutors to honor the spirit and letter of the law and reject the use of "witness portals"; and
- Reject calls to re-open or renegotiate the provisions of the DFJRA.

New York is poised to become the national leader in criminal justice reform nationwide. We thank you for this opportunity to talk about how to ensure that the promise of the DFJRA becomes a reality for our clients.

The Legislature Must Be Vigilant for Efforts to Undermine the Spirit and Letter of the Law

For decades, New York has operated under a "trial by ambush" model of criminal discovery. Prosecutors were not required to turn over even basic police paperwork to people accused of crimes and facing trial, and what little information they were required to provide did not need to be turned over until the eve of trial. Our clients were regularly forced to choose between plea bargains — some resulting in years of incarceration — and facing trial without any real understanding of the evidence against them. The blindfolding of our clients led to a deeply unjust power imbalance in the criminal courts, giving prosecutors immense and illegitimate leverage in plea negotiations.

Full Transparency in Criminal Cases

The DFJRA represents a sea change in the way information is shared in the criminal legal system, requiring prosecutors to engage in early, open, and automatic discovery in every case. The plain language of the statute makes clear that the aim of discovery reform was leveling the playing field and full transparency. Section 245.20(1) of the new law requires prosecutors to disclose "all items and information that relate to the subject matter of the case" in the possession of law enforcement within 15 days of criminal court arraignment. Section 245.20(7) also requires judges to apply a "presumption in favor of disclosure" when interpreting the statute. Together, these provisions create a framework for full transparency in criminal cases.

Predictably, however, prosecutors have already begun to strategize ways to undermine these provisions and thwart the intent of the new law. The New York Prosecutors Training Institute (NYPTI) — created by the District Attorneys Association of New York (DAASNY) to educate and train New

York prosecutors — recently issued a manual on the 2019 criminal justice reforms. The manual's purported objective is "to identify practical, procedural, and technical 'gaps' in the legislation and provide equally practical solutions to those gaps." These "solutions" are presented in the form of practice tips and recommendations on how to delay the provision of discovery, withhold certain types of evidence, and circumvent the spirit of the DFJRA.

For instance, the NYPTI manual suggests that prosecutors designate civilian witnesses as "confidential informants" in order to withhold the provision of their contact information to defense counsel. It notes that the term "confidential informant" has no current definition under the law, and urges prosecutors to interpret it as broadly as possible. In addition, the manual urges prosecutors to strategically file motions in order to stop the speedy trial clock and delay handing discovery over in a timely manner. It notes that when a motion to extend the time to provide discovery due to "exceptional circumstances" is filed, the time to decide the motion will be excluded from the speedy trial calculation whether or not the motion has any merit. These so-called "solutions" are simply efforts to avoid providing full and fair discovery and should be seen as an effort to thwart the implementation of discovery reform. The Legislature should monitor these efforts to subvert the intent of discovery reform and should use its oversight powers to hold prosecutors accountable.

Disclosure of Witness Contact Information

Critically, the DFJRA also requires prosecutors to disclose the "names and adequate contact information" for all non-law enforcement witnesses. Contact information for witnesses enables the accused and their counsel to fully and properly investigate the criminal allegations, evaluate the strength of the prosecutor's case, weigh plea bargain offers, and prepare for trial and effective cross-examination. The DFJRA's witness contact information provisions are in line with the recommendations of the American Bar Association, The New York State Bar Association, and the New York State Justice Task Force. And, importantly, the DFJRA provides straightforward and commonsense protections for witnesses in the form of lenient standards for protective orders whenever a judge determine that disclosure of contact information would threaten witness safety.

Prosecutors across New York have tried to stoke irrational fears to undermine these provisions. There has been a steady stream of op-eds from district attorneys deploying scare tactics.[1] And, as noted above, the NYPTI manual suggests that prosecutors broadly interpret the term "confidential informant" in order to withhold the provision of witness contact information under that exception. In addition, some prosecutors have indicated that they will "paper the courts" by filing motions for protective orders to withhold witness contact information in nearly every case, despite the fact that the

[1] *See, e.g.,* Michael E.McMahon, "State Reforms Would Give Thugs Keys to this City," SI Live, May 15, 2019, *available at* https://www.silive.com/news/2019/05/state-reforms-would-give-thugs-keys-to-this-city-commentary.html.

law only allows for an order when there is "good cause" to issue one. These efforts undermine the DFJRA before it even goes into effect.

Contrary to this fearmongering, the DFJRA's witness contact information provisions strike the proper balance between the need for full transparency and fairness and the need to protect potential witnesses. Indeed, the substance of the DFJRA's witness information provisions has been endorsed by prosecutors from other jurisdictions with similar provisions as well as crime survivor advocates here in New York. Under the DFJRA, judges and prosecutors will have ample tools at their disposal to protect witnesses and complainants whenever the circumstances call for it.

Moreover, contrary to the claims of many prosecutors, the new statute will not result in a flood of litigation over the necessity of protective orders (unless prosecutors opt to file frivolous motions to obstruct discovery). As the experience of numerous other jurisdictions shows, judicial intervention is almost never required. Instead, in the vast majority of cases prosecutors and defense attorneys are able to resolve conflicts over the disclosure of witness information without the involvement of a judge. As one Texas judge put it,

> Prosecutors who oppose discovery reform often set forth a concern for the safety of victims and witnesses if their identification and contact information were to be disclosed early in the discovery process. Our experience in Texas is that if there is a realistic threat to a victim or witness, the prosecutor and defense attorney are generally able to agree to disclosure terms safeguarding the person's 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. In five years working with open file discovery, I have never seen this system jeopardize the safety of a victim or witness.[2]

Claims that the new law will put witnesses at risk or inundate the courts with litigation over protective orders are simply unfounded.

Electronic "Witness Portal" Applications Are an End-Run Around the New Statute

In response to the DFJRA, New York City prosecutors have indicated that starting on January 1, 2020 they intend to start using a digital application — a "witness portal" — through which criminal defense attorneys can contact witnesses in their respective cases as an alternative to providing adequate contact information. According to prosecutors, the witness portal will be operated by a third party vendor and will provide a list of names of all witnesses associated with a particular case without any additional contact information. Instead, the witness portal will give defense counsel an option to contact each

[2] Letter from the Honorable Beckie Palomo, District Court Judge, 341st State District Court, Texas, Feb. 7, 2018.

witness either via a telephone call or text message. Once defense counsel makes a selection as to which method they wish to use, the application will contact the witness. Defense counsel is never provided with the witness's direct contact information. Separately, law enforcement will notify the witness in advance of this call or text that a "defense attorney" will try to contact them, but that their contact information will be hidden. The witness can either choose to answer or ignore defense counsel's attempt to communicate. If the call or text is answered, defense counsel will have no way of verifying that the person answering the call or text is in fact a witness in the case. If the call or text is ignored, defense counsel will have no way of knowing if it was ever received. It is our understanding that this portal will be used even when there is no need for any kind of protective order — even a *limited* protective order — as envisioned by the new law.

The witness portal is an obvious attempt to subvert the intent of one of the most important and fully negotiated parts of the new discovery law. Rather than comply with the clear intent of the law — full transparency and a level playing field — prosecutors are now trying to maintain control over critical pieces of information and to regulate defense attorneys' investigation of their clients' cases. The Legislature, however, has already rejected language allowing for the use of such a portal as a method of communicating with witnesses. DAASNY vigorously opposed disclosing any witness contact information to defense attorneys. In an effort to reach a compromise,prosecutors proposed using a secure online portal in lieu of providing contact information. This proposal was submitted to the Executive and shared with the Assembly and Senate at the end of February 2019. The Legislature rejected that proposal and instead adopted the language in the final bill that requires prosecutors to provide "adequate contact information" but not a physical address absent a court order. The ultimate compromise reflected the Legislature's intent to ensure defense counsel's ability to properly investigate cases without inappropriate intervention from prosecutors.

Discovery Reform Was Exhaustively Vetted and Should Not Be Renegotiated After-the-Fact

There is no reason to revisit the DFJRA. It is critical to remember that the DFJRA did not just appear overnight. Prior to the passage of the DFJRA, New York's discovery laws had not been meaningfully changed since 1979. In the 40 years following, there was a constant drumbeat for reform from impacted people, defense attorneys, and the broader criminal justice advocacy community. The passage of the DFJRA was not an aberration or hasty last-minute addition to the State budget; it was the product of a rigorous and exhaustive years-long debate involving prosecutors, law enforcement, the defense bar, the judiciary, academics, victim advocates, and politicians, during which the core provisions were well-known and vigorously debated. The result was a statute that follows the lead of the majority of states and sets the gold standard for discovery reform in this country.

The New York State Bar Association Embraced Comprehensive Discovery Reform

In 2015, the New York State Bar Association convened a Task Force on Discovery comprised of some of the most prominent members of New York's legal community, including judges, prosecutors, defefenders, and academics. After an exhaustive process, the NYSBA Task Force issued a report and recommended "large-scale changes" to the existing discovery law, focusing on "early and broad"

discovery.[3] Notably, the NYSBA Task Force also recognized that discovery of witness information is critical to ensuring a fair and transparent system, noting that "several dozen States with modern discovery rules have recognized that it is critical that both parties receive enough information through discovery to locate witnesses as necessary (baring circumstances that justify a protective order). This means exchanging names and addresses."[4] In fact, the NYSBA Task Force ultimately recommended that prosecutors be allowed to provide "adequate alternative contact information" in lieu of a person's address — almost precisely the standard ultimately adopted by the DFJRA.

New York's prosecutors voiced their objections to the discovery of witness contact information in the NYSBA process, and in the end a minority of the Task Force members dissented from the Report's recommendations, opposing the provision of discovery early in the criminal process and arguing that disclosure of witness information would endanger potential witnesses and discourage cooperation with law enforcement, despite ample evidence to the contrary from dozens of jurisdictions across the country (see below). The Task Force majority dismissed these objections as "baseless" and characterized some of the dissenters' arguments — many of them the same arguments being advanced here today — as "misleading."[5] Indeed, the majority found that the dissenters "fundamentally oppose meaningful discovery reform" and called their opposition to the provision of early discovery "embarrassingly simplistic."[6]

As a result of the Task Force's work, NYSBA ultimately supported legislation introduced by Assembly Member Lentol in that fully embraced comprehensive discovery reform, including early disclosure of evidence and discovery of witness information.

Experience of Other States

Prior to the passage of the DFJRA, New York was one of four states — along with Wyoming, South Carolina, and Louisiana — that allowed the prosecution to hide almost all information until the day of trial. Forty-six states mandate disclosure of the prosecution's witnesses with reasonable exceptions for commonsense security measures — such as protective orders issued by judges. No state has ever repealed a broad discovery statute or replaced it with a more restrictive one. Early adopters, such as New Jersey (enacted in 1973) and Florida (enacted in 1968), have operated under liberal, expedited discovery statutes for over 40 years. Other states, seeing the results, have followed suit as recently as 2004 (North Carolina), 2010 (Ohio), and 2014 (Texas). If broad discovery resulted in waves of witness intimidation, as some opponents of discovery reform in New York claim, surely some of these states — or even one of them — would have restricted discovery in response. No state ever has.

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[3] New York State Bar Association, "Report of the Task Force on Criminal Discovery," Jan. 30, 2015, pp. 7-8, *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572.

[4] *Id.* at 9.

[5] *Id.* at 124-25.

[6] *Id.* at 127.

Legislative Vetting

The DFJRA was not the product of "uninformed legislators" "tripping over each other" to pass a hastily crafted bill.[7] Over the course of the last two legislative sessions, the merits of various discovery reform proposals were considered. None of the provisions that were ultimately included in the final version of the bill were novel or a surprise. The building blocks of the law passed in the spring have been known and debated for years. Indeed, provisions adapted from the bill supported by NYSBA served as the backbone of the legislation. Other critical provisions were drawn from Senator Bailey's proposal from the 2018 legislative session. At every step in the long road to discovery reform, opponents of reform raised the same objections, and each time they were considered and rejected. And that is because of the straightforward and obvious need for transparency and fundamental fairness in our criminal legal system. For the same reasons these objections were rejected in 2015 and again in 2019, the Legislature should reject calls to renegotiate a law that was exhaustively debated and vetted and that has yet to go into effect.

The Legislature should take pride in making New York a leader in criminal justice reform. The DFJRA is the new gold standard for discovery reform nationwide. The Legislature must stand strong to protect these critical hard-fought gains.

[7] *See* Michael E.McMahon, "State Reforms Would Give Thugs Keys to this City," SI Live, May 15, 2019, *available at* https://www.silive.com/news/2019/05/state-reforms-would-give-thugs-keys-to-this-city-commentary.html.