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NYSACDL Testimony

Senate Standing Committee on Codes

Public Hearing – September 9, 2019

Good morning Senate Codes Chair Bailey and all the other senators present at this hearing. Thank you with providing me with an opportunity to testify on this important issue.

My name is Lori Cohen, I am the current president of The New York State Association of Criminal Defense Lawyers (NYSACDL). NYSACDL was formed in 1986 by a group of defense attorneys who felt it was time to speak in a unified voice about criminal defense issues in New York State. We are a statewide organization with over 1000 members, responsive to the needs of both private practitioners and public defenders and dedicated to assuring the protection of individual rights and liberties for all.

NYSACDL is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Our guiding principle is that vigorous defense is the strongest bulwark against error and injustice in the criminal justice system. In an era when the United States has the highest incarceration rate in the world, we expand on the question most often posed to our members and ask “how can we defend those people most effectively?”

To achieve these goals, NYSACDL has actively lobbied lawmakers for change in state laws. For the past several years, discovery reform has been our top legislative goal. For too long, New York State lagged behind when other states recognized that the only way to make the criminal justice system fair is to afford those accused of crimes a timely opportunity to review all of the evidence against them. Prior to the passage of the new law, NYS ranked 4th from the bottom when it came to discovery rules. The old rules made it impossible for the defense to interview witnesses or conduct background investigations to determine credibility or potential errors in future testimony. The old laws fostered a system where vital pieces of discovery were withheld from the defense until days before a trial. Indeed, prior to the passage of the new discovery laws, a defendant in a civil lawsuit over \$25,000 would get far more discovery before a trial than a person facing life imprisonment.

Thankfully, the new discovery reform laws will end trial by ambush.

The new discovery laws laid out a framework that would provide open, early and automatic discovery to the defense. This framework was imperative to stop the

landslide of wrongful convictions plaguing our state – many due to the failure of prosecutors to provide full discovery.

Since the passage of the new discovery laws the only refrain we have heard from prosecutors is how they cannot possibly get this done – these changes are too onerous. I have been a criminal defense attorney for over thirty-five years and the reality the prosecutors don't want you to know is that it is possible to provide open, early and automatic discovery. Most cases in the criminal justice system simply do not have that much paperwork – an arrest report, a complaint report, maybe some notes in police officer's memobook, maybe a lineup report. Most cases are simply not that complicated.

But prosecutors have had total and utter control of the discovery process for too long. Indeed, discovery reform became necessary because of the failures of a process where one party in an adversarial proceeding controlled the spigot of information. Wrongful convictions in which innocent people spent years and decades in jail because information was not provided to the defense had become too frequent. Prosecutors have simply forgotten that their primary duty is to seek justice. As representatives of the State, they have the utmost obligation to insure the fairness of the process for all of its citizens.

In Albany, prosecutors claimed to accept that changes needed to be made. Since the passage of the new law, however, all we have heard from prosecutors is fear mongering and foot dragging. The realization that the law, and not the prosecutors, would control what information should be produced and when had sunk in, and prosecutors would now begin their campaign to minimize the law as much as possible.

Instead of embracing changes to make the process fairer – for it would seem they would have an interest in making the process as fair as possible – they have sought ways to impede the early, open and automatic discovery changes enacted by the NYS Legislature. Some prosecutors have openly stated that they will seek protective orders on all cases. The newest materials from New York Prosecutors Training Institute, which was created by the District Attorneys Association of New York State to educate and train New York prosecutors, provides practice tips and recommendations on ways to circumvent discovery obligations, extend time to provide discovery and advises prosecutors to file motions for additional time to provide discovery as that also stops the speedy trial clock. For instance, the NYPTI manual suggests:

1. Upon the voting of an indictment, a felony complaint is superseded and a new action commences in superior court with an independent clock for discovery. That clock commences on the arraignment of the indictment; not on the filing. **Accordingly, any lag in the arraignment set-up on an indictment also assists in the preparation of discovery on that particular case.**

2. Recall that “pre-trial motions” – without limitation – are protected from the speedy trial clock under section 30.30(4)(a). Therefore, upon the filing of a 245.70 motion for an extension of discovery – the clock stops until a determination is made.

Instead of embracing change, welcoming a roadmap to a criminal justice system we can all be proud of, prosecutors have devised ways to circumvent the rules. The creation of a portal that they control, the extension of time by suggesting a delay in processing indictments and the urging of frivolous motions to extend the time to prosecute are simply the new ways that the prosecution will seek to blindfold the defense.

The discovery laws passed by this body are not only historic, they are tried and tested. Other states have enacted similar legislation and the criminal justice system has not collapsed, witnesses have not been harmed – instead, the process has become fairer, and justice more clear.

Thank you.