SUPREME COURT OF THE STATE OF NEW YORK
COUNTY: CRIMINAL TERM, PART

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- : NOTICE OF MOTION

######, : Ind./Dkt. No.

:

Defendant.

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PLEASE TAKE NOTICE that, upon the annexed affirmation of ###### ###### and Memorandum of Law, and upon the accusatory instrument and all prior proceedings, the undersigned will move this Court at Part ###### at the courthouse located at ###### ######, New York, on ###### ######, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order:

1. Requiring disclosure of adequate contact information for all persons known to have evidence or information relevant to any offense charged or to any potential defense thereto, pursuant to C.P.L. §§ 245.20(1)(c) and (7);
2. Granting such other relief as this Court may deem proper.

Dated: ###### ######
######, New York

[IMPORTANT NOTE TO DEFENSE ATTORNEY – DELETE BEFORE FILING: Filing a *written motion* to compel production of non-disclosed information may stop the C.P.L. § 30.30 clock [*see* §§ 30.30(4)(a), 255.10(1)(c)], although an argument against that is set forth below for this particular motion. In general, it is better to litigate these issues orally to begin with, and to file the written motion only in selected cases – ideally after strategic discussion with supervisors. Cases where it may *not* make sense to file the motion could include (*e.g.*) where we were able to find the witness without the portal; or it's a witness that is peripheral and we do not actually plan to contact them; of if the client is going to enter a plea soon anyway; etc.]

Yours, etc.

JANET E. SABEL
Attorney for the Defendant
The Legal Aid Society
Criminal Defense Practice
######, ###### Floor
######, New York ######

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Of Counsel

Phone: ###### ######
Email: ###### ######

To: Hon. ###### ######
District Attorney
County
######
######, New York ######

Attn: ADA ###### ######

Clerk of the Court
County
######
######, New York ######

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY: CRIMINAL TERM, PART

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- : AFFIRMATION

######, :

Ind./Dkt. No. ######

:

Defendant.

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######, an attorney admitted to practice law in the courts of this State, hereby affirms under penalty of perjury that the following statements are true, except for those made upon information and belief, which I believe to be true:

1. I am associated with JANET E. SABEL, the attorney of record for the defendant, ###### ######. I am familiar with the facts of this case and make this affirmation in support of defendant's motion. Unless otherwise specified, all allegations of fact are based upon information and belief, the sources of which include inspection of the record of the case, conversations with Assistant District Attorneys, the defendant, and counsel's own investigations.

2. The defendant respectfully requests the following relief from the Court:

Motion For Disclosure Pursuant to C.P.L. §§ 245.20(1)(c)&(7)

3. The defendant is charged with violating Penal Law § [###### CURRENT TOP CHARGE] and various other charges.

4. The defendant was arraigned in Criminal Court on [###### ARRAIGNMENT DATE].

5. Under the discovery statute, "witnesses" whose contact information the prosecution must disclose include all people with any relevant information about the case. They will not necessarily be called to testify, nor may they have actually witnessed the alleged crime. Specifically, pursuant to C.P.L. § 245.10(1)(a) and § 245.20(1)(c), within 15 calendar days (or, if applicable, 45 calendar days) of the defendant's arraignment on any accusatory instrument, the prosecution must disclose:

> The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical address. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown. C.P.L. § 245.20(1)(c).

6. Under C.P.L. §§ 245.20(7), "[t]here shall be a presumption in favor of disclosure when interpreting sections 245.10 and . . . subdivision one of section 245.20, of this article."

7. On [###### DATE PROSECUTION PROVIDED PORTAL INFORMATION], the prosecution informed defense counsel that its effort to comply with the requirement to disclose "adequate contact information" under C.P.L. § 245.20(1)(c) would consist only of use of a portal application by which counsel could contact witnesses (hereinafter the "witness portal"). The prosecution has refused defense counsel's request to disclose other information for contacting witnesses.

8. The witness portal application is managed by a third party vendor. The application lists the names of all witnesses associated with the defendant's case. The application does not indicate how the witness is associated with the case (whether he or she is an eyewitness, complainant, 911 caller, or *Brady* witness), nor does it provide any contact information for

the witness. Rather, the application gives defense counsel an option to contact each witness either via a telephone call or text message. Once defense counsel makes a selection as to which method to use, the application contacts the witness. Defense counsel is never provided with the witness's direct contact information – this is all managed through the third party vendor.

9. Separately, the prosecution (and possibly the police) has notified the witness in advance of a call or text that a "defense attorney" may try to contact them, but that their contact information will be hidden.

10. If defense counsel opts to call the witness, the witness receives a call and counsel's telephone number appears on the witness's end, but defense counsel cannot see the witness's telephone number. The witness can either choose to answer or ignore defense counsel's attempt to communicate. If the call or text is answered, defense counsel has no way of verifying that the person answering the call or text is in fact the named person. If the call or text is ignored, defense counsel has no way of knowing if it was ever received by the named person.

11. It is our understanding that the prosecution has used the witness portal in this case without applying for, let alone being granted, any kind of protective order based on a showing of "good cause" – even a "counsel-only" protective order – as envisioned under C.P.L. § 245.70(1).

12. We have declined to participate in the impermissible portal application, because it is counterproductive, will deter witness cooperation, and presents evidentiary and other concerns discussed in the annexed Memorandum of Law. In this case, [###### CONSIDER INSERTING PERTINENT FACTS SHOWING THAT THE DEFENSE HAS MADE EFFORTS TO CONTACT WITNESS(ES) BUT HAS BEEN UNSUCCESSFUL.]

13. For the reasons set forth in the annexed Memorandum of Law, the witness portal application fails to comply with the statutory requirements of C.P.L. §§ 245.20(1)(c) and (7) since it does not provide adequate contact information for witnesses. It also runs afoul of the

state and federal constitutions because it prevents adequate investigations in violation of the right to effective assistance of counsel; it violates due process reciprocity requirements because the defense is still required to disclose "addresses" for all of its intended witnesses; and it is an inadequate method for disclosing *Brady* information. *See People v. Rong He*, 34 N.Y.3d 956 (2019). Additionally, the portal will result in grave evidentiary concerns, because its use will make impeaching witnesses – and authenticating purported communications from witnesses – impossible in court proceedings, infringing on the constitutional rights to confrontation and to present a defense.

14. The defendant therefore moves for an order requiring the prosecution to expeditiously disclose adequate contact information – as required by the statute – for all persons known to have evidence or information relevant to any offense charged or to any potential defense thereto. See C.P.L. §§ 245.20(1)(c)&(7).

15. Finally, despite the general rule that motion practice time is excluded from the chargeable C.P.L. § 30.30 time calculation [*see* C.P.L. § 30.30(4)(a); *People v. Worley*, 66 N.Y.2d 523, 527 (1985)], the prosecution should be charged with the motion practice time resulting from this motion. The underlying theory of *Worley* (in which the Court of Appeals ruled that an adjournment period for defense motions is excludable) was that, when the defendant has decided to file a pretrial motion, he or she is *voluntarily* choosing to waive speedy trial rights. *See People v. Worley*, 66 N.Y.2d at 527. But this basic premise of *Worley* is inapplicable when – as in this case – the defense should not have to file a motion at all, insofar as the District Attorney has simply imposed an improper barrier to the *automatic* discovery system the Legislature enacted in C.P.L. § 245.10(1)(a). The Legislature even specifically stated – within the language of C.P.L. § 245.20(1)(c) – that a "motion" by the defense is required only when it seeks court-ordered disclosure of a person's "*physical address*" (not "adequate contact information").

16. Thus, because the voluntary waiver premise of *Worley* is inapplicable, that decision is not controlling in these circumstances. *See, e.g.*, *People v. Knapp*, 164 Misc.2d 216, 225 (Crim. Ct., Richmond Co. 1995) ("*Worley* was not intended to apply to a situation such as this one"); *People v. Schuler*, 23 Misc.3d 1137(A)(Crim. Ct., Kings Co. 2009); *People v.*

Hayden, 15 Misc.3d 1120(A)(Crim. Ct., N.Y. Co. 2007); *People v. Ortiz*, 6 Misc.3d 1024(A)(Crim. Ct., Bronx. Co. 2004); *People v. Aquart*, 171 Misc.2d 114, 119 (Crim. Ct., Bronx Co. 1997); *People v. Vreeland*, 143 Misc.2d 141, 143-44 (Crim. Ct., N.Y. Co. 1989).

Request for Other Relief

17. Defendant respectfully asks the Court to order such other and further relief as it may deem proper.

WHEREFORE, the affiant respectfully requests this Court to grant the relief sought herein, and in the annexed Memorandum of Law, and reserve to defendant the right to amend or supplement this motion and to grant such other and further relief as the Court may deem just and proper.

Dated: ###### ######
######, New York

Yours, etc.

JANET E. SABEL
Attorney for the Defendant
The Legal Aid Society
Criminal Defense Practice
######, ###### Floor
######, New York ######

_____
Of Counsel

Phone: ###### ######
Email: ###### ######

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY: CRIMINAL TERM, PART

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- : MEMORANDUM OF LAW

######, :

Ind./Dkt. No. ######

:

Defendant.

----------X

The Witness Portal Application Does Not Constitute "Adequate Contact Information" Under C.P.L. § 245.20(1)(c) and § 245.20(7), and Limiting Disclosure In This Manner Also Runs Afoul of the State and Federal Constitutional Rights to Effective Assistance of Counsel and Due Process and *People v. Rong He*, 34 N.Y.3d 956 (2019).

Requiring the defense to use the witness portal, when there has been no individualized showing of "good cause" for a protective order, violates the statutory discovery requirements of C.P.L. article 245. The Legislature has already rejected a proposal to use such a portal for contacting witnesses. A system in which *no* contact information is provided does not qualify as disclosure of "adequate contact information." Furthermore, a mandatory statutory "presumption in favor of disclosure" must be applied "when interpreting" the term "adequate contact information" in C.P.L. § 245.20(1)(c), and the restrictions of a portal do not satisfy that test.

The portal is also constitutionally flawed in several ways, and the Court of Appeals recently held that "the People's refusal to disclose . . . contact information, or to provide any means for defense counsel to contact the witnesses other than through the prosecution itself, is tantamount to suppression of the requested information." *People v. Rong He*, 34 N.Y.3d 956 (2019). Moreover, the portal it will make impeaching witnesses and authenticating purported communications from witnesses impossible in court proceedings. The Court should, therefore, direct the prosecution to disclose "adequate contact information" for all persons with relevant information.

As previously described, pursuant to C.P.L. § 245.10(1)(a) and § 245.20(1)(c), within 15 calendar days (or, if applicable, 45 calendar days) of the defendant's arraignment on any accusatory instrument, the prosecution must disclose "[t]he names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses." The prosecution does not have to disclose "physical addresses," but the court may direct the disclosure of a physical address upon a showing of "good cause." Contact information for confidential informants may be withheld. C.P.L. § 245.20(1)(c). In "interpreting" these provisions, the Legislature has directed that courts "shall" employ a "presumption in favor of disclosure." C.P.L. § 245.20(7).

A. The Legislature Already Rejected Use of A Witness Portal

In the course of enacting C.P.L. article 245, the Legislature rejected a statutory proposal allowing for use of a portal as the method for the defense to communicate with witnesses. It is well known that throughout the legislative process, the District Attorneys Association of New York ("DAASNY") vigorously opposed timely disclosing any witness contact information to defense attorneys.[1] In an effort to reach a compromise, the New York County District Attorney's Office proposed using a secure online portal – like the one the prosecution seeks to use in this case – as the means for the defense to contact witnesses. This proposal was submitted to the Executive and shared with the Assembly and Senate at the end of February 2019.[2]

[1] *See, e.g.*, Ashley Southall and Jan Ransom, "Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials," *New York Times* (5/2/19); Emily Bazelon, "A Chance for Fairness in New York's Criminal Justice System; Governor Cuomo faces opposition as he seeks reform," *New York Times* (2/28/19); NYSBA, "Report of the Task Force on Criminal Discovery" (2015), pp. 76-120 (dissenting statement of District Attorneys).

[2] These facts have been confirmed to New York City defender organizations by legislative counsel who received and deliberated on the proposal at the time, and were flagged in submissions to the Senate Codes Committee at its oversight hearings (9/9/19). We have also seen the actual proposal, and, to our knowledge, its existence has not been disputed by District Attorneys (*see* "Public Defender Opposition to DA Offices' Use of Online Witness Portal," letter addressed to Susan Sommer, Esq., General Counsel of NYC Mayor's Office of Criminal Justice, dated 8/9/19, and shared by MOCJ with NYC District Attorneys).

The Legislature rejected that proposal and instead mandated that prosecutors disclose the "names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense. . . ." This mandate can only be interpreted to mean that prosecutors are required to give defense attorneys adequate information to contact witnesses directly, without an intermediary. In short, the Legislature has already rejected routine use of a portal. The Legislature's response to the District Attorneys' objections was that physical addresses need not be disclosed absent a court order, but that defense lawyers must be given adequate information to investigate. In particular cases where the prosecution shows "good cause" for greater restriction on the defense's access to witnesses, the Legislature provided that courts may issue protective orders under C.P.L. § 245.70(1), including "counsel-only" orders or other protective orders if appropriate.

B. <u>The Witness Portal Does Not Comply with C.P.L. §§ 245.20(1)(c) and 245.20(7)</u>

This witness portal fails to comply with the new law. As indicated above, C.P.L § 245.20(1)(c) requires the prosecution to disclose witness names and adequate contact information. The plain language of this provision underscores the requirement for "adequate contact information"; it does not authorize the witness portal, which provides *no* contact information and only permits contact through a third party.[3] Additionally, C.P.L. § 245.20(7) creates a mandatory "presumption in favor of disclosure" that courts must apply when interpreting the term "adequate contact information" in C.P.L. § 245.20(1)(c).

What is "adequate" to enable a fair opportunity to "contact" a witness will vary from case to case, but certainly hiding *all* contact information from the defense is not adequate.

[3] *See generally People v. Tychanski*, 78 N.Y.2d 909 (1991) ("The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended"); *People v. Finnegan*, 85 N.Y.2d 53 (1995) ("The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used. Equally settled is the principle that courts are not to legislate under the guise of interpretation").

The witness portal – which does exactly that – fails to comply with these statutory requirements.[4]

C. <u>The Witness Portal Runs Afoul of *People v. Rong He*, 34 N.Y.3d 956 (2019)</u>

In *People v. Rong He*, 34 N.Y.3d 956 (2019), the Court of Appeals recently evaluated what qualifies as adequate disclosure of witnesses' "contact information" to the defense. It held that that the prosecution had violated *Brady* by "failing to provide defendant with meaningful access to favorable witnesses." The Court explained:

> The People objected to defendant's pre-trial request for the direct disclosure of the witnesses' contact information, and instead offered to provide the witnesses with defense counsel's information. Yet this approach *would not have provided defendant with adequate means for defense counsel to investigate* those witnesses' statements. Furthermore, at the time of the request, the People did not bring forth any evidence that defendant presented a risk to the requested witnesses. Consequently, there was no apparent reason at that time for *implementing protective measures or otherwise insulating the contact information* from disclosure in the face of defendant's clear 'right to discover a potentially material witness.' Accordingly, under the circumstances of this case, the People's refusal to disclose the contact information, or to provide any means for defense counsel to contact the witnesses *other than through the prosecution itself*, is tantamount to suppression of the requested information.

Id. (emphasis added) (*citing People v. Andre W.,* 44 N.Y.2d 179, 186 [1978] *and United States v. Rodriguez,* 496 F.3d 221, 226 [2d Cir. 2007]).

This high court decision effectively forecloses the prosecution's use of the witness portal as a means to satisfy C.P.L. § 245.20(1)(c), barring an individualized showing of "good cause" and protective order under C.P.L. § 245.70. The Court of Appeals has now specifically ruled that "insulating" the defense's right to "witnesses' contact information" by a "protective measure" imposed by "the prosecution itself" (not ordered by the court after a sufficient case-specific showing) does not give "adequate means for defense counsel to

[4] Importantly, all states excluding just three – Louisiana, South Carolina and Wyoming – require that prosecutors disclose witness contact information to defense counsel. *See* NYSBA, "Report of the Task Force on Criminal Discovery" (2015), fn.'s 4, 16, 17.

investigate" the witnesses or "meaningful access" to them, and instead it is "suppression." *Id.* That precisely describes the witness portal as well.

Because the defense has the statutory right to the witness's actual contact information, the prosecution cannot merely "provide the witnesses with defense counsel's information." The term "adequate contact information" means the same thing, regardless of whether the underlying right comes from the constitutional *Brady* rule or the statutory rule of C.P.L. § 245.20(1)(c). Furthermore, the legislative design for C.P.L. § 245.20(1)(c) was in part to minimize *Brady* violations (as legislative history confirms). Thus, the Court of Appeals would almost surely invalidate the portal and this Court should not permit it.

D. <u>The Witness Portal Does Not Comply with the State and Federal Constitutions</u>

The accused has a federal and state constitutional right to effective assistance of counsel, which includes adequate investigation. *See* U.S. Const., Amend. VI; N.Y. Const., art. I, § 6*; see also People v. Oliveras*, 21 N.Y.3d 339, 346 (2013) ("[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case") (*citing Strickland v. Washington*, 466 U.S. 668, 690-691 (1984)); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) ("A defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial"); OCA, Order to Counsel in Criminal Cases (providing that defense counsel has an obligation to conduct "a reasonable investigation of both the facts and the law pertinent to the case (including as applicable, *e.g.*, visiting the scene, interviewing witnesses . . . etc.")).

Disclosure of the witness portal as the only way to contact witnesses has impeded defense counsel's ability to conduct thorough and complete investigations. **[###### SUMMARIZE PERTINENT FACTS RELATING TO EFFORTS TO CONTACT WITNESSES IN THE CASE.]**

Another problem with the portal is that the defense never knows whether the lack of any response from the witness should be interpreted as a "No." Worse, it is impossible for a

defense investigator to confirm the identity of the person who answered or responded – they never know if they were refused by the actual witness, or even communicated with the actual witness. In households where English is not the primary language or for individuals who are uncomfortable using technology, these issues are exacerbated. Other problems include that: many witnesses do not even own phones; witnesses' phone numbers often change or expire; witnesses may not even *receive* the defense's texts/calls, but the defense would not know that merely based on the lack of a response; and in-person interviews are in general far preferable to telephone interviews since it is hard to evaluate a person's demeanor or to establish a meaningful rapport on the phone.

More generally, after being informed by prosecutors and police that the defense will contact them using the portal but that their information will be kept confidential, witnesses become less inclined to speak with the defense. It suggests to witnesses that defense attorneys are not to be trusted and that the witnesses may be in danger. As a result, witnesses are more likely to either refrain from speaking with the defense, or, if they do speak with the defense, be less forthcoming in their conversations.

Moreover, defense counsel never knows what other information the prosecutor or police has given a witness about the application and whether they suggested to the witness not to speak with the defense. There is not any consistency in messaging[5] to witnesses or defense's ability to ensure that prosecutors or police are not discouraging witnesses from answering the "defense attorney" call or text. It is unethical for law enforcement personnel to encourage a witness – either expressly or implicitly – to decline to speak with the defense. Prosecutors are not the witness's lawyer. They must leave it to the witness to decide whether or not to speak with the defense.

Even though the witness portal is meant to assure witnesses that the defendant and his or her attorney will not have access to their contact information, it, in fact, has a different impact. First, the witness has a sense that the prosecutor is surveilling whether they did or did not speak with the defense. Witnesses often seek to please the prosecutor or believe that

[5] This cannot be remedied through the use of a script because monitoring and accountability will be an issue.

not speaking to the defense is what the prosecutor wants. The application, although administered by a third party, gives the appearance that the prosecutor will know about any contact between the witness and the defense team. In many types of cases, this will be an important factor for witnesses in deciding whether to speak with the defense. For instance, many people who have made allegations of domestic violence are told they may lose their children if they do not cooperate with the DA, and those people may intentionally refuse a defense call because they fear that outcome. Perhaps more important, however, is the notion that there needs to be some kind of buffer between a defense attorney and the witness. There is no getting away from the subtle messaging in the use of this portal that defense attorneys cannot be trusted.

Moreover, prosecution-imposed restrictions on defense contacts with witnesses violate state and federal due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which prohibits requiring discovery from the defense that the prosecution does not also have to provide – since the defense is mandated by C.P.L. § 245.20(4)(a) to disclose "addresses" for all of its intended witnesses and is not given the option of using an online portal to shield them from in-person interviews with prosecutors or police. Of course, the prosecution would strongly oppose if the defense tried to share alibi witnesses only through a witness portal, rather than giving their home and work addresses so that police can try to interview them. But if the prosecution uses the "portal" system, the defense has a strong argument under *Wardius* that it may also restrict access to all of its intended witnesses in the same way. Prosecution-mediated access turns settled law on its head. The courts have uniformly held that witnesses "belong" to neither party and the prosecutor's intended witnesses cannot be treated differently from defense witnesses.[6] But the witness portal system is one in which

[6] *See U.S. v. Ash*, 413 U.S. 300, 318 (1973) ("The traditional counterbalance in the American adversary system" for prosecutors' pre-trial interviews with and access to witnesses "arises from the equal ability of defense counsel to seek and interview witnesses himself"); *People v. Townsley*, 20 N.Y.3d 294 (2012) ("a lawyer's interviewing a witness in the hope of getting favorable testimony . . . is not in the least improper. It is what good lawyers do"); *People v. Greene*, 153 A.D.2d 439 (2d Dept. 1990) ("a witness is not the property of either party"); *People v. Eanes*, 43 A.D.2d 744 (2d Dept. 1973); *People v. DeVecchio*, 17 Misc.3d 1114(A) (Sup. Ct., Kings Co. 2007) ("Witnesses do not belong to any party and each side in our adversary system has the right, indeed the obligation, to learn as much about the case as they can while acting in a professional and ethical manner"); *see also Grievance Committee for SDNY v. Simels*, 48 F.3d 640 (2d Cir. 1995); *Schulz v. Marshall*, 528 F.Supp.2d 77 (EDNY 2007) ("New York State courts have consistently held that prosecutors may not

police and prosecutors may contact witnesses directly, but defense lawyers can do so only through the prosecutor's software.

Furthermore, the witness portal also is an inadequate method for disclosing *Brady* witnesses. Its use is not limited to people who have reported crimes or whom the prosecutor intends to call at trial. Even witnesses who have *Brady* information exculpating the defendant are reachable only through use of the portal – leaving to chance whether the defense will ever get to contact them. *See generally*, *e.g.*, *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (inadequate disclosure of *Brady* witness); *People v. Rong He*, 34 N.Y.3d 956 (2019) (discoverability of contact information for *Brady* witnesses); *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011); *People v. Garcia*, 46 A.D.3d 461, 463 (1st Dept. 2007); *People v. Roberts*, 203 A.D.2d 600, 601-02 (2d Dept. 1994); *People v. Robinson*, 34 Misc.3d 1217(A) (Crim Ct., Queens Co. 2011) (requiring timely disclosure of a 911 caller's name, address and telephone number to the defense). This may result in *Brady* violations.

E. <u>The Witness Portal Will Not Comply With Evidentiary Standards</u>

Finally, use of the portal application – without providing witnesses' contact information – will result in serious evidentiary problems in court proceedings. It will make impeaching witnesses and authenticating purported communications from witnesses impossible, infringing on the defendant's constitutional rights to confrontation and to present a defense. Specifically, because defense counsel will not be provided with a phone number linked to a witness, impeaching a witness – part of a defendant's fundamental rights under the Confrontation Clause – with a prior statement that may or may not have been made to defense counsel will be impossible. It also will be impossible to authenticate text messages from a witness as exhibits.[7]

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refuse defense counsel requests for interviews with prosecution witnesses, and that courts will enable these interviews if necessary"), *aff'd*, 345 Fed.Appx. 627 (2d Cir. 2009); *People v. Wisdom*, 164 A.D.3d 928 (2d Dept. 2018); *Matter of Subpoenas*, *NYLJ* 8/16/04, p. 18, col. 1 (Sup. Ct., N.Y. Co.) (prosecutor improperly said merely that exculpatory witness was "free" to speak to defense).

[7] *See generally People v. Patterson*, 93 N.Y.2d 80 (1999)("Standard protections and prerequisites for the introduction of relevant, reliable evidence must be observed, not excused by short cuts and shortfalls"); *People v. Blades*, 93 N.Y.2d 166 (1999)("Common-law adjudication applying the rules of evidence is a sacred guardian of this State's truth-testing trial process. It is for this reason that sensibly rigorous standards have been

* * *

For all of these reasons, the Court should order the prosecution expeditiously to disclose "adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto," as required by C.P.L. § 245.20(1)(c).

CONCLUSION

The Court Should Order the Prosecution to Disclose "Adequate Contact Information" for All Persons With Relevant Information.

Respectfully submitted,

JANET E. SABEL
Attorney for the Defendant
The Legal Aid Society
Criminal Defense Practice
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######, New York ######

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Of Counsel

Phone: ###### ######
Email: ###### ######

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erected and continue to be enforced. They may seem fastidious, but because much is at stake, we resolutely refuse to sacrifice tried-and-true testing methods that help to insure that only reliable evidence will be presented to fact finders"); OCA, *Guide to New York Evidence*, Rules 6.15 ("Impeachment by Prior Inconsistent Statement"), 9.01 ("Authenticating or Identifying Evidence; In General"), 9.07 ("Methods of Authentication and Identification").

To: Hon. ###### ######
District Attorney
County
######
######, New York ######

Attn: ADA ###### ######

Clerk of the Court
County
######
######, New York ######