



**BROOKLYN  
DEFENDER  
SERVICES**

## **MEMORANDUM OF SUPPORT**

### **Comprehensive Discovery Reform**

***S.1716 (Bailey) /A.1431 (Lentol) – The 2019 Discovery for Justice Reform Act***

January 25, 2019

**Brooklyn Defender Services (BDS) calls on the Legislature to pass and the Governor to sign comprehensive criminal discovery reform this session. We strongly support the Discovery for Justice Reform Act before the legislature (S.1716 (Bailey) /A.1431 (Lentol), which will repeal the current “Blindfold Law” and go a long way towards bringing about necessary reform to our criminal legal system.**

BDS provides multi-disciplinary and client-centered criminal defense, family defense, immigration and other civil legal services, social work support and tools for self-advocacy to more than 30,000 indigent Brooklyn residents every year. Over the past 22 years we have represented close to half million people in criminal matters in Kings County, New York.

#### **I. THE PROBLEM**

In New York, unlike most of the rest of the country, prosecutors and police are not required to provide copies of police reports and other crucial documents or information or evidence related to their case to people facing criminal allegations or their attorneys until trial begins – months or years after an arrest, pursuant to New York State Criminal Procedure Law Article 240 (Discovery).

Under our current criminal discovery laws, people accused of crimes in New York are denied access to critical materials that are necessary for them to make informed decisions about their cases, to undertake proper investigations, to intelligently assess plea offers, to secure and use exculpatory evidence, and to adequately prepare for trial before the last minute. Those accused of crimes in New York are “blindfolded” during the pendency of their case. That is why many call New York’s current discovery statute the “Blindfold Law.” The denial of discovery until trial

begins has unsurprisingly resulted in chronic case delays and wrongful convictions across the state.<sup>1</sup> More than one-third (38%) of the 234 overturned wrongful convictions in New York involved non-disclosure of exculpatory evidence, according to the National Registry of Exonerations.<sup>2</sup>

Dozens of other states have employed systems of broad access to both parties' evidence at an early stage of criminal cases for many years. Broad discovery is currently turned over early and readily in New Jersey, Massachusetts, Pennsylvania, and 35 other states.<sup>3</sup> Prosecutors in these states consistently say broad discovery works – they are satisfied with it, they have the tools to protect witnesses, and the process is fairer and more efficient. In Brooklyn, the District Attorney's office has had an "open-file" discovery policy for more than two decades. This has resulted in swifter resolution of cases and greater fairness in cases that proceed to trial. Most importantly, there is a recognition of the humanity of the accused in a system where people have the information they need to understand the charges against them.

New York's antiquated criminal discovery laws stand in stark contrast to its law in civil cases, where only money is at stake, not someone's liberty. In New York civil cases, both parties are required to turn over all of the information, though live testimony, called depositions, questions and answers, called interrogatories and production of documents. Yet, people facing jail or prison, a criminal record, and a lifetime of related consequences, like loss of employment, housing, educational opportunity and deportation are not currently afforded even the most basic information prior to making a decision about whether to plead guilty or as they proceed to trial. There are counties in New York State where "trial by ambush" is still very common, including New York County, where attorneys begin a trial with no idea as to what the witnesses will say about their client, who those witnesses will be and whether there might be something in the testimony that they need to follow up and investigate. This is a horrible circumstance that must to stopped immediately.

## II. BROOKLYN STORIES<sup>4</sup>

In Brooklyn, unlike most of the rest of the state, the Kings County District Attorney's Office has a policy to provide discovery to the defense on an ongoing basis.<sup>5</sup> The policy has now been in effect in Brooklyn for over two decades and has improved outcomes for clients and streamlined court efficiency. A few years ago, we reviewed our internal data and found that, on average, open file discovery in a case reduced the length of time between arraignment and disposition by six months as compared to cases where we do not receive discovery for some reason. The current District Attorney Eric Gonzalez has agreed to continue and improve the timely disclosure of evidence and we strongly support those efforts. However, this voluntary program is not a substitute for a legal requirement that spells out when and what information is required to be shared.

<sup>1</sup> See Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES, Aug. 7, 2017, available at <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?mcubz=1>.

<sup>2</sup> Beth Schwartzapfel, *New York Courts Say: Hand It Over*, MARSHALL PROJECT, Nov. 8, 2017, available at <https://www.themarshallproject.org/2017/11/08/new-york-courts-say-hand-it-over>.

<sup>3</sup> New York State Bar Association, *Task Force on Criminal Discovery Final Report*, Dec. 1, 2014, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54071>.

<sup>4</sup> Names changed to protect client confidentiality.

<sup>5</sup> New York County Lawyers' Association, *Discovery in New York Criminal Courts: Survey Report & Recommendations* (2006), available at [https://www.nycla.org/siteFiles/Publications/Publications227\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications227_0.pdf).

a. *Johnny – Innocent of Robbery, Prosecuted for Months, Case Dismissed at Trial*

Last year, BDS represented Johnny, a Brooklyn man who was wrongfully accused of attempted robbery of a taxi cab driver. The driver alleged that Johnny pulled a gun on him and attempted to rob him during the cab ride. Johnny adamantly refuted this, insisting that, in fact, the cab driver had pulled the gun on him. Johnny always asserted his innocence and he and his defense attorney took the case to trial, even though his attorney had not been able to find any evidence to support Johnny's account.

Midway through trial, Johnny was vindicated. The Assistant District Attorney on the case informed BDS that she had only just spoken with the witness who called in to 911 to report the crime. Even though the BDS attorney had received the 911 call transcript under the Brooklyn D.A.'s open-file discovery policy, the witness's name and contact information were redacted. After placing the 911 call, the witness told the prosecutor that she saw the driver pull the gun out and threaten our client. The prosecutor informed BDS and the case was dismissed. Our innocent client was able to walk free after months of unnecessary litigation.

Under New York law, the prosecutor was not required to turn over the names and contact information of witnesses, in stark contrast to most other states that would have required such disclosure to defense counsel. If Johnny had not insisted upon a trial, and had the witness not come forward during that trial, he would have become another innocent New Yorker serving a prison sentence and saddled with a lifelong criminal record.

The Discovery for Justice Reform Act requires that the prosecution provide the defense the names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have information relevant to the case. This information cannot be redacted unless the prosecution requests a protective order from the court and provides the court with good cause for the redaction during a hearing. Under that statutory scheme Johnny's attorney would have been able to contact the 911 caller much earlier and learned about the exonerating evidence. This would have resulted in a much quicker resolution of the case, eliminating needless court appearances and wasted effort by the attorneys and the court as well as spared an innocent man of having these charges hanging over his head for so long.

b. *Jason – Prosecutors Turned Over Relevant Discovery and it Resulted in a Fair Outcome*

Jason was charged with the burglary of a bodega for conduct that was clearly related to his ongoing and serious substance abuse problem. Jason was accused of taking a dozen soft drinks, four packs of cigarettes and money from the cash register. Our client initially insisted that he was innocent because he had no recollection of the events. However, two months into the case, during which Jason had been detained at Rikers Island and chose to fight the charges, the prosecutor turned over video surveillance footage, a videotape of his confession, and police reports. Upon viewing the discovery together with his defense attorney, Jason was able to see confirmation that he did stumble into the bodega and take the soft drinks and cigarettes. He appeared visibly intoxicated in the video. Critically, the surveillance footage did not confirm the bodega owner's assertion that he took money from the cash register.

Because he was able to see the evidence, Jason had more confidence in his defense attorney and agreed to speak with a social worker. Working together, the defense attorney and social worker were able to get Jason into an inpatient drug treatment program. Because the video

showed visible intoxication and that Jason had not gone into the cash register, the defense team was able to negotiate a plea bargain that included drug treatment. Two years later, Jason has been sober for the longest period of time since he was 15 years old.

It is our experience that open file discovery does a lot more than just provide information to defense counsel and the accused about the case. It allows our clients to have faith that the process is fair. It allows our attorneys and their clients to have a positive relationship that is mutually trusting. And it opens the door to fair resolutions that reflect an the honest assessment of the evidence against our client because both the prosecution and defense have the same information.

### **III. THE SOLUTION: OPEN, EARLY, AUTOMATIC, AND COMPLETE DISCOVERY**

New York must adopt open, early and automatic discovery in criminal cases. The Discovery for Justice Reform Act goes a long way towards establishing a robust discovery process on a clear and fair timeline.

- Evidence will be turned over before someone is required to take a plea.
- Prosecutors will no longer be the gatekeepers of information and will not be allowed to redact or withhold information unless a hearing is held and a Judge decides there is good cause to redact.
- There will no longer be a delay in the transfer of information to the defendant and defense counsel.
- Prosecutors will be held accountable when they fail to comply with the rules.
- There will be a continuing obligation for the prosecution to turn over evidence they acquire during the pendency of a case.

The Discovery for Justice Reform Act includes the essential components of fair and effective criminal discovery reform.

- The Bill requires the automatic disclosure of all necessary discovery in a timely manner. Specifically, prosecutors will be required to disclose many documents and electronic recordings that are within the prosecutions possession at the commencement of the criminal action and throughout the pendency of the case.
- The Bill comports with the constitutional due process requirements regarding notification of the defense of any redacted and withheld evidence and allows for appropriate judicial intervention. Prosecutors will no longer be able to make a unilateral decision to redact information and will be required to show good cause to the court during a hearing.
- The Bill requires disclosure prior to guilty pleas so that pleas are truly knowing and voluntary. The Prosecution would not be permitted to withdraw a plea offer until the accused has had an opportunity to review such discovery.
- The Bill provides for remedies in cases of non-compliance, including preclusion and dismissal. The Court will be permitted to impose sanctions that are appropriate under the circumstances.
- The Bill allows the defense to conduct depositions of police officers and expert witnesses, as in civil cases

Brooklyn Defender Services urges the legislature to pass and the Governor to sign comprehensive discovery reform this year.

**Questions?** Contact Jared Chausow, Senior Policy Specialist, at [jchausow@bds.org](mailto:jchausow@bds.org) or 718-254-0700 ext. 382.