The Bronx Defenders Redefining public defense.

MEMORANDUM OF SUPPORT

S.1716 (Bailey) / A.1431 (Lentol) — The 2019 Discovery for Justice Reform Act
February 8, 2019

The Bronx Defenders urges the Legislature to pass and the Governor to sign comprehensive discovery reform without delay. We strongly support the Discovery for Justice Reform Act S.1716 (Bailey) / A.1431 (Lentol), which would repeal the current "Blindfold Law," one of the most regressive discovery laws in the country, and replace it with open, early, and automatic discovery to our criminal legal system.

The Bronx Defenders represents more than 20,000 people in the Bronx criminal courts each year. Every day, our clients must make one of the biggest decisions of their lives — whether to go to trial or plead guilty — in the dark. They may 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. 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 act more as a blindfold than a guarantor of justice. New Yorkers desperately need meaningful discovery reform to fulfil the basic promises of fairness, transparency, and due process that our criminal legal system makes to everyone charged with a crime. **Critically, the Discovery for Justice Reform Act would require: 1) disclosure of discovery prior to a guilty plea, 2) critical discovery to be turned over at first appearance, and 3) comprehensive discovery and a presumption of disclosure.** That is why The Bronx Defenders strongly supports S.1716 / A.1431 (Bailey/Lentol).

Discovery reform must be guided by the following principles:

- **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 plea. Because New York's discovery rules do nothing to guarantee transparency, 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. Meaningful discovery reform must require 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 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 the their case and, possibly, the rest of their lives. Moreover, discovery must be

disclosed automatically, without the need to file boilerplate papers which serve only to promote delay and create busywork for both sides.

- **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. 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. Prosecutors cannot be allowed to pick and choose which pieces of information to turn over. 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.

The Discovery for Justice Reform Act demonstrates a strong commitment to these principles and will not only increase fairness, transparency, and equality, but will promote early and efficient resolutions in cases by eliminating uncertainty and allowing plea negotiations in appropriate cases based on a shared set of facts. Specifically, the bill will broaden access to evidence for the defense and the prosecution; require automatic discovery to take place early in the criminal process; and, critically, mandate that discovery be turned over before the accused accepts a guilty plea. The bill also includes commonsense mechanisms to protect witnesses safety, such as protective orders that, upon a showing of necessity, would prohibit defense attorneys from sharing sensitive information with their clients.[1]

New Yorkers deserve a discovery law that will increase transparency, enhance fairness, and promote trust and confidence in our criminal justice system. **For these reasons, The Bronx Defenders strongly supports S.1716/A.1431 (Bailey/Lentol).**

[1] New York is among only four states — New York, Wyoming, South Carolina, and Louisiana — that allow 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.