REPEAL THE BLINDFOLD COALITION

The DISCOVERY FOR JUSTICE REFORM ACT Protects Witnesses

The Discovery for Justice Reform Act (S.1716/A.1431) protects witness safety and incorporates safeguards recommended by the New York State Bar Association's Task Force on Discovery.[1] The Task Force specifically endorsed exchanging names and addresses at an early stage.[2] This Task Force included prosecutors, defense attorneys, judges and academics and addressed the need for both safety and disclosure of evidence. Here are **five (5) key** points to remember:

- ✓ In the vast majority of cases, there are no risks to witnesses – and often there are no civilian witnesses at all. The Discovery for Justice Reform Act empowers judges to order that any and all evidence be withheld from people facing criminal allegations and their attorneys in the rare cases in which witness safety may be at risk.

- ✓ Prosecutors from other states have endorsed reform, as have crime survivor advocates here in New York.[3,4]

- ✓ Judges already have tools to protect crime victims and other witnesses, including orders of protection, which prohibit all contact between defendants and any other party.

- ✓ Prosecutors already have tools to protect crime victims and other witnesses, including felony charges for violating orders of protection or intimidating witnesses.

- ✓ Discovery reform is NOT an experiment. The vast majority of other states have enacted legislation that both requires the timely disclosure of evidence, including witness information, and keeps survivors and witnesses safe.

---

[1] http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572
[2] ibid.
[3] https://www.law.com/newyorklawjournal/2019/02/11/open-discovery-benefits-police-and-prosecutors-too/
[4] https://www.timesunion.com/news/article/Victim-advocates-make-case-for-open-discovery-13598256.php

More Information on the Discovery for Justice Reform Act

- ✓ The Discovery for Justice Reform Act gives judges the right to issue what are called ***protective orders***, which say that the District Attorney (DA) does not have to turn over certain information, based on the needs of an individual case. A protective order is something the DA can ask for in any case where they fear there may be any risk of harm to a witness. The vast majority of states have already reformed their discovery laws and prosecutors find that protective orders are effective.
- ✓ The Discovery for Justice Reform Act uses the same "good cause" standard that is used in many other states that have reformed their discovery laws. This bill actually defines "good cause" more broadly, explicitly naming considerations like substantiated gang affiliation as justifications for withholding discovery materials.. Judges would also have the freedom to craft orders appropriate for every case, including allowing information to go to defense counsel but not their client.
- ✓ The DA can withhold anything they think creates a risk to a witness until they ask for a protective order. The DA does not have to ask permission first. The DA just needs to notify the defense in case there is additional information the defense attorney can provide to the court.
- ✓ The bill does **NOT** require victims' or witnesses' addresses to be turned over – ever. Instead, it allows the DA to provide "alternative contact information."
- ✓ The bill allows the court to order the parties to "diligently" work out discovery issues and to schedule a discovery conference if they cannot. In most cases, the defense will agree to a reasonable solution. This will be an effective solution in almost all cases because the defense attorney is seeking the information solely for the purpose of investigating the case, giving their clients advice about plea offers and preparing for a trial.

Additional Protections for Victims and Witnesses:

- ✓ Existing law allows a judge to issue a full ***Order of Protection*** in any case. An order of protection is *not* the same as a protective order. An Order of Protection tells the accused that they are not allowed to go near or contact the victim/witness/others involved in the case. **The judge can order the defendant not to make any contact – in person, via social media, etc. – with a witness or harmed party.** These orders are extremely common in cases involving allegations of domestic violence, even *against* the wishes of both parties. (Again – and this may be confusing. Orders of Protection exist in current law; the protective order discussed above is a feature of the Discovery for Justice Reform Act.)
- ✓ If someone violates an order of protection and calls a witness, the judge can immediately remand that person to jail.
- ✓ If someone violates an order of protection, the DA can charge that person with a new felony crime.
- ✓ A new law passed by the Legislature earlier this year – **The Red Flag Law** – says that anyone can petition for a "temporary extreme risk protection order" asking the Court to prohibit a person from purchasing, obtaining or possessing a gun.

Other Important Things to Consider:

- ✓ In most cases, there is no risk of danger to a witness or victim.
- ✓ Many cases involve only police officers and no civilian witnesses, including many non-violent cases—drug possession, entering the subway without paying, prostitution.
- ✓ Many cases involve people that already know each other—neighbors, family members, co-workers, students in the same school. In these cases, the order of protection is very important because it tells the accused to stay away from the person.
- ✓ Early disclosure of witness information expedites the resolution of many cases in which a defendant is willing to enter a guilty plea, sparing victims from extended case involvement.
- ✓ The overwhelming majority of people respect a court order telling them to stay away from someone that has accused them of a crime. Sometimes this means moving, leaving a job, changing schools or other serious changes—yet the vast majority of people make those changes.
- ✓ No other state that has modernized its discovery laws has failed to require that DAs disclose witnesses' names and adequate contact information. This is universally recognized to be a fundamental and indispensable component of having a fair and reliable criminal justice system. Moreover, all experienced investigators know that conducting an *early* investigation – when witnesses are still available, their memories are fresh, and physical evidence has not yet been lost or destroyed – is critically important for finding and preserving any exonerating evidence.
- ✓ All of the new bail bills allow for detention in witness intimidation cases. They also do not change existing law which allows for remand when an order of protection is violated.

How Does This Bill Compare to Other States' Discovery Laws?

Disclosure of witness names and addresses is widespread throughout the country. 32 states with modern criminal discovery rules recognize that it is critical that the parties receive enough information through discovery to locate witnesses. These states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin

Nine states require that witnesses' names be listed ***on the indictment or be given prior to arraignment***. These states are: Georgia, Indiana, Iowa, Kansas, Kentucky, South Dakota, Tennessee, Texas, and Utah.

Other states require disclosure of witness names and addresses within time limits ranging from 10 days to 30 days:

- ✓ Florida (within 15 days of demand)
- ✓ Hawaii (within 10 days of arraignment)
- ✓ Missouri (within 10 days of demand)
- ✓ New Jersey (within 7 days of unsealing of indictment)
- ✓ New Mexico (within 10 days of arraignment)
- ✓ Arizona (30 days after arraignment)
- ✓ Colorado (21 days after 1st appearance)
- ✓ Maryland (within 30 days after arraignment)
- ✓ Michigan (within 21 days of demand)
- ✓ New Hampshire (within 30 days of not guilty plea)
- ✓ Rhode Island (within 30 days of arraignment)
- ✓ Texas (as soon as practicable after receiving a timely request).

BILL LANGUAGE

Below, are the important languages of the bill which has also been highlighted in red.

§ 245.10 **TIMING** OF DISCOVERY.
1. PROSECUTION'S PERFORMANCE OF OBLIGATIONS. (A) THE PROSECUTION SHALL PERFORM ITS INITIAL DISCOVERY OBLIGATIONS UNDER SUBDIVISION ONE OF SECTION 245.20 OF THIS ARTICLE AS SOON AS PRACTICABLE BUT NOT LATER THAN **FIFTEEN** CALENDAR DAYS AFTER THE DEFENDANT'S ARRAIGNMENT ON AN INDICTMENT, SUPERIOR COURT INFORMATION, PROSECUTOR'S INFORMATION, INFORMATION, OR SIMPLIFIED INFORMATION. PORTIONS OF MATERIALS CLAIMED TO BE NON-DISCOVERABLE **MAY BE WITHHELD** PENDING A DETERMINATION AND RULING OF THE COURT UNDER SECTION 245.70 OF THIS ARTICLE; BUT THE DEFENDANT SHALL BE NOTIFIED IN WRITING THAT INFORMATION HAS NOT BEEN DISCLOSED UNDER A PARTICULAR SUBDIVISION OF THIS SECTION, AND THE DISCOVERABLE PORTIONS OF SUCH MATERIALS SHALL BE DISCLOSED TO THE EXTENT PRACTICABLE.

5. **STAY** OF AUTOMATIC DISCOVERY; REMEDIES AND SANCTIONS. SECTIONS 245.05 AND 245.10 AND SUBDIVISIONS ONE, TWO, THREE AND FOUR OF THIS SECTION SHALL HAVE THE FORCE AND EFFECT OF A COURT ORDER, AND FAILURE TO PROVIDE DISCOVERY PURSUANT TO SUCH SECTION OR SUBDIVISION MAY RESULT IN APPLICATION OF ANY REMEDIES OR SANCTIONS PERMITTED FOR NON-COMPLIANCE WITH A COURT ORDER UNDER SECTION 245.80 OF THIS ARTICLE. HOWEVER, IF IN THE **JUDGMENT** OF EITHER PARTY GOOD CAUSE EXISTS FOR DECLINING TO MAKE ANY OF THE DISCLOSURES SET FORTH ABOVE, SUCH PARTY **MAY MOVE** FOR A PROTECTIVE ORDER PURSUANT TO SECTION 245.70 OF THIS ARTICLE AND PRODUCTION OF THE ITEM **SHALL BE** STAYED PENDING A RULING BY THE COURT. THE OPPOSING PARTY SHALL BE NOTIFIED IN WRITING THAT INFORMATION HAS NOT BEEN DISCLOSED UNDER A PARTICULAR SECTION. WHEN SOME PARTS OF MATERIAL OR INFORMATION ARE DISCOVERABLE BUT IN THE JUDGMENT OF A PARTY GOOD CAUSE EXISTS FOR DECLINING TO DISCLOSE OTHER PARTS, THE DISCOVERABLE PARTS SHALL BE DISCLOSED AND THE DISCLOSING PARTY SHALL GIVE NOTICE IN WRITING THAT NON-DISCOVERABLE PARTS HAVE BEEN WITHHELD.

§ 245.70 **PROTECTIVE ORDERS**.
1. ANY DISCOVERY SUBJECT TO PROTECTIVE ORDER. UPON A SHOWING OF GOOD CAUSE BY EITHER PARTY, THE **COURT MAY AT ANY TIME ORDER** THAT DISCOVERY OR INSPECTION OF ANY KIND OF MATERIAL OR INFORMATION UNDER THIS ARTICLE BE DENIED, RESTRICTED, CONDITIONED OR DEFERRED, OR MAKE SUCH OTHER ORDER AS IS APPROPRIATE. THE COURT MAY IMPOSE AS A CONDITION ON DISCOVERY TO A DEFENDANT THAT THE MATERIAL OR INFORMATION TO BE DISCOVERED BE AVAILABLE ONLY TO COUNSEL FOR THE DEFENDANT; OR, ALTERNATIVELY, THAT COUNSEL FOR THE DEFENDANT … MAY NOT DISCLOSE PHYSICAL COPIES OF THE DISCOVERABLE DOCUMENTS TO A DEFENDANT OR TO ANYONE ELSE, … THE COURT MAY PERMIT A PARTY … TO SUBMIT PAPERS OR TESTIFY ON THE RECORD **EX PARTE OR IN CAMERA**. ANY SUCH PAPERS AND A TRANSCRIPT OF SUCH TESTIMONY MAY BE SEALED ….

2. **MODIFICATION** OF **TIME PERIODS** FOR DISCOVERY. UPON MOTION OF A PARTY IN AN INDIVIDUAL CASE, THE **COURT MAY ALTER THE TIME PERIODS** FOR DISCOVERY IMPOSED BY THIS ARTICLE UPON A SHOWING OF GOOD CAUSE.