New York County District Attorney's Office

Testimony before City Council Committee on the Justice System

February 27, 2018

Good morning Chairman Lancman and members of the Committee on the Justice System. I am Executive Assistant District Attorney Karen Friedman-Agnifilo and I am presenting testimony on behalf of Manhattan District Attorney Cyrus R. Vance, Jr. Thank you for the opportunity to speak today about criminal discovery practices.

Prosecutors in the Manhattan District Attorney's Office have always been committed to complying fully with, if not exceeding, their constitutional, ethical, and statutory obligations with respect to the disclosure of information and the discovery of documents. For example, pursuant to Office policy, prosecutors must disclose any and all information favorable to the defense, regardless of the individual prosecutor's assessment of the credibility of the information or its importance to the defense. Over the past several years, the Office has implemented enhanced disclosure practices, offering expedited discovery at the time of Supreme Court arraignment in cases in which law enforcement or civilian security or peace officers are the primary prosecution witnesses.[1] We also expanded and clarified existing practices with respect to materials in our case files, continued to focus on the identification of *Brady* and *Giglio* information for disclosure to the defense, and enhanced our ability to identify, and disclose to the defense, the names of police and civilian witnesses whose testimony in a prior proceeding has been found to be untruthful.

In 2015, the Chief of the Manhattan District Attorney's Office's Trial Division established a policy entitled "Turn It Over" to emphasize that, subject to important exceptions, the most important of which is the safety of witnesses, all material in the Assistant's case file should be made available to the defense before trial, even if such discovery is not required by statute or case law.

While the collective import of Manhattan's practices is to increase the fairness in the criminal justice system—a goal we share with this Committee—importantly, we have not changed any protocol, and oppose any statutory changes, that would compromise witness safety.

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[1] As outlined in a May 2017 notification to defense providers, expedited discovery is now offered at the time of Supreme Court arraignment on various drug possession or sale cases, weapons possession cases not involving civilian witnesses, trespass, commercial burglary, shoplift grand larceny, possession of stolen property, robbery, forged instrument possession, identity theft, or other offenses where the civilian witness is a security guard or special police officer, among other cases. Beginning April 1, 2018, expedited discovery will also be offered on the misdemeanor equivalents of these same felony cases.

Why do we do this? Because of cases involving victims like Scotty Scott, a 13-year-old boy who was fatally shot in Harlem in 2008. Daniel Everret, a member of the violent 2MF gang, fired seven shots in the direction of approximately 15-20 rival Lenox Boys members and young bystanders who had gathered to watch a fight. Two bullets pierced Scott's heart, lungs, liver, and leg; he died at the scene. Two other victims were seriously wounded but survived. Everett eventually was convicted and sentenced to 32 years to life in prison in 2012, but only after being recorded on a phone from Riker's Island instructing gang members to intimidate witnesses in the neighborhood and even inside the courtroom. As *New York Post* columnist Leonard Greene wrote at the time:

> Even though the sun had not yet set, and more than two dozen people saw the shooter recklessly whip out a 9mm and aim it at a thick crowd, everyone on the street that day — including two shooting victims who survived — somehow suffered collective amnesia. Nobody wanted to "snitch." … Everett was arrested three years later, after a witness came forward and finally did the right thing.[2]

A *New York Times* article from the same time noted:

> Efforts by the police to investigate the shootings went nowhere. Police vans were pelted with rocks, prosecutors said. Posters requesting information on Scotty's murder were torn down. Ms. Mungo and her family pleaded with their community, hoping that one of the 20 to 30 people who saw the shooting would come forward and identify the gunman … In summer 2011, a young woman who had witnessed the killing saw Mr. Everret laughing and joking with friends at a community basketball game, [Manhattan Assistant District Attorney] Ms. Yoran said, adding, "It upset her to see him going on with his life." The woman was scared, Ms. Yoran said, but eventually she told the police that she had seen Mr. Everret kill Scotty. Immediately after coming forward, Ms. Yoran said, the woman left New York.[3]

The three civilian witnesses who testified at the defendant's trial did so under protective orders, as well as pursuant to additional protective measures that had to be utilized to keep them safe both before and after their identities were disclosed. The necessity of these measures became apparent during the trial. Evidence showed that the defendant, upon learning a particular witness' identity, immediately relayed that information to a fellow gang member on the phone and asked him to "press" the witness. Not surprisingly, that witness failed to appear in court to testify against him as anticipated. Although the witness did eventually testify, immediately after his testimony he came back into the courtroom and begged a 2MF gang member sitting in the back to spare him from retaliation. In a chilling recorded call later that day, the defendant marveled at the effect his intimidation tactics had on that witness, and he commanded his fellow gang members to continue to appear in court and sit in the back of the courtroom in order to intimidate witnesses into altering their accounts.

We have other examples, such as a case involving a defendant charged with murdering a 27-year-old man by shooting him in the head in broad daylight in Harlem. However, that case is now dismissed, the alleged gunman released, and the record is sealed after the defendant was acquitted at trial. The case collapsed when a crucial cooperating witness, who was incarcerated, was repeatedly called out

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[2] Leonard Greene. "'Today is my mother's day'." *New York Post*, May 15, 2012. https://nypost.com/2012/05/15/today-is-my-mothers-day/

[3] Tim Stelloh. "Prison Term for Family Friend in Harlem Boy's Killing." The New York Times, May 14, 2012. http://www.nytimes.com/2012/05/15/nyregion/family-friend-sentenced-in-a-2008-harlem-shooting.html

as a "snitch" and ultimately refused to testify. Just a year later, the same prosecutor handled a case involving the murder of a 28-year-old father of two during a robbery at a NYCHA building in East Harlem. A cooperating witness in that case, who was identified as a "snitch," was slashed at the Manhattan Detention Complex after his identity became known at the first trial—which resulted in a mistrial—and again at the second trial. Fortunately, at great personal risk, the witness testified and the defendants were each sentenced to decades in prison as a result of this critical eyewitness testimony.

We use these examples not to shock, but to show that witness intimidation is a real and present concern. We know from experience that prematurely exposing the identity of witnesses can result in harassment, intimidation, and violence against civilians. These witnesses—your constituents—tell us every day that they are afraid of the consequences of their identities being revealed. These people, who we ask to "do the right thing" to keep our city safe for the rest of us, need to know that we recognize and prioritize their legitimate fears and concerns. Just as members of the city's immigrant community are now hesitant to report crimes and participate in court proceedings for fear of being deported, civilian witnesses will increasingly refuse to report to or cooperate with law enforcement if they know that their name, address, and contact information will be provided to the defendant well in advance of trial. The loss of these protections will result in a precipitous decline in public confidence in law enforcement and the criminal justice system.

Witness intimidation takes many forms. It does not just occur in person, but increasingly over social media, and it hampers law enforcement's ability to investigate and prosecute violent criminals. Taxpayers will also have to pay extraordinary amounts to relocate an increased number of witnesses to secure locations over the period of time it takes for a case to go to trial. In the past year, our Office has had to pay to relocate witnesses to other cities and towns within New York State, and to other states. In Fiscal Year 2016, the Office paid $58,325 for witness protection expenses, which includes living, lodging, and transportation. That number was slightly down in Fiscal Year 2017 to $43,696.[4] Notably, these amounts do not include hotel expenses incurred when witnesses are forced to leave their homes due to legitimate safety concerns. In 2017, there were 40 short-term hotel placements, post-trial, at a cost of $23,570.94 to the Office.[5] This amount will increase exponentially if some of the proposals being discussed today are enacted, as victims of and witnesses to crime have to be uprooted and moved from their homes.

Finally, our Office's Witness Aid Services Unit helps to relocate families who are in danger from one NYCHA development to another, far from where the crime took place. School safety transfers are another way in which our Office facilitates the relocation of witnesses for their protection. All of these measures—and their associated costs—can be expected to increase if various proposals under consideration by the state legislature and Governor Cuomo are enacted, at a time when public funding is scarce, to say nothing of the cost to people whose lives are being uprooted as a result of their unsought involvement or chance involvement in a criminal case.

Unfortunately, protective orders are never a guarantee, so a fearful or reluctant witness cannot be assured of his or her safety at the outset of an investigation. In order to obtain a protective order, prosecutors must show a judge that there is good cause by providing as many specific facts as possible, such as the number of times a trial witness has been approached, intimidated, or interfered

[4] Fiscal Year 2018 runs from July 1, 2017 through June 30, 2018. As of January 31, 2018, $22,058 has been spent on witness relocation.

[5] In past years, the New York Prosecutors Training Institute (NYPTI) has reimbursed the Office for these hotel costs to varying degrees, but NYPTI did not provide any funds in 2017 and covered only a small portion, between $2,000 and $3,000 in 2015 and 2016.

with by a defendant or someone acting on the defendant's behalf. Even with convincing evidence, judges may decline to grant protective orders. "*Maybe* we can protect you" is not a strong enough assurance for a person terrified for her or his safety.

The Manhattan District Attorney's Office is aware of the arguments for and against many discovery proposals by various stakeholders in the justice system. We have been examining our own Office's discovery practices for many years. As far back as 2009, District Attorney Vance pledged to study this issue, when he said he supported the expansion of criminal discovery through statutory reform. That is still his position, and it is undoubtedly why Governor Cuomo—a former Manhattan Assistant District Attorney—has taken up this issue. But we need to ensure that any effort at discovery reform takes into account the serious problem of witness tampering of all kinds. The Governor's current proposal requires the prosecution to expose the identity of *all* cooperating citizens, regardless of whether the witness will testify, well before trial. This is not just problematic, but dangerous: some defendants will use this information to identify, target, and intimidate witnesses who possess incriminating information.

A comprehensive statewide Task Force already in existence has exhaustively researched discovery and issued several recommendations. Created by then-Chief Judge Jonathan Lippman in 2009, the New York State Justice Task Force is comprised of judges, prosecutors, defense attorneys, law enforcement personnel, legal scholars, legislators, executive branch officials, forensic experts, and victim advocates. It is led by Court of Appeals and New York State Chief Judge Janet DiFiore, and chaired by former Court of Appeals Senior Associate Judge Carmen Beauchamp Ciparick and Court of Claims Judge and Acting Supreme Court Justice Mark Dwyer. District Attorney Vance has been a member since 2010, and several prosecutors from this Office have participated in the Task Force since its inception.

In 2014, following an 18-month review, the Task Force issued its Recommendations Regarding Criminal Discovery Reform.[6] As it wrote in the report, "The Task Force's proposed reforms provide earlier and more robust discovery to defendants while also protecting witness safety and the integrity of ongoing investigations. The protection of witnesses from physical harm, harassment, or tampering—an important and relevant consideration when expanding discovery—was an overarching consideration that informed many recommendations." Importantly, all of the recommendations, which generally pertain to accelerated discovery in certain types of cases, permit prosecutors to redact or retain sensitive material that would protect witness safety or integrity, or preserve the integrity of an active investigation. Notably, felony cases involving gang violence were excluded from the recommendations.

In February 2017, this same Task Force issued a Report on Attorney Responsibility in Criminal Cases.[7] The Task Force made various recommendations in its 2017 report, many of which District Attorney Vance personally voted for, including that judges in all criminal cases issue an order directing prosecutors to make timely disclosures of information favorable to the defense, as required by the federal and state constitutions, statutes, and ethical rules.

There is a misperception that District Attorneys adhere to the current rules because they provide some kind of tactical advantage. That couldn't be further from the truth. There is also a misperception that expanding discovery laws would make our system more efficient, because defendants who know at an early stage that the case against them is strong will have a greater incentive to work out a disposition earlier, rather than delay the proceedings.

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[6] http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf
[7] http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf

Unfortunately, this appears to be little more than wishful thinking. For the past several years, Brooklyn has had a disclosure policy described as "open-file discovery." Available evidence points to the policy either having no effect on the time it takes for a case to be disposed of, or even slowing down proceedings, as cases are adjourned repeatedly for discovery to be provided. According to data from the New York State Department of Criminal Justice Services (DCJS), between January 1, 2017 and September 30, 2017, the median time to disposition for the 3,858 cases resolved in Manhattan was 309 days, compared to 315 days for the 3,581 cases resolved in Brooklyn during the same time period. Therefore, cases in Brooklyn, where a version of "open-file discovery" is in place, proceed no faster than in Manhattan.

Some allege that Manhattan's discovery practices force defendants to plead guilty, rather than take their cases to trial. Again, this is debunked by DCJS statistics, which show that Manhattan had nearly twice as many defendants go to trial in the first three quarters of 2017 than in Brooklyn (224 Manhattan trial defendants vs. 114 Brooklyn trial defendants). Manhattan consistently conducts more trials that any other county, and additional judicial resources assigned to Manhattan would allow for even more trials. Presently, Manhattan's Supreme Courts are woefully understaffed, down eight Supreme Court justices from the full, authorized complement.

Beginning in 2011, the Manhattan District Attorney's Office began offering expedited discovery on Quality of Life cases in Criminal Court to all defense attorneys who requested it. Just four percent of defense attorneys took advantage of the procedure in 2017, which is consistent with prior years, and there have been no requests thus far in 2018.

Additionally, in early 2017, when our Office instituted expedited discovery in cases in which law enforcement or civilian security or peace officers are primary prosecution witnesses (see para. 2, above), we asked the defense bar to identify those felony cases that they wished to try on an expedited schedule of 90 days from the date of Supreme Court arraignment. To date, we have not received a single request from any defense attorney for an expedited trial schedule where we have provided early discovery.

For all of the reasons stated above, it is actually in the *interest* of prosecutors to expeditiously take a case to trial. Case delays typically serve to benefit the defendant, as memories fade, evidence erodes, and witnesses stop participating. It does not benefit the prosecution's case to languish longer than necessary, and it certainly harms victims who are often desperate for justice. To suggest that prosecutors use discovery as a way of delaying cases is illogical, as well as inaccurate.

In 2017, there were at least 214 times in which both the defense counsel and the prosecutor answered "ready for trial" in a misdemeanor case, but no judge was available and the case had to be adjourned.[8] That is an improvement over previous years: in 2015, there were 1,119 times when both sides answered ready for trial in Criminal Court, but no court parts were available. The effect is cumulative: when an ADA prepares for and answers ready on one case, it means that she is answering "not ready" on other cases that day. Each time a judge is unavailable to try a case, the delay affects not just one case, but many.

[8] During the same period, there were at least 168 times in which both defense counsel and prosecutor answered "ready for trial" on a *felony* case, but no judge was available and the case had to be adjourned. Earlier data on trial readiness in felony cases is not currently available.

The changes and improvements to Manhattan's discovery protocols within the recent past show we support an early, expedited process, so long as it in no way endangers the safety of victims and witnesses.

In closing, we should not prioritize the desires of criminal suspects and their attorneys over the need to protect actual crime victims and witnesses to criminal activity.

Thank you for the opportunity to speak today, and thank you for the continued support of the Manhattan District Attorney's Office.

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