April 1, 2022

The Honorable Kathy Hochul

Governor of New York State

NYS State Capitol Building

Albany, NY 12224

**Re: Proposed Changes to Discovery Rules in New York State**

Dear Gov. Hochul:

The undersigned organizations collectively write to you with respect to the changes to New York State’s discovery rules proposed in your office’s “Ten Point Plan” for consideration in the FY23 budget.  As legal & civil rights advocates, we implore you to keep intact the 2019 discovery law which was developed through an extensive and deliberative multi-year process that included impacted people, community groups, legal organizations and stakeholders from all corners of the criminal legal community.  The 2019 law reformed draconian discovery rules which had been the law of the land for nearly a half century in New York, a law which had been ranked fourth from the bottom in the United States. The well-informed decision to repeal the Blindfold Law at long last brought New York in line with conservative states like Texas and North Carolina that have reformed their discovery laws.

While calls to address public safety concerns in New York have increased during what can only be described as a mental health crisis, the appropriate policy solution is proper funding of community-based mental and behavioral health care services, not rolling back the discovery rules that enable the accused to avail themselves of their constitutional due process rights, including the right to present an adequate defense.

Police and prosecutors have an enormous advantage when it comes to accessing evidence in criminal cases. They are the first at the crime scene collecting evidence, identifying witnesses and questioning suspects. And up until 2019, the prosecution had wide-ranging discretion to negotiate plea deals and sentences of incarceration without ever providing the accused and their legal counsel with critical information about the case against them.  New York’s discovery law now ensures that both sides in a legal case have prompt and comprehensive access to this information so that the accused can make informed plea agreements and, in cases where the accused is innocent, defend against wrongful convictions.  Robust and early discovery is foundational to the truth-seeking process in our criminal legal system–judges, juries and defendants can only make sound decisions when all the facts come to light.

A strong discovery law is also fundamental to an effective public safety plan.  It protects innocent people, and allows law enforcement to focus its energy on detecting those who have actually committed crimes. It streamlines the court process both before and after conviction, avoids protracted litigation spent processing post-conviction claims alleging that evidence had been withheld.  Protecting transparency and due process through fair discovery laws is essential to keeping our communities safe. New York must never put the blindfold back on.

**As budget negotiations unfold, we ask that you honor the following principles and priorities:**

* *Speedy trial tied to turning over discovery.* The disclosure of discovery under Criminal Procedure Law § 245 is currently tied to specific speedy trial timelines under CPL § 30.30. Speedy trial is the enforcement mechanism to ensure discovery obligations are met. Under current law, DAs must obtain discovery within a reasonable timeframe, from law enforcement and other sources, or be charged with speedy trial time for failure to do so. Any attempts to change timelines, requiring only “good faith” exceptions, or shifting the burden to the defense to show prejudice will divorce speedy trial protections from discovery disclosure, undermining the goal of discovery reform of ensuring that the criminal legal process is timely and transparent.

* *Police and prosecution must be accountable for discovery compliance.* Under the current discovery law, DAs have the obligation, as close partners with law enforcement, to obtain evidence from the police. It is wholly appropriate and expected that DAs should bear that responsibility, given not only the relationship between the DAs and local law enforcement, but given consistent rulings from the Supreme Court that the prosecution is obligated to obtain materials and documents from law enforcement.  Otherwise, this invites law enforcement to hold back critical documents which may be exculpatory in nature.  This would create a breeding ground for wrongful convictions.

**The following proposals would devastate the robust discovery framework established by the 2019 law:**

* *Shift the burden onto the defense.* The current discovery law rightfully requires the DA to comply with discovery obligations given their knowledge and control of all the information. Any attempt to change the current discovery law to ease the DA’s burden or relieve them of obligations is improper. All evidence should be turned over. Any attempt to require the defense to show prejudice is an unworkable standard that requires prosecutors and courts to make a value judgment about discovery.  These value judgments will result in prolonged arguments and disparate results throughout the state.

* *Limit disclosure to what is in the DA’s actual possession.* Any attempt to roll back discovery obligations so that DAs need only turn over evidence that is actually in their possession will absolve the police from ever turning over discovery, including exculpatory discovery.  This will lead to countless wrongful convictions and coerced pleas from the innocent.

Just one month ago, the National Registry of Exonerations revealed the nation’s [3,000th wrongful conviction](https://www.law.umich.edu/special/exoneration/Pages/about.aspx) (since 1989). A staggering [20% of these people had pled guilty](https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx) to crimes [they did not commit](https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P). This number is just the tip of the iceberg because not only are there comparatively few lawyers litigating post-conviction claims, but these figures largely fail to capture misdemeanor wrongful convictions, a huge universe of cases that are rarely revealed post-conviction.

Unlike the frenetic budget process under which we are all presently laboring, the 2019 discovery law grew out of thoughtful deliberations. Indeed, the law had practically no opportunity to flourish since the onset of the pandemic coincided with the start date for implementation. More than $40 million was dedicated to implementation at that time, and an additional $59 million is being considered in this budget process.  (This can be compared with wrongful conviction settlements that typically award New Yorkers $1 million for each year of wrongful incarceration.)

If the prosecution is experiencing issues with law enforcement disclosures, this is an issue best resolved through dedicated staff responsible for discovery disclosures and electronic discovery, not through undermining a framework that assures fidelity to the Constitution. Changes to the discovery framework promise to devastate a fair and just criminal legal process, disproportionately harm communities of color, and will certainly do nothing to make the public feel, or actually be, safer.

Rather than scaling back these transformational pretrial reforms, the Empire State would do well to, at long last, invest in community-based mental healthcare, mobile crisis units, and other supports for people who have mental health needs, as well as electronic discovery technology to implement the law properly. Resources like these are what would make all of us safer. Facts and not fear must dictate policymaking. To do otherwise would be to ignore the data at the expense of countless New Yorkers.

Sincerely,

Bronx Defenders

Brooklyn Defender Services

Center for Community Alternatives, Inc. (CCA)

Center for Appellate Litigation

Chief Defenders Association of New York

Citizen Action of New York

Close Rosie’s

College & Community Fellowship

Common Justice

Discovery for Justice

Drug Policy Alliance (DPA)

Empowerment Collaborative of Long Island (ECLI)

End Qualified Immunity New York

Exodus Transitional Community

The Fortune Society

Free the People WNY

FWD.us

GLSEN Lower Hudson Valley

Hour Children

Innocence Project

Justice for Families

The Legal Aid Society

National Association of Criminal Defense Lawyers (NACDL)

National Legal Aid & Defender Organization (NLADA)

Neighborhood Defender Service of Harlem

New York Civil Liberties Union (NYCLU)

The New York Immigration Coalition

New York State Association of Criminal Defense Lawyers (NYSACDL)

New York State Defenders Association, Inc. (NYSDA)

New Yorkers United for Justice (NYUJ)

New York Working Families Party (WFP)

Open Arms

Partnership for Public Good

The Release Aging People in Prison Campaign/RAPP

T'ruah: The Rabbinic Call for Human Rights

United Voices of Cortland

Vera Institute of Justice

Wayne County Public Defender