



New York Lt. Gov. Antonio Delgado, presides over the Senate Chamber during session prior to Gov. Kathy Hochul delivering her State of the State address in the Assembly Chamber at the state Capitol, Tuesday, Jan. 10, 2023, in Albany, N.Y. (AP Photo/Hans Pennink)

COMMENTARY

# Relaxing Penalties on Discovery Noncompliance Allows Criminal Cases to Get Decided on Merit

While some New Yorkers may be shocked at the increase of criminal charges being dropped and cases being dismissed under discovery laws passed in 2019, members of the Senate Republican Conference, law enforcement groups, court employees and district attorneys' Offices have been sounding alarms about the changes ever since, two Republican lawmakers write.

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🕒 5 minute read

**By Tom O'Mara**

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In 2019, the Republican conferences in the New York State Legislature argued stridently against the passage of Bail and Discovery reform on the floors of the New York State Assembly and Senate. This opposition did not come from political partisanship, but rather, it was formed by years of on the ground experience by our members who were former prosecutors and attorneys. We predicted then, as did many others, that the new laws wouldn't work and would be a disaster for New York's criminal justice system, particularly since none of the law enforcement stakeholders were consulted or even invited to be part of the drafting of the legislation.

The discovery reform legislation dramatically increased administrative burdens on already resource-strapped prosecutor's offices with new requirements that set out an impossibly short timeframe for them to review and disclose all information and evidence from criminal cases. The result of them not being able to keep up has been the unacceptable and dramatic increase in dismissals of cases for solely technical reasons.

In the wake of changes that went into effect in 2020, district attorneys have struggled to keep up with the onerous requirements, particularly as they continue to lack adequate staff and resources. While subsequent state budgets did finally include some moderate funding to address these concerns, it was not near the amount needed for District Attorneys to fully meet the demand of the increased burdens.

It is from this vantage point that we find the recent comments made by State Sen. Zellnor Myrie and Assembly Member Micah Lasher in a recent op-ed remarkably disingenuous and politically expedient. The sudden surprise that the dramatic increase in the number of criminal charges dropped and cases dismissed was foreseeable then, and has been apparent for five years. Since the winter of 2019, our concerns regarding discovery were brushed away as anecdotal or politically charged fearmongering—along with the same arrogant dismissal of our concerns regarding bail reform. So, while some New Yorkers may be shocked at the increase of criminal charges being dropped and cases being dismissed under the new discovery laws, members of the Senate Republican Conference, law enforcement groups, court employees and district attorneys' Offices who raised these very concerns are not surprised in the least—and have been sounding alarms about the changes since their adoption.

If the administrative burdens weren't enough, the law also greatly compromised the privacy of witnesses, giving defendants unfettered access to their personal information and allowing defendants to request access to the crime scene. This intimidates witnesses, decreasing their likelihood to come forward and cooperate, and further traumatizes the victims of crimes.

These failed policies have played a direct role in increased crime and decreased arrests diminishing public confidence, public safety and has led to the continued victimization of law-abiding New Yorkers in communities throughout New York State. Both Republicans and

Democrats have joined this chorus over the past five years, but all have been ignored by the Democrat controlled legislature.

We have a solution. The most significant flaw in the discovery reform is that non-compliance with the time constraints results in the speedy trial clock continuing to run. A simple removal of such a harsh consequence could resolve most of the problem. While we recognize that the timeliness of discovery is very important, (and our law already provides for expedited disclosure of certain evidence such as statements and identification procedures, *see*, CPL Section 710.30), the failure to comply without good reason usually results in the preclusion of that evidence from the case—not outright dismissal of the charges. Accordingly, reducing the penalty for non-compliance and providing some discretion to the court so they may mete out the appropriate punishment for a discovery violation will allow the overwhelming majority of these cases to be decided on the merits. Allowing the so-called punishment to be consistent with the level of violation has always been a basic tenet of our justice system and there is no reason why it shouldn't be reciprocal for the law enforcement side of the discovery equation.

Bottom line, many of us agreed that changes needed to be made, but they should have been done incrementally and with everyone's input. The complete overhaul of such a serious body of law is never a good idea particularly when the Democratic legislators who drafted these reforms refused to include the district attorneys and law enforcement. Failing to include all of stakeholders on an issue never results in good policy and discovery reform is no exception. I appreciate that the individuals who created this mess are now tacitly acknowledging the problem, albeit years late, but now that the babes in the woods have recognized the dangers of the forest, let's fix the discovery statute to provide justice for crime victims and for the safety of all New Yorkers.

**Tom O'Mara** and **Anthony Palumbo** are Republican New York state senators who, respectfully, represent the state's 58th and 1st Senate

*districts.*

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