February 13th, 2025 Public Protection Hearing Testimony

My name is Kevin Stadelmaier and I am the First Deputy Defender of the Erie County Assigned Counsel Program as well as the Legislative Committee Chair and President-Elect of the New York State Association of Criminal Defense Lawyers. I am here today to urge you to "intentionally omit" Part B of the Public Protection Bill and demand no further rollbacks to Article 245 of the Criminal Procedure Law.

Contrary to what the District Attorney's Association of New York State, Governor Hochul, Mayor Adams and other political actors have been telling you, the landmark 2020 Discovery Law is working as intended. Prosecutors are turning over eye opening amounts of evidence.

It is no surprise that the governor and DAASNY are using the very same propaganda as they did for bail. It is completely illogical to blame the discovery law for rearrests.

This latest attempt at a repeal (the 5th such attempt) was done completely in the dark. While in the past, NYS defenders were seen as partners in this process and offered valuable "other side" insight into proposed changes, this year we were left completely outside. We were not called, consulted or asked to weigh in on this extraordinarily damaging legislation before the Governor included this destructive proposal in her budget.

OVERVIEW

Here are the facts:

The 2020 Discovery Law is among the most successful criminal legal system reforms of the past century.

Among other things; it:

- Mandates full and complete discovery, so that ADA's do not have to think about whether the information they hold may be exculpatory or helpful to the defense;

- Requires the District Attorney to ensure that the police turn over all the evidence. This requirement also ensures that the DA's can assess the value of their case;

- Incentivizes the DA to exercise due diligence to ensure timely disclosures. NY courts have held the DA's to the statutory speedy trial "due diligence" standard for decades. It is not a new concept to the DA's. .

- As long as the DA's can show due diligence, courts are allowed to give them leeway to err and to provide additional discovery at a later date. There is no such thing as a strict dismissal rule.

- When defense attorneys do not alert the DA's to known missing items, our speedy trial claims can be, and, in fact, are denied.

- When DA's believe that a witness is in danger or might suffer embarrassment, or that the evidence might be destroyed, they are able to obtain protective orders. In fact, defense attorneys routinely consent to many of the proposed protective orders.

This statutory scheme finally brought New York State in line with other early and full discovery states, such as New Jersey, North Carolina and Texas.

Part B eviscerates nearly every major component of the old law. While they have repeatedly strive to soften Part B to "a tweak to close a loophole," it is a full repeal. If you look at what is bracketed, i.e. deletions, you can see how expansive the destruction is.

Part B, will, among other things, do the following:

- change the "related to" standard for evidence disclosure to "relevant." This trial evidentiary standard will once again allow prosecutors to be the sole determinants what materials to turn over and which to hide. This will undoubtedly result in the non-disclosure of critical evidence. Even worse, if the defense finds out that evidence is being withheld, protracted litigation will ensue.

- relieve the prosecutor of the burden to obtain evidence from the police by changing "constructive possession" to "actual possession." If the police do not turn over material, the DA's can still stop the Speedy Trial Clock because they need only turn over items in their "actual" possession. This leaves vast amounts of information including officer notes, body cameras, witness statements, and other critical materials undisclosed. We know that in NYC, the NYPD is recalcitrant about sharing over discovery in an efficient manner to the DA's.

- eliminate any accountability for turning over discovery late; By requiring the defense to show prejudice – which, at a trial level, is extremely difficult, if not impossible, DA's are shielded from court scrutiny. At best, courts will simply adjourn cases to alleviate any prejudice. We will go back to the days of numerous court adjournments as DA's keep explaining that they are trying to track down the discovery.

DATA ON DISMISSALS

Much has been made of the Department of Criminal Justice Services (DCJS) data showing high rates of dismissals for all, especially felony cases. DCJS data, while accurate, shows "dismissals" based on "arrest charge." Using this data to argue that felony cases are being dismissed at a higher rate post discovery reform as compared with pre-discovery reform is highly misleading.

Often, law enforcement agencies will arrest a person and charge him or her with a felony.

DA's downgrade many felony arrests and file, instead, misdemeanor complaints. Those that remain as felony complaints get further downgraded by another set of ADA's who have had more time to

talk to witnesses (not just the police). The grand juries also have the power to reduce or dismiss charges. In short, even at this stage, not every felony complaint results in an indictment.

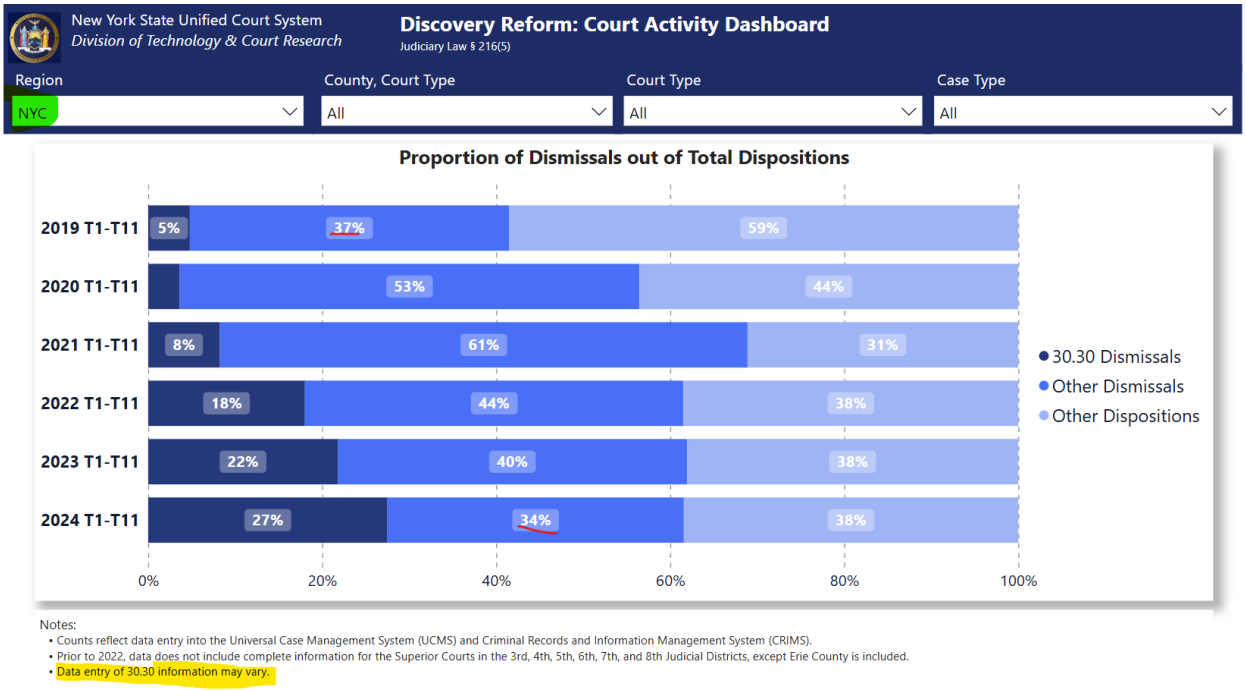
DJCS data does not take this into account when measuring dismissals. A felony charged at arrest is a felony forever as far as their data is concerned. This leads to extremely misleading conclusions, and would appear to a "fearful" public to mean a higher rate of felony dismissals post-discovery as opposed to pre-discovery.

A more accurate measure as to the difference in dismissal rates is the data compiled by the NYS Office of Court Administration (OCA). Their dashboard is located at https://ww2.nycourts.gov/discovery-implementation It can be used to accurately track dismissal data for the entire state.

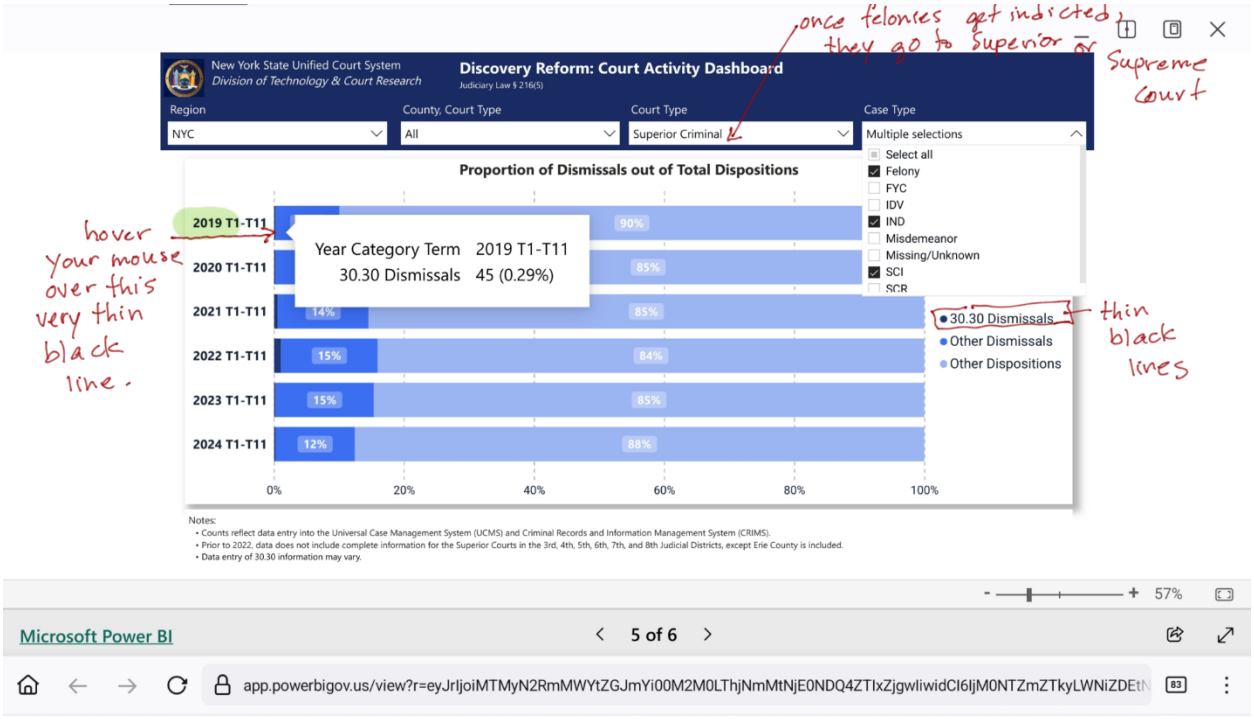
New York City's misdemeanor dismissal rate appears as an outlier. You may be asking yourself why:

Prior to April 2022, when cases were on the "speedy trial or 30.30 dismissal" calendars, DA's were allowed to concede the dismissal but would concede on other grounds such as "CW uncooperative" or "in the interest of justice." The clerks did not have to enter the dismissal as a speedy trial dismissal even though that was the true reason. Much of the 2019 data about speedy trial dismissals is an underreporting of those dismissals. Unfortunately, we will not be able to recalculate the true reasons for the dismissals.

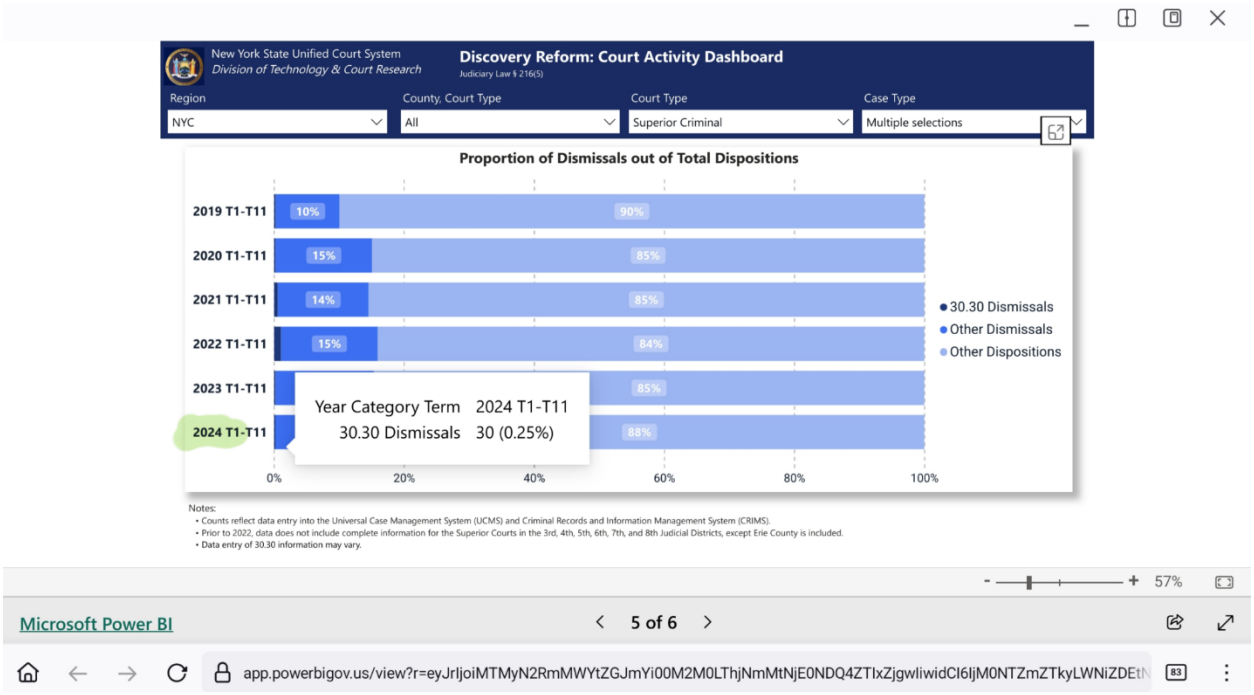
OCA's dashboard, however, shows that the dismissal rate (regardless of the reason) for NYC has not changed significantly:



The felony dismissal rate – based on speedy trial - in NYC has remained steady as well (less than .5%). In 2019, the indicted felony dismissal rate was .29%:



In 2024, the indicted felony dismissal rate was .25%:



The NYPD has vocally opposed the 2020 Discovery Law from its inception. They sought to roll it back before it even took effect and have done so every year since it was enacted.

No one anticipated the vast amount of discovery that was out there: it's a testament to how little we were given prior to 2020. But we must all acknowledge that it is crucial. We now understand why law enforcement wants to hide information. We now spend a lot of time reviewing the discovery and then reviewing it with clients. We also ask our investigators to speak with witnesses we would have never found before 2020. We then spend time making decisions about plea offers or going to trial. At times, we are able to negotiate better plea offers. We admit that this requires a lot more work. But, unlike some DA's, we are not afraid of the hard work that is so necessary to achieve justice.

While some prosecutors and most law enforcement lament that we are not quickly taking guilty pleas, there is good reason. We are seeing – finally – that the people we represent should not plead guilty so quickly and easily. I use the word "some" for prosecutors because a majority of prosecutors are being diligent and are providing discovery. When cases get dismissed on speedy trial grounds, it occurs mostly in misdemeanor cases. On those misdemeanor cases we are seeing ADA's who are not familiar with how to obtain basic discovery from recalcitrant law enforcement and some inexperienced DA's who do not have a way to digest the discovery so that they can figure out what else is out there.

This is a problem that is especially true in New York City.

Further, it should be noted that any increased dismissals are NOT SOLELY attributable to 30.30 Speedy Trial violations. The increases shown are dismissals for ALL REASONS, not just speedy trial.

The data accurately shows then that the discovery law has had minimal impact on dismissals; whether those be for misdemeanors or felonies.

DEBUNKING MYTHS WITH CASE LAW

Various other unsupported allegations have been made by the Governor and Prosecutors as justification for amending the statute; these variously have included:

- Defenders are "lying in wait" until speedy trial times elapse so that ADA's do not have time to correct their mistakes;
- The timelines for discovery are unreasonable and burdensome;
- Cases are being dismissed due to missing "shreds of unimportant and irrelevant information"

The Alliance to Protect Kalief's Law has gathered a 6 page document containing decisions both denying and granting motions to dismiss. (attached to my testimony) These decisions are representative of what courts are actually doing. Cases do not get dismissed when the defense

attorneys wait too long to notify the DA's of known missing items. Cases do not get dismissed because of an inadvertent mistake or because one small minor piece of discovery was late.

These decisions, in fact, show that "due diligence" is not a difficult standard. They are common sense steps that we all need to take in everyday life. Here is a brief overview of what that means. In a case involving the DA's attempts to obtain medical records, a court found that despite an error in filling out the HIPAA, the DA exercised due diligence; the court was more than satisfied when the ADA obtained: "a signed HIPAA release from the complainant; serv[ed] a subpoena upon the appropriate hospital, along with the HIPAA release; [spoke] with a hospital representative when the records were not received; and contact[ed] an outside vender when directed by the hospital representative to do so."[1]

In another case, a court due diligence when: "[t]he witness signed the HIPAA forms on May 26, 2022 and on June 7, 2022, the People drafted corresponding subpoenas and mailed them to the medical providers on June 9, 2022."[2]

When a dismissal occurs, the circumstances are egregious. Thus, in a misdemeanor case, when the ADA waited until 115 days had passed to make any attempt to obtain something as simple as EMS records, the court could not find due diligence.[3] What is also clear from all these decisions is that prosecutors are not only given leeway but they are given opportunities to explain what steps they took to obtain the discovery, as well as any explanations as to why they were not able to obtain the discovery. As long as they provide some basis and explain that they started obtaining the discovery within the speedy trial time, cases do not get dismissed.

THE ISSUES THEY CLAIM ARE FATAL TO THE STATUTE ARE EASILY SOLVED BY RESOURCES AND DA/LE DATA SHARING

The NYC DAs, in proffering excuses for their failure to comply, have often pointed to a lack of resources as well as difficulty in obtaining "constructively possessed" materials in the hands of the NYPD. There are two fixes to these issues that have nothing to do with amending the highly successful statutory language already in place.

First, a bill has been introduced by Sen. Zellnor Myrie and Assemblyman Micah Lasher (S613/A825) which would provide District Attorneys Offices DIRECT ACCESS to the NYPD information portal. This would negate the NYPD's ability to withhold information and make the process of transparent evidence sharing seamless between the NYPD, DAs and the Defense.

Second, $80 million dollars has already been provided to prosecutor's offices for implementation of CPL 245. Another $40 million is earmarked for the FY 2026 budget. $120 million is available to be spent on technology, staffing and culture changing apparatus to ensure that the promise of CPL 245

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[1] People v. Miles, 81 Misc. 3d 1248(A)(Bronx Crim.Ct. 2024)

[2] People v. Hall, 76 Misc. 3d 804, 810 (Bronx Crim.Ct. 2022).

[3] People v. Sylvestre, 81 Misc. 3d 1051, 1060 (Kings Crim.Ct. 2023)(numerous other key items of discovery were missing).

is fully realized. The issue is that there has been little to no enforcement as to prosecutor office use of these funds. Most DA's have not fully implemented new discovery platforms like NICE. In fact, the Richmond County DA – despite additional funding – is refusing to switch to NICE claiming that it is too costly.

In closing, the NYS legislature **MUST INTENTIONALLY OMIT PART B** in the final NYS Budget.

- These changes are a FULL REPEAL, not a tweak
- These changes will substantially delay cases, result in extensive litigation, lead to excessive pre-trial incarceration and wrongful convictions.
- The data supports ZERO LINKAGE between the 2020 law and increased dismissals.
- Cases are not being dismissed due to "loopholes" but rather due to egregious prosecutorial misconduct or overt subversion of the law by law enforcement and DAs.
- There are abundant resources and legislative solutions available to solve the issues DA's point to as "most pressing."

New York must continue to hold law enforcement and DA's accountable. We must all do our jobs. Obtaining convictions - whether by guilty plea or trial verdict - should never be based on excuses that our jobs are difficult.