49 THOMAS STREET NEW YORK, NY 10013 TEL: 212-577-3300 www.legalaidnyc.org

THE LEGAL AID SOCIETY CRIMINAL DEFENSE

**Alan Levine**
*President*

**Twyla Carter**
*Attorney-in-Chief*

**Tina M. Luongo**
*Chief Attorney*
Criminal Practice

**Philip Desgranges**
*Attorney-in-Charge*
Law Reform and
Special Litigation

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The Honorable Liz Krueger
Chair, Standing Finance Committee
Room 416 CAP,
Capitol Building
Albany, NY 12247
financechair@nysenate.gov

The Honorable Gary Pretlow
Chair, Standing Committee on Ways and Means
LOB 923,
Capitol Building
Albany, NY 12248
wamchair@nyassembly.gov

**Testimony of the Legal Aid Society in Support of Funding for Defender Offices and Discovery Technology Across New York and in Opposition to Sweeping Repeal of Criminal Procedure Law Article 245 and Certain Penal Law Changes Proposed by the Executive**

**Submitted to the Joint Legislative Budget Hearings on Public Protection**

Dear Chairperson Krueger and Chairperson Pretlow,

We thank you for this opportunity to provide testimony to the joint Budget Hearing on Public Protection. We are grateful to the Legislature for recognizing the vital role defenders play in our criminal legal system and for supporting that constitutionally mandated role by introducing and then reappropriating funding for staffing and discovery technology into the final FY23 and FY24 budgets; we once again ask that those crucial amounts be reappropriated.

In our testimony we will expound upon the ways we have marshalled that crucial appropriation to adapt our practice to the realities of modern digital discovery in an age of mass surveillance. We have begun to build out a team of litigation assistants and have entered into a contract with a digital evidence sharing platform that has already created a model for streamlined preparation and thorough and zealous representation.

While we in the defense bar have taken advantage of the funds deployed to help us realize the promise of the watershed reforms of 2020, the county prosecutors have once again come with a demand to turn back the clock on our evidence sharing rules. We join with defenders and advocates across the state in decrying the regressive proposals found in the Executive Proposal on Public Protection General Governments Article VII Legislation, Part B. These sweeping proposals would mark an end to open-file discovery in our state, landing us in a too-familiar time of blind pleas, wrongful convictions and prolonged pre-trial detention, all with no timely or transparent access to evidence. We also stand opposed to the Executive proposals for unwarranted expansion of a carceral system that this Legislature has rightfully worked to shrink and reform. We thank you for considering our opposition and encourage your continued efforts to address the root causes of crime and the investments that truly create thriving communities.

The Legal Aid Society is built on one simple but powerful belief: that no New Yorker should be denied the right to equal justice. We seek to be a beacon of hope for New Yorkers who feel neglected -regardless of who they are, where they come from, or how they identify. From our start over 140 years ago, our growth has mirrored that of the city we serve. Today, we are proud to be the largest, most influential social justice law firm in New York City. Our staff and attorneys deliver justice in every borough, working tirelessly to defend our clients and dismantle the hidden, systemic barriers that can prevent them from thriving. As passionate advocates for individuals and families, The Legal Aid Society is an indispensable component of the legal, social, and economic fabric of New York City.

We are proud to work in coalition with fellow defenders, advocates, impacted individuals and community organizations all of whom organize and work for investments in our communities and the eradication of the social inequities that too often lead to arrest, detention and incarceration. As part of this ongoing work, we have formed the Alliance to Protect Kalief's Law, a coalition united in our goal to protect our successful discovery laws. We will continue to work with our partners across the state to push for a more just, equitable and compassionate legal system and a fully funded social safety net.

**Request to reappropriate the $40 million for Aid to Defense and $40 million for Defense Discovery**

First, we want to underscore our deep appreciation to the Legislature for receiving our request for statewide funding in FY 24 and FY 25 and ensuring that the funding made it into the final

budget. While that money has not yet been delivered to all defenders across New York, it has been crucial to implementing much-needed technology upgrades and to address staffing needs. In our endeavor to work in coalition with partners to secure funding and resources for our attorneys and the communities we serve, some of our most important partnerships are with the Chief Defenders Association of New York (CDANY) and the New York State Defender Association (NYSDA) and the New York State Association of Criminal Defense Attorney (NYSACDL). These organizations have also submitted testimony to this joint committee on the state-wide funding requests of the defender community. We fully adopt those funding requests and offer further anecdotal context in support for the following:

**Aid to Defense $40 Million and Defense Discovery $40 Million: Digital Discovery and Litigation Assistants**

We request reappropriation of the $80 million in statewide aid to defense ($40M) and discovery funding for the defense ($40M) via the Division of Criminal Justice Services, Aid to Localities allocation. This crucial continued infusion helps support defenders across the city and state who have been dealing with high attrition rates and critical technology upgrades.

In the FY 2024 budget the legislature championed this combined $80 million dollars to defender organizations, across the state, to fund the technology and staffing necessary to fully implement the promise of the landmark Discovery Reform of 2019. The Legal Aid Society was one of the first defender organizations to receive our portion of these funds. This has allowed us to be at the forefront of testing and contracting with technology as well as staffing up to meet the demands of thorough review of evidence disclosure. We are making the changes necessary to ensure that every New Yorker we represent is provided zealous representation with full access to and understanding of the evidence against them.

While some of our sister defender organizations outside of New York City have only begun to receive FY24 funding, we at the Legal Aid Society received our first infusion of funding from this allocation in the early fall of 2024. This has allowed us to move forward with plans to hire litigation assistants and contract with a digital evidence platform that, once fully integrated, will allow our attorneys to receive, organize and review the evidence provided on each case by the prosecutors' offices.

NICE Defense is an online platform to help attorneys review and organize the discovery information we receive from the prosecution. The platform enables an attorney to search for specific evidence, edit files directly on the platform, sort and organize evidence, know when files are uploaded and updated, and re-label, tag, and share evidence easily. Importantly, we have chosen to contract with the same digital evidence system, NICE, also now engaged by four of the five New York City Prosecutors. Only Richmond County DA, and current District Attorneys

Association Of New York President, McMahan has opted not to use the NICE system, his office is currently without a digital platform. Likewise, the NYPD, which has generous funding from both the city and state for technology needs has opted not to use the NICE system. We chose the NICE system because we understand that working in the same digital environment as the District Attorneys will allow for efficient and seamless transfers of information. This investment is necessary to make the promise of the discovery law a reality. We want to streamline evidence sharing between our offices and technology is available to help us do that,

Throughout our representation in all five boroughs, each District Attorney has provided discovery in different ways. For example, in Queens, the assistant district attorneys routinely turn over packets of discovery that are in no particular order, have no index associated with them and take our attorneys hours to organize and comb through to understand what they have received and what is missing in order for discovery to be properly certified. The NICE system allows us to sort and organize with much greater ease, allowing us to determine what discovery might be missing and alert the assigned prosecutor in a timely manner.

As one of our staff attorneys, who are part of our pilot project with NICE, recently said,

> "...NICE has saved me, quite literally, HOURS of work on this trial case. Due to an issue that arose I needed to carefully re-review BWC (Body Worn Camera) to look for something that didn't matter before. I was able to use the syncing feature to play several [videos] at once and get a more complete picture than I ever got watching them (even repeatedly) one by one."

Discovery funding from the State also has allowed LAS to hire a first class of Litigation Assistants who are providing meaningful support to senior attorneys thereby alleviating the burden of representing clients with serious allegations and complex discovery. The role of the Litigation Assistant is essentially a highly trained paralegal, who using the NICE Defense discovery software and other tools can efficiently review and organize discovery. In addition, the Litigation Assistants provide direct client representation by acting as a point of contact, and the person who is expected to visit incarcerated clients for purposes of reviewing discovery. Finally, the Litigation Assistants are seated at counsel table during hearings and trials, to assist with quickly locating necessary discovery, creating and publishing exhibits, and creating and displaying demonstrative aids such as power point presentations during closing arguments.

The inaugural class of Litigation Assistants consisted of 45 people assigned citywide. We are in the process of hiring an additional class to start in the Spring. The Litigation Assistants received five weeks of training which covered the criminal court process, NYPD structure and functions, discovery law and substance, and various technological components such as NICE Defense, PowerPoint, Adobe, Excel, and video players. Legal Aid developed this comprehensive training program and is available to share the information and resources with other providers as they begin to receive the funding and staff up.

By performing some of the most time-consuming case-related tasks, the Litigation Assistants are increasing the caseload capacity of attorneys. We have already seen the boost to morale among senior attorneys and will increase our retention of these critical staff. The Litigation Assistants are almost entirely people who have recently graduated from college. This role creates an entryway into public defense work that did not previously exist. Legal Aid is working to build relationships with our local colleges to promote this opportunity. Many of the new Litigation Assistants are planning to attend law school in the next two or three years. When they return as criminal defense attorneys, they will have multiple years of in-depth experience working on serious violent felony cases. We believe that not only will many of our Litigation Assistants return to public defense, but they will be prepared for the nature of the work and are more likely to commit to public defense as a long-term career.

Moreover, clients who receive representation from a lawyer working with a Litigation Assistant have the advantage of two highly trained professionals reviewing the evidence in their case, and the case will be able to be resolved more expeditiously thereby alleviating some of the burden from the Courts. As an example of how we are seeing this impact, in a case in the Bronx, the attorney handling the case reports that the Litigation Assistant has been invaluable in working with the client because she not only understands the entire case but is also able to spend the time connecting with the client and assisting her with important matters outside of the facts of the case. This has allowed the client to truly engage in her case and prepare the upcoming trial. As the assigned Litigation Assistant states:

> "I've had quite a bit of interaction with the client, primarily making sure she feels reassured that the legal team is handling everything properly. She's very tired and can get upset during this difficult process, so I've helped guide conversations when she becomes overwhelmed or distracted. I've also assisted in receiving and managing her health forms, ensuring all necessary documents are in order.
>
> Additionally, I've been keeping an eye on her health aide to make sure he isn't over-involving himself in ways that could interfere with the process. I've helped her navigate different aspects of the case, from paperwork to general support, and I expect my role to expand as we get closer to trial since she'll likely need even more guidance."

It is no exaggeration to say that the funding for defense that this legislature first championed in FY 24 has been transformational to ensure that the promise of the landmark Discovery Reform Legislation of 2019 is fully realized. We will expound upon the Executive Proposal to effectively repeal those landmark laws later in this testimony. First, we want to share some of the success of the funding you have provided which we believe illustrates that by changing the culture of how our attorneys handle discovery and prepare cases we have begun to fully realize the promise of this watershed legislation.

In a recent case in Queens, the District Attorney alleged – based on the sworn testimony of a police officer – that our client was in possession of a firearm. The firearm was located inside a safe that was searched pursuant to a warrant, but the only item of evidence connecting our client to the gun or the safe was his ID card that the officer stated was also found inside the locked safe. The attorney believed that this information was not accurate but had been unable to go over every video produced in the case in detail. A Litigation Assistant was assigned, and using the NICE software was able to review all of the body worn camera video efficiently and thoroughly. Through this review the Litigation Assistant located body worn camera footage that showed the officer picking up our client's ID card in a shoebox in a different room and then carrying it to the safe and placing it inside. This very same police officer (falsely) testified in the grand jury that he found our client's benefit card in the safe, right next to the gun. After showing this video footage to the Assistant District Attorney, the case was dismissed thereby preventing a wrongful conviction.

In a recent trial case for attempted murder, the Assistant District Attorney relied on video compilations that were created by the police to demonstrate our client's whereabouts and alleged presence at the scene of the offense. The allegation was a shooting that occurred in 2021 when our client was just 15 years old. Prior to trial the Litigation Assistant reviewed all of the *Giglio* materials that had been provided. Their synthesis of these extensive materials allowed the attorney to complete an effective cross-examination which called into question the officer's competence and veracity. Additionally, as the Litigation Assistant describes their role:

> "Many of my responsibilities in this case were video-related, as I watched and rewatched and indexed the multiple versions of the video compilations (the judge made some rulings regarding edits in the compilation, so we received multiple slightly different versions throughout the trial). The detectives put together a map and chart of the footage locations documenting the timing offset for each camera (the majority were not aligned with actual time on the night of the shooting). So I reviewed the compilation and raw footage of the most pertinent locations to document the timestamp on the footage, the offset determined by the detectives, and the respective "actual" time for each camera. There (were) hours of footage, so this was definitely a time-consuming task but ended up being totally worth it! Upon review, I noticed that the timing offsets were such that the client was depicted in footage half a block / an entire avenue block AWAY from the shooting when it happened. Because the investigation was sloppy and the detectives did not determine timing offsets to the second (only to the minute), they essentially provided our client with an alibi."

The jury returned a verdict of not guilty and in speaking to the defense team afterward noted that both the cross-examination and the video review were the basis for their decision. The evidence that led to exoneration in these two cases is exactly the kind of evidence that the Executive's proposed changes to our discovery law will allow to stay hidden. No one would have learned the relevance of this evidence if the defense hadn't painstakingly studied it. That is why a rule that lets prosecutors withhold evidence they deem "irrelevant" is so dangerous. Even worse is a rule that lets police withhold evidence from prosecutors; this too is a proposal the Governor makes in her sweeping repeal of our discovery laws.

In other cases, timely review of the complete discovery, and the ability to sit with clients to go over it in detail has allowed clients to more comfortably accept a plea offer. Overall, we are seeing case processing times decrease, while the level of service we are providing has increased. The funding for both NICE Defense and Litigation Assistants has allowed us to fully engage with the discovery on behalf of our clients and is increasing morale throughout the office.

Our use of crucial state funding to secure the resources of staffing and technology has allowed us, at The Legal Aid Society, to begin to realize the full promise of the landmark discovery reforms. The long overdue 2020 discovery reform combined with the ever-increasing use of surveillance technology and digitized investigation techniques required criminal law practitioners to adapt culture change for both the defenders and the prosecutors. We thank this committee for the opportunity to share the forward-thinking ways that have enabled us to embrace this moment of change and create a new culture of cooperation and innovation to better serve the New Yorkers we are proud to represent.

**Recommendation to Wholly Reject Part B of Executive Proposal in PPGG**

We strongly oppose the entirety of Part B of the Executive Proposal within the Public Protection and General Government Article VII legislation. If enacted, these wholesale changes would effectively repeal our landmark discovery laws, decimating fairness and reducing efficiency in the courts. As we have discussed above, the state has allocated resources that we have used to hire new staff and contract with digital evidence platforms. This change in culture and practice has already yielded success. The prosecutors who advocated for these baseless changes must join us in employing the resources this legislature has provided to embrace the modern law rather than fight against it.

The Governor has justified her sweeping proposal by citing the need to close "technical" "loopholes" that result in defense attorneys "gaming the system." She promises her changes will increase case efficiency and address criminal recidivism. She supports these proposals with data from DCJS that does not represent a dismissal rate of cases actually prosecuted as felonies nor does it distinguish between speedy trial dismissals based on discovery violations and other dismissals. And most importantly, not one of the justifications offered is based on what is really happening in criminal courts – where, in decision after decision, judges find that diligent prosecutors' cases should not be dismissed for inadvertent mistakes.

We cannot go back to the decades upon decades of New Yorkers being forced into the impossible position to take pleas with no timely access to full and transparent evidence. The Governor's proposal will without question take us back. According to the National Registry of Exonerations, in New York, evidence had been withheld in 204 of the state's 359 exonerations. New York's

current discovery laws remove any confusion about which evidence must be turned over and when, preventing huge miscarriages of justice and protecting foundational fairness.

***The Executive Proposal Would End Open-file Discovery In New York Criminal Courts***

This unwarranted proposed regression would effectively end open-file discovery in our state. The Governor's proposal will bring us back to the days when prosecutors decided which pieces of evidence are "relevant" to "the charges" and which pieces of evidence should be withheld from the defense. The proposal also allows prosecutors to redact any information from discovery material that they deem irrelevant to the charges without approval from a judge. Together these changes would enable prosecutors to withhold potentially favorable information from the defense. In the two cases described above, no one would have learned the relevance of the exonerating evidence if the defense hadn't painstakingly studied it. That is why a rule that lets prosecutors withhold evidence they deem "irrelevant" is so dangerous. If adopted, this proposal would mark the end of open-file discovery in New York and bring us back to the days of wrongful convictions.

***The Executive Proposal Would Allow Police to Withhold Evidence***

Currently, the law ensures that the police cannot hide evidence by requiring prosecutors to disclose all the evidence in the possession of the police before they can state "ready for trial." This rule is vital because most evidence in a criminal case is collected by the police. The Governor's proposal removes that requirement. Instead, prosecutors would only be required to disclose evidence in their *actual possession* (anything in the possession of the police would be deemed only in their constructive possession). This means that police also have the power to decide what evidence gets disclosed to the defense, creating a system that rewards police intransigence and will require protracted litigation to obtain basic evidence. At best, the police will have no incentive to turn over critical discovery.

***The Executive Proposal Would Turn the Discovery Law into a Set of Guidelines Instead of Enforceable Rules***

The proposal turns a law that ensures fairness and transparency through meaningful enforcement into a toothless guideline that will lead to prolonged pretrial incarceration and wrongful convictions. Under the current law, prosecutors have expansive time frames to hand over all evidence in a case: 90 days for misdemeanor cases and 6 months for felonies, with numerous extensions that expand the speedy trial clock, including time spent on necessary motions by both the prosecution and defense. Under the Governor's proposal, prosecutors would be able to stop this clock without turning over evidence and with no meaningful consequence for their failure to do so. Cases will drag on, and people who can't afford their bail will languish in jails waiting to

see the evidence against them, as there would no longer be any incentive for timely disclosure of evidence.

***The Rhetoric Used to Justify These Changes Is a Baseless Distraction***

In 2022, the legislature, with input from both defenders and prosecutors, amended the statute to require defense attorneys to alert prosecutors as soon as they are able when they learn that discovery is missing. In 2023, the Court of Appeals heard a case of first impression on missing discovery and the enforcement mechanism in the statue, People v. Bay, 41 N.Y.3d 200 (2023). In the Court's decision they affirmed that the statute never required a "perfect prosecutor," and that CPL 245 is not a "strict liability" statute.

As a result of the 2022 amendments, cases are not dismissed when the defense delays in alerting prosecutors to missing discovery unless the prosecutor has delayed turning over evidence until the expiration of the speedy trial clock.

Meanwhile, judges don't penalize prosecutors who are diligent. Cases are only dismissed when a prosecutor's failures to timely disclose evidence are a result of a lack of diligence. As the Court of Appeals explained, there is no such thing as a "perfect prosecutor" and this is not a "strict liability" statute.

The data on dismissal rates on felony cases cited by the Governor is misleading and is being used as a false flag. 41% of Felony Cases Prosecuted in New York City are NOT being dismissed. This data is derived from DCJS data, which tracks the disposition of cases in given year based on *arrest* charges and not charges at arraignments. These metrics are not useful in assessing discovery reform's impact. Arrest charges are what the police write down in their paperwork—not what prosecutors ultimately charge in court. This is an important difference because it is common knowledge in the criminal legal system that police officers frequently make "felony arrests" for offenses that do not amount to felony conduct.

In order to prosecute a felony case to trial, a prosecutor must present the case to a grand jury and obtain an indictment. At that point, the case is transferred from local criminal court to superior court. With the limited exception of disclosing the accused's statements to police to the defense, prosecutors aren't required to provide *any* discovery in felony cases until after the case is indicted. Therefore, in order to meaningfully assess the impact of the discovery law on felony case dismissals, we must look at superior court data on indicted felonies which is housed on the Office of Court Administration dashboard. Dismissal rates in superior courts (*where felonies get prosecuted*) are *the same* now as they were before discovery reform.

As to the alleged connection between "recidivism" or "repeat offenders" and our discovery law, the Governor has offered no proof of this connection. That is because there is neither evidence to

support this assertion nor a logical connection between repeat crimes and evidence-sharing. In the days before implementation of discovery reform, misdemeanor cases were largely cycled through from arrest to plea taken at arraignment, landing the person arrested directly back on the street with no evaluation of needs nor connection to resources. This was because as attorneys, we could give no guarantee as to when our clients would be given access to the evidence against them and misdemeanor cases that survived arraignment routinely dragged on for months and even years. Faced with the proposition of coming back to court every four weeks for a year or worse, waiting in jail for a prolonged period, people chose to plead to end the interminable process. Now, people aren't backed into a corner to take a plea at arraignments because their attorney can explain that there is an enforceable timeframe in which they must be given the evidence against them. This means fewer pleas at arraignments and more opportunity to connect with services offered by the courts and the defense. In essence it also creates court and prosecutorial supervision for at least the 90 days until discovery must be provided. Any assertion that our current laws are somehow linked to recidivism is not a serious claim and should be dismissed as such. We must reject the Governor's attempt to diminish the rights of our clients in favor of making this baseless political point. In truth, the Governor's claims serve as a distraction from the necessary work to provide our most vulnerable New Yorkers with the services they need to thrive.

**Judicial Decisions Highlight that Cases Are Not Dismissed If Prosecutors Are Diligent and Demonstrate that Defense Attorneys cannot Benefit from a Strategy of "Lying in Wait"**

The case decisions from trial and appellate courts show that, especially since the December 2023 Court of Appeals decision in People v. Bay, clarified that the "touchstone" of the statute is reasonableness. The Court explained that cases should not be dismissed for the late disclosure of evidence if prosecutors are diligent and good faith efforts to learn of discovery. Those prosecutors do not have their cases dismissed based on "technicalities." And since 2022, decisions show that motions to dismiss made by defense attorneys who faile to notify prosecutors of missing discovery (that they could know about) are denied. In other words, there is no "loophole," that allows for this.

Defense attorneys are now very aware that trial courts will deny challenges to missing or late discovery if we do not notify the prosecution as soon as practicable. Thus, in a felony case, a court found that had the defense attorney "minimally perused" the discovery, the missing items, including body worn camera, would have been immediately detected. The court held,

> "[c]onsequently, because of defendant's unreasonable inaction and undue delay in notifying the People of discovery defects and/or challenging the People's COC [certificate of compliance] as soon as practicable, this Court declines to charge the People with all speedy trial accruals since its filing of the original COC on November 30, 2020." *People v. Smith*, 79 Misc. 3d 649, 657-58 [Queens Co. Sup. Ct. 2023].

A few months ago, an appellate court reaffirmed what defense attorneys already knew: defense delays in challenging the validity of a Certificate of Compliance (COC) result in denials of defense challenges. The Second Department's Appellate Term, held that

> "CPL 245.50 (4) (b) provides that, '[t]o the extent that the party is aware of a potential defect or deficiency related to a [COC] or supplemental [COC], the party entitled to disclosure *shall* notify or alert the opposing party *as soon as practicable*' (emphasis added). In addition, CPL 245.50 (4) (c) provides that '[c]hallenges related to the sufficiency of a [COC] or supplemental [COCs] *shall* be addressed by motion *as soon as practicable*' (emphasis added). Here, as defendant's first notification of any deficiency in, or challenge to the sufficiency of, **the COC was 72 days after the prosecution filed its COC, when defendant filed his motion, defendant's motion, under the circumstances presented herein, was properly denied as untimely.**" *People v. Seymour*, 84 Misc. 3d 23, 25 [App Term 2024], lv to appeal denied, 42 NY3d 1022 [2024]:

Trial courts have been following suit. In a criminal court case, the court found that the prosecution notified defense counsel that they were awaiting search warrant materials. The defense was therefore on notice that the items existed but never followed up with the assigned ADA. The court found that the People's supplement CoC [was] valid and denied "the defendant's challenge to the COC .... as untimely." *People v. Irving*, 84 Misc. 3d 1233(A) [Kings Sup. Ct. 2024].

Not only have courts routinely found that defense attorneys can not engage in gamesmanship to gain dismissals, they have also found that prosecutors who require additional time to obtain material discovery materials simply need to ask for it. The 2020 discovery statute has always permitted courts to amend the timeframes to allow diligent prosecutors to continue to gather evidence as there are "safety valves" found throughout article 245. Thus,

> "[T]he Legislature anticipated circumstances that would necessitate amending the statutory timeline to comply with disclosure obligations and the People were provided recourse to request that the court modify their deadline to comply. ..."[w]hen the discoverable materials are exceptionally voluminous or, despite diligent, good faith efforts, are otherwise not in the actual possession of the prosecution, the time period in this paragraph may be extended pursuant to a motion pursuant to subdivision two of section 245.70." " *People v. Amissah*, 79 Misc.3d 401 (Bx. Crim. Ct. 2023)((citing People v Castellanos, 72 Misc 3d 371, 374 (Sup Ct, Bronx County 2021)).

**The Governor's sweeping repeal of our landmark discovery laws will decrease court efficiency and prolong pre-trial incarceration while having no logical link to reducing recidivism rates.**

Although the Governor has characterized her proposal as a set of "tweaks" to "close loopholes" and "streamline" the discovery process, the changes in the proposal would actually change the *scope* of the evidence required to be disclosed, not just the process by which it is disclosed. Further, the changes to the process are so severe that they remove the incentive for prosecutors to follow the law by dramatically weakening the statute's enforcement mechanism. It makes the

statute into more of a set of guidelines rather than an enforceable law. The proposal recategorizes materials in the possession of police as in the *constructive* possession of prosecutors but only requires prosecutors to disclose evidence in their *actual* possession before certifying that they have discharged their disclosure obligations. In other words, they will have completed discovery without disclosing the police's evidence. This means that a prosecutor can stop the speedy trial clock and slow down the progression of a case, despite requests for information from police having been ignored. This will increase litigation and inefficiency because defense attorneys will once again be forced to file discovery motions in every case to obtain basic evidence like body worn cameras, police misconduct reports, and lab reports.

Serious proposals of how to increase safety in our communities would instead focus on the proven solutions that address the conditions that cause the instability that can lead to arrest, not end the transparent sharing of evidence. We know what works; experts have long pointed out that infusing robust funding and resources into our communities serves to increase our feeling and experience of safety[1]These are the proactive approaches we must pursue, and the Governor's proposal distracts us from doing so.

There is no discernable proof that sharing evidence makes New Yorkers less safe. "Open File" discovery laws have been implemented across the country with great success. Diligent law enforcement officials – police and prosecutors -- share evidence—they do not try to hide it. The effective repeal of our discovery laws in Part B must be wholly rejected and we ask the Legislature to do so, allowing us to move into conversations about real solutions to support thriving communities and all New Yorkers.

## Additional Recommendations Based on the Executive Budget Proposal

Over the last decade, conversations around mass incarceration and the disparate impact that it has had on communities of color have become more prevalent in the discourse, but rarely do we see legislation prioritized by the Executive to truly address it. Although it is important that awareness is growing around the racial implications of criminalization, we continue as a state to misguidedly fall into a pattern of addressing social harms with more arrests and criminalization.[2] These policies always target Black and Latine New Yorkers at a disproportionate rate; and oftentimes, they cause further economic strain on Black, Indigenous and Latine families, increasing the likelihood of violent police interactions and family separation through incarceration. If passed, the proposals below will not meaningfully impact community safety and will only serve to expand our prison population in New York state, which currently locks up a higher percentage of its state population than almost any democratic *country*.[3]

[1] Center for Justice Innovation "To Achieve Public Safety Invest in Strong Communities" available at https://www.innovatingjustice.org/articles/what-is-public-safety (Last visited 2/9/25).

**Recommendation to Reject Changes to Vehicle and Traffic Law 1192 as contained in part E of the Transportation, Economic Development and Environmental Conservation Article VII Legislation**

We urge this Legislature to reject Part E of the Transportation, Economic Development and Environmental Conservation Bill. We recognize that this bill is not contained with the PPGG Article VII proposals, but nonetheless it is a dangerous expansion of criminal penalties. This proposal expands the definition of the term "drug" for alleged impaired driving offenses, and mandates submission to scientifically unreliable field-testing methods as the basis for arrest and license suspension. The proposed bill would not, as it suggests, "strengthen drug-impaired driving provisions" or "enhance public safety". To the contrary, these provisions would unjustly stigmatize those with chronic conditions or mental health diagnoses and deter them from seeking treatment – creating far more dangerous road conditions and public safety concerns.

Because of the clear danger of over broadly defining a "drug", the Legislature enacted Vehicle and Traffic Law 114-a, limiting a "drug" to the hundreds of substances listed in Public Health Law (VTL) 3306 (which itself mimics the Federal Controlled Substance schedules). As the Court of Appeals has noted, "The legislative history is conclusive that the Legislature in 1966, like previous legislatures, intended that "intoxication" refer to inebriation by alcohol. It appears that the Legislature did not want to penalize a driver who inadvertently took prescription drugs without knowing their side effects. In addition, the Legislature sought to limit criminalization by defining the drugs prohibited. " People v. Litto, 8 NY 3d. 692 (NY Court of Appeals, 2007)

The proposals included in the Governor's bill would not only upend decades of Legislative intent, but would also unduly expand criminal culpability to a nearly infinite list of benign substances.

Currently, for law enforcement to arrest someone for operating while impaired by drugs, they must allege that impairment is caused by a substance listed in the Public Health Law (PHL). While this may seem limiting, this list includes hundreds of substances – and has been (and will continue to be) amended on a myriad of occasions over the years to add substances deemed potentially dangerous by medical and scientific consensus. Conversely, per National Highway Traffic Safety Administration's own standardized training material, there are thousands of physical and mental conditions that can resemble and mimic drug impairment. Expanding the definition of a drug to an infinite number of unspecified "substances" will undoubtedly result in a number of unfounded arrests and wrongful accusations of those who are taking (but are not impaired by) a medication for legitimate purposes. To compound this danger, this could conceivably even include alleged impairment by something as ubiquitous as the caffeine found in coffee or over the counter allergy medications. More importantly, those who take medications to manage the symptoms of a mental health or other chronic condition may choose not to take them for fear of being accused of a criminal act – resulting in substantially more dangerous driving conditions.

The overly broad amendments proposed by the Governor pose a significant and unjust danger to New York drivers – many of whom take medication to manage a chronic physical or mental health condition – and must be rejected.

**Recommendation to Reject Part N: Expand the Transit Ban**

The legislature should again reject the Governor's shocking proposal to expand the transit ban, as defined in Penal Law § 65.10(2)(k-2). This was proposed last year under the Governor's "Five Point Plan to Protect New Yorkers on the Subway." and would mean that people who allegedly engage in criminal activity say, *near* a bus stop can be banned from all public transportation.

The same overly-broad amendments now proposed in Part N were previously rejected by the legislature in the 2024 session, as it is understood that they would dramatically increase judges ability to ban New Yorkers from public transportation for up to three years and this wide-ranging power would disproportionately impact low-income communities who rely on public transit everyday. Further, given the stark racial targeting and biases of the criminal legal system, the proposal expanding conviction-based bans will have a disproportionate impact on Black, Indigenous, and Latine people and their families, subjecting them to increased searches and suspicion less stops while using public transportation.

If passed, the Governor's proposal would allow a ban in cases where someone was convicted of an assault against a passenger, MTA employee, or anyone working within the transit system. Importantly, bans would be permitted if the assault happened either in or **adjacent to** the entire MTA system. What this means, for example, is that a judge could ban a young person from the entire MTA transit system (buses, subway, rail, etc.) for getting into a fight in front of any one of our city's hundreds of subway or bus stations. Given the scope of the New York City transit system, this expansion to include adjacent spaces is untenable. Banishing more people from accessing public transit will not keep New Yorkers safe. In fact, expanding transit bans, as proposed here, will only exacerbate housing and job insecurity, while also depriving people from accessing critical services and health care. New York should reinvest funds that are spent on aggressive policing, surveillance, and punishment and instead focus on ways to make public transit affordable for low-income New Yorkers, while also ensuring people can access housing, health care, education, and employment.

**Recommendation to Reject Part O: Expand Definitions of Criminal Trespass and Burglary Statute to Add Transportation Facilities**

The legislature should reject Part O, which will expand the definition of "building" as defined under the criminal trespass and burglary statutes to include transportation facilities. If this amendment is passed, subway cars and buses would be considered "buildings," drastically

expanding the ordinary or publicly understood meaning of the word. The Governor's proposal appears again to be aimed at increasing criminal penalties upon the most vulnerable New Yorkers, while failing to actually meet the goal of increasing community safety. This proposal will impact low-income, unhoused, and young people most severely, subjecting them to increased criminal penalties and the possibility of years in prison.

This expansion of the criminal definition for building would allow for an unhoused person who enters the subway without paying the fare and panhandles on the train or platform to be charged with burglary, a felony offense. The proposal will also result in the increased criminalization of conduct that arises from poverty, while failing to provide the solutions and resources New Yorkers desperately need. This expansion is unnecessary and dangerous, as police and prosecutors already have numerous tools at their disposal for holding people accountable for conduct that causes harm and it will subject vulnerable New Yorkers to increased police contact, destabilizing interaction with the criminal legal system, and pre-trial detention.

**Recommendation to Reject Part P: Aggravated Transportation Offense**

The proposal to create a new offense titled "Aggravated Transportation Offense," a class C felony punishable by up to 15 years in prison, is an extremely dangerous expansion of the criminal law that will allow prosecutors to seek punishments which do not fit the crime. The proposal creates a new crime that is a C felony, a category of crime that is punishable by up to 15 years in prison. A person can be charged with PL § 240.80 if they were convicted of a specified offense within the prior five years (excluding any time spent incarcerated) and are now accused of committing any of the specified offenses " in or adjacent to any facility or conveyance of the MTA or a subsidiary thereof or NYC transit authority or subsidiary thereof.."

This will allow prosecutors to strategically overcharge people which will do the work of forcing people to plead out to the lesser charge (of which they may be innocent) in order to avoid the possibility of conviction on the overcharged felony that carries [2]mandatory prison time. This is an unwarranted expansion of the already oversized strength of prosecutorial power.

The Aggravated Transportation Offense would allow for prosecutors to dramatically increase penalties for conduct that is the least severe in the criminal code, including conduct that is considered non-criminal (violations) or the lowest level of crimes (B misdemeanors and non-violent offenses). The proposal includes more than 64 eligible offenses, including misdemeanor crimes like Criminal Mischief in the Fourth Degree for causing damage to property. This could mean that if a teenager is convicted for criminal mischief for using a marker to "tag" a subway station and is then arrested for some other minor crime in or *near* the subway, they could be sent to prison for up to 15 years. This proposal is an unacceptable overreach with serious

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consequences. The proposal would also punish individuals accused of attempting to commit a crime with the same level of culpability as individuals who are accused of completing a criminal act, which runs afoul of how the criminal code operates in all other instances.

Further, the offense would not just include individuals accused of committing violations or crimes within subways or transit buildings, but any area "adjacent" to it. In New York City, this could subject individuals to extreme criminalization at almost every street corner.

If the Governor's intention is to reduce crime and to support individuals experiencing mental illness, this proposal will fail at both. Rather, investing in supportive services such as mental health care (including expansion of assertive forensic treatment teams[4]) supportive and affordable housing will begin to meet these New Yorker's basic needs while creating the stable and supportive conditions that build community safety and reduce recidivism.

**Recommendation to Reject Part D: Dispossess Domestic Violence Abusers of Firearms**
Governor Hochul has proposed creating Penal Law § 120.65 -- a new crime of "domestic violence" -- in cases where a person is alleged to have committed a specified penal law offense against a member of their household or someone who is a former spouse, parent, or other relative. Notably, this proposal has been suggested in prior years by Andrew Cuomo and rejected by the legislature.

The aims of these proposals are to disqualify individuals from owning or purchasing a new firearm once convicted of the new domestic violence law and to address the harms of intimate partner violence and intrafamilial violence. However, this proposal achieves neither. Importantly, laws already exist to dispossess individuals accused of domestic violence from possessing firearms (See CPL § 530.14, which requires individuals to surrender firearms and the suspension of applications for firearms when an order of protection is issued). Instead of addressing the root causes of domestic violence and gun-based violence, this new law merely reiterates existing penal laws under one unifying statute, PL 120.65, creating a direct pathway to a mandatory arrest of either/or both parties involved.

Further, the drafting of the proposal is ambiguous and could raise potential constitutional challenges, as it refers to "any misdemeanor" offense without specifying the jurisdiction. Under this language, it may be possible for a person to be prosecuted in New York for alleged conduct within another state.

These proposals will have a disproportionately harmful impact on New Yorkers of color, criminalize Black and Latine survivors of domestic violence, and expose vulnerable New Yorkers to more state violence. Instead of addressing the root causes of domestic violence and gun-based violence, this new law merely reiterates existing penal laws under one unifying

statute, PL 120.65, creating a direct pathway to a mandatory arrest of either/or both parties involved.

**Recommendation to Reject Part F: Eliminate the Statute of Limitations for Sex Trafficking Cases**

The Governor's proposal in Part F would eliminate the statute of limitations for Penal Law § 230.34 and § 230.34-a for sex trafficking and sex trafficking of a child, respectively, and while well-intentioned, the proposal will have serious implications for survivors of sex trafficking and gender-based violence. Ironically this proposal would disincentive victims of trafficking and exploitation from seeking the help they need. People subjected to exploitation may be less likely to participate with the prosecution – even when offered alternative sentences in exchange for their cooperation - because of both fear of retribution *and* the potential that they themselves may be further prosecuted.

The Legal Aid Society's Exploitation Intervention Project (EIP), founded in 2011 is the first effort by a public defender office to address the systemic criminalization of victims of trafficking and gender-based violence. EIP has advocated for thousands of clients, providing direct-representation and comprehensive services to those charged with offenses related to sex work and survivors of trafficking and gender-based violence facing prosecution for other offenses in New York City.

Some of the most impactful work the Exploitation Intervention Project has done is through our post-conviction advocacy representing trafficking survivors seeking to vacate criminal convictions pursuant to New York State's vacatur law, Criminal Procedure Law Section 440.10(1)(i). This law, as expanded by the START Act, allows survivors of trafficking to vacate all criminal convictions directly tied to their trafficking. While survivors face many challenges in rebuilding their lives, the stigma of a criminal record imposed for acts in which they were compelled to engage is particularly burdensome as it impedes survivors' ability to obtain stable employment and housing and is a constant reminder of their exploitation. Our clients regularly worry about retaliation from the person who sex trafficked them when initiating these procedures and would be less likely to proceed with this critical process if further prosecution of their trafficker was possible. Because the statute of limitations has typically expired by the time individuals seek relief under the START Act, we are currently able to assure them that a new prosecution will not result from their application. Removing the statute of limitations entirely would have a chilling effect on the 440.10(1)(i) motions and the START Act, and also may put individuals who decide to utilize it in danger.

This proposal could also expose non-citizens to increased contact by law enforcement. With an unlimited statute of limitations, police would have permission to increase contact upon

vulnerable groups, including non-citizens, and pressure them to cooperate on old cases. This would result in increased exposure for these individuals and put survivors at risk. Finally, for many EIP clients who are prosecuted, prosecutors often require a proffer session with the District Attorney's office. In these meetings, clients waive privilege and share their experiences with District Attorneys. They also answer questions that may be helpful to the prosecutor's investigation. Extending the statute of limitations for these two offenses will make these already delicate conversations less likely to occur, as criminal liability for the person could now extend to the individual communicating with the prosecutor. For example, people who are trafficked are often coerced to recruit and manage other victims, meaning that they are also technically engaging in sex trafficking. Understandably, survivors of trafficking will be less willing to come forward to talk about their experience being trafficked when fewer protections exist to assure them of their safety. For these reasons, we urge the legislature to reject Part F.

**Recommendation to Reject Part L: Outlaw Artificial Intelligence-Generated Child Sexual Abuse**

Part L's proposed amendments to Penal Law article 263, Sexual Performance by a Child, that add "created . . . by digitization" to sections 263.10, 263.11, 263.15, and 263.16 would manufacture victimless crimes, would violate the Free Speech Clause of the First Amendment, and would be impossible to enforce.

Presumably these amendments were proposed in response to computer applications that use artificial intelligence (AI) to aid in the creation of photorealistic images of sexual activity that appear to involve children. Article 263, in its current and amended forms, uses the definition of "digitization" found in Penal Law 245.15(d): "digitization" shall mean to alter an image in a realistic manner utilizing an image or images of a person, other than the person depicted, or computer generated images." As distasteful as they may be, computer generated images do not involve actual people—adults or children—so they are not child pornography as traditionally understood, nor are they child sex abuse records.

The rationale for the criminalization of child pornography is that it protects children from the harm that child pornography causes, as opposed to punishing the distasteful proclivities of adults who consume it. These proposed amendments move away from protecting children, as no actual children are involved—simply computer-generated representations—and embrace punishing people for their sexual interests. This would be a sea change in the justification for laws against child pornography. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 249-50 (2002)(noting that actual child pornography is intrinsically related to the sexual abuse of real children because it is a permanent record of their abuse and because its trafficking is an economic motive for its production, citing New York v. Ferber, 458 U.S. 747, 759-60 (1982)).

Because the protection of children rationale does not apply, criminalizing computer-generated images that appear to depict sexual conduct by children, without involving any actual children, runs afoul of the First Amendment. Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)(holding that the ban on virtual child pornography in the Child Pornography Prevention Act abridges the freedom to engage in a substantial amount of lawful speech, and thus is overbroad and unconstitutional under the First Amendment).

Part of the definition of "Sexual Performance by a Child" in Penal Law article 263 requires that the child who engaged in sexual conduct be under 17 years of age (for PL 263.10 and 263.15) or 16 years of age (for PL 263.11 and PL 263.16). As a practical matter, how would law enforcement officials determine if the digital "child" depicted in the "sexual performance" is under 17 or 16 years of age? Simply asking the question highlights the absurdity of deeming computer-generated images a "sexual performance by a child."

Part L's proposed amendments to Penal Law article 263 that add "altered by digitization" to sections 263.10, 263.11, 263.15, and 263.16 impose liability for felony sex offenses—and the long-lasting, onerous burden of sex offender registration—for actions that do not involve the sexual abuse of children. The amendments are unduly harsh.

Presumably these amendments were proposed in response to computer applications that use artificial intelligence (AI) to alter images to make it appear as if actual people, including children, originally depicted in non-sexual images, are engaging in sexual conduct. Specifically, the faces of children can be put in place of the faces of the adults who were recorded.

Unlike purely computer-generated images, such altered images, when depicting actual children, are not protected by the First Amendment, (see, e.g. United States v Mecham, 950 F3d 257 [5th Cir 2020], United States v Hotaling, 634 F3d 725 [2d Cir 2011]) because of the reputational and emotional harms that can result when the faces of identifiable children are disseminated. But the amendments do not require dissemination of the images for conviction. See, e.g., PL 263.10 ("such person produces . . . a performance created or altered by digitization"). A person could be convicted based on images that no one, beyond himself and a law enforcement official, saw. Like purely computer-generated images—and unlike pre-digital child pornography—altered images based on adults engaging in sexual conduct are not records of child sexual abuse.

Therefore the traumatic harm, both physical and psychological, involved in the creation of pre-digital child pornography is absent. In addition, the language of the amendments requires neither intent to harm nor any showing of harm to the children whose likenesses are used. This means a person could be convicted of a felony sex offense under the proposed amendments without any showing by prosecutors that the children depicted or anyone who knows them or recognizes them ever saw the altered images or is even aware that they exist.

By comparison, Penal Law 245.15, Unlawful Dissemination or Publication of an Intimate Image, requires that the person intentionally disseminate or publish an image, as well as proof of "intent to cause harm to the emotional, financial or physical welfare of another person" before a conviction can be obtained. It is a Class A misdemeanor, rather than a felony, and it is not a sex offense under New York law. See Correction Law 168-a(2) (defining "sex offense").

## Conclusion

Thanks to the leadership of the Legislature, we have made great strides in recent years to make our criminal legal system more just and equitable in outcome; however, our work is far from done. We offer our partnership in advancing our shared goals of stable and thriving communities and encourage you to continue divesting in carceral tools while investing in the social services, housing, health care, and robust public education and opportunities for our youth that create opportunity for all New Yorkers.

If you have any questions about our testimony, please email Criminal Defense Practice Policy Director Amanda Jack ajack@legal-aid.org.

Sincerely,

Tina Luongo
Attorney-In-Charge
Criminal Defense Practice