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LETTING THE CAT OUT OF THE BAG: HOW NEW YORK'S DISCOVERY REFORM REMOVES THE
SECRECY FROM THE GRAND JURY

I. INTRODUCTION

As soon as February 5, 2020, just one month after New York enacted the new discovery laws, critics blamed the laws for the death of Wilmer Maldonado Rodriguez.¹ His death became “a new flashpoint in the debate over criminal justice changes enacted by the New York State Legislature in 2019”² Mr. Rodriguez had helped two boys being threatened by MS-13 gang members on Long Island in October of 2018.³ After that, he was a victim of assault by the gang members; they stabbed him and repeatedly hit him in the head with a bat.⁴ Notwithstanding the assault he endured, Mr. Rodriguez agreed to cooperate with the prosecution and testify against his assaulters.⁵ In December 2018, a protective order was obtained to protect Rodriguez’s identity; however, after the new discovery laws were enacted, his name was disclosed to the defense attorneys within a year.⁶ However, the initial backlash and blame placed on the criminal justice

¹ See Ed Shanahan & Jesse McKinley, *Furor Erupts Over Killing of Witness in MS-13 Gang Case*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/nyregion/ms-13-long-island.html>; see also Scott Shackford, *New York Police Try To Pin Gang Witness’s Death on Criminal Justice Reforms*, REASON (Feb. 6, 2020 12:30 PM), <https://reason.com/2020/02/06/new-york-police-try-to-pin-gang-witnesss-death-on-criminal-justice-reforms/> (“When Wilmer Maldonado Rodriguez, 36, was found dead on Sunday in New Cassel, New York, police and prosecutors quickly went to work—not just on solving the crime, but on trying to blame recent reforms on how information is shared with criminal defendants.”); Daniel Hampton, *Teen Arrested, Accused Of Murdering Witness in MS-13 Case: Police*, PATCH (Feb. 16, 2020 9:22 AM), <https://patch.com/new-york/hicksville/teen-arrested-accused-murdering-witness-ms-13-case-police> (“Ryder [commissioner of the police department] initially blamed criminal justice reform laws for Rodriguez’s death”); Robert Brodsky, *Activists: Don’t Politicize MS-13 Witness’ Death*, NEWSDAY (Feb. 7, 2020 5:49 PM), <https://www.newsday.com/long-island/nassau/ms-13-witness-maldonado-curran-ryder-1.41556339> (“County Executive Laura Curran and Police Commissioner Patrick Ryder initially linked Rodriguez’s death to a new law requiring prosecutors to give defense attorney’s discovery material—including, potentially, the name of confidential witnesses – no later than 15 days after a defendant is arraigned.”).

² See Shanahan, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Hampton, *supra* note 1.

reform was quickly withdrawn.⁷ Commissioner Ryder of the Nassau County Police Department said, “[t]here was no direct link between the death of Wilmer Maldonado Rodriguez and criminal justice reform.”⁸ When the case did not move to trial and a motion was made to lift the protective order, it was granted.⁹ Further, it was found that all of the parties were familiar with each other in 2018.¹⁰

The grand jury is a historical institution in New York’s criminal justice system,¹¹ and the discovery reform is long-needed change to that same system.¹² But that change has already affected the system in a way that was not intended. So, what can we do to help? This paper proposes that the answer to that question is to amend the provision that mandates identification and contact information for witnesses that testify in the grand jury. Part II.A of this paper discusses the history of the grand jury system in New York. Part II.B discusses the changes to discovery laws made by the New York State Legislature. Part III discusses the issue that has arisen surrounding the secrecy of the grand jury and witnesses’ reluctance to cooperate. Part IV proposes that the provision of the New York State discovery laws should be amended to provide the identification and contact information for grand jury witnesses only to the defense attorney until trial. Part V will conclude this paper.

II. BACKGROUND

This section gives background information on the grand jury and highlight parts of New York’s recent criminal justice reform as it relates to the discovery provisions. Part II.A provides

⁷ Bridget Murphy & Nicole Fuller, *Man Found Dead in New Cassel was Witness in MS-13 Assault Case, Cops Say*, NEWSDAY (Feb. 6, 2020 3:08 PM), <https://www.newsday.com/long-island/crime/witness-murder-reform-new-cassel-1.41460454>.

⁸ Ali Watkins, *Police Chief Made Fiery Claim Over MS-13 Murder. Records Dispute It*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/nyregion/ms-13-long-island.html>.

⁹ See Murphy & Fuller, *supra* note 7.

¹⁰ See Watkins, *supra* note 8.

¹¹ See *infra* Part II.A.

¹² See *infra* Part II.B.

information about the grand jury system. It first discusses the grand jury process and then the secrecy surrounding the institution, highlighting goals that require it be done in secret. The last subsection of Part II.A discusses the main arguments that opponents of the grand jury as an institution often cite when arguing for its abolishment. Part II.B cites a specific provision of the New York Discovery laws and discusses select provisions that, this paper argues, interferes with grand jury proceedings in the state.

A. *The Grand Jury*

“The United States and New York *did not create* the grand jury as in institution . . . [b]oth Constitutions *by their very language*, refer to the grand jury *as an existing institution*.”¹³ The grand jury system utilized today, gets its roots from the system in England.¹⁴

Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.¹⁵

In other words, the grand jury’s original purpose was to protect citizens from the state’s power.¹⁶

In England, it was used as a method to prevent the oppressive prosecution by the monarch.¹⁷ Still,

¹³ Lawrence N. Gray, *The Grand Jury as an Institution: Its Essential Character and Miscellaneous Supervision*, 65 N.Y. ST. B. J. 38, 38 (1993); *see also* U.S. Const. Amend. V; N.Y. Const. Art. I, Section 6.

¹⁴ *See* YALE KAMISAR, WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR & EVE BRENSIKE PRIMUS, *ADVANCED CRIMINAL PROCEDURE* 945 (15 ed. 2019); *see also* Gerald D. Robin, *The Grand Jury: Historical Roots, Contemporary Operation and Calls for Reform*, <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=922C6A8C26EE13B031CF781B13ABBF78?doi=10.1.1.59.2459&rep=rep1&type=pdf> (last visited June 4, 2020).

¹⁵ *Id.*

¹⁶ GARY MULDOON, ESQ., § 6:2 *Original Purpose, Statutory Authority, Membership, and Function*, in *HANDLING A CRIMINAL CASE IN NEW YORK* (Sept. 2019).

¹⁷ *Grand Jury*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/grand-jury> (last visited Apr. 28, 2020).

it serves as a check on the prosecutors, or the State; grand jurors cannot indict if they believe that there is not enough evidence against the accused.¹⁸

Rules governing the grand jury have been codified in New York Criminal Procedure Law.¹⁹ New York defines the grand jury as “a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses and concerning misconduct.”²⁰ While New York State has provided for the grand jury protection of prosecutions in the state, the federal guarantee of a grand jury is not actually binding on the states by way of the Fourteenth Amendment.²¹ Further, the accused may waive his right to receive an indictment by grand jury.²²

1. The Process

Grand jurors are chosen from the same pool of individuals from the community that trial, or petit jurors are.²³ Twenty-three are chosen and sixteen, “a quorum,” must be present to hear evidence or deliberate.²⁴ After the grand jury is impaneled, a foreman and backup foreman are chosen and then all members are sworn in.²⁵ The jurors will then sit for an extended period of

¹⁸See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, QUALITY AND SCOPE OF EVIDENCE BEFORE A GRAND JURY §3-4.6 (4th ed. 2017),

https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.

¹⁹ See N.Y. CRIM. PROC. LAW § 190 (McKinney 2019).

²⁰ N.Y. CRIM. PROC. LAW § 190.05 (McKinney 2019).

²¹ See *Hurtado v. California*, 110 U.S. 516, 538 (1884) (“[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross examination of the witnesses produced for the prosecution, is not due process of law.”).

²² See N.Y. CRIM. PROC. LAW § 195.10 (1) (McKinney’s 2019) (“A defendant may waive indictment and consent to be prosecuted by superior court information when: (a) a local criminal court has held the defendant for the action of a grand jury; (b) the defendant is not charged with a class A felony punishable by death or life imprisonment; and, (c) the district attorney consents to the waiver.”).

²³ See Elianna Spitzer, *What Is a Grand Jury and How Does It Work?*, THOUGHTCO. (Sept. 21, 2018), <https://www.thoughtco.com/grand-jury-in-the-united-states-3368320>.

²⁴ GRAND JUROR’S HANDBOOK, NEW YORK STATE UNIFIED COURT SYSTEM 3 (Feb. 2017), https://www.nyjuror.gov/pdfs/hb_Grand.pdf.

²⁵ N.Y. CRIM. PROC. LAW § 190.20 (3) (McKinney 2019).

time (in New York, this can range from three weeks to two months, depending on jurisdiction).²⁶ Within this time period, the prosecutor will present evidence through witnesses on various cases.²⁷ After the evidence is presented, it is the grand jury’s job to determine “whether or not to formally charge the accused person with a crime.”²⁸ At the conclusion of the presentation, the prosecutor will submit a “statement of proposed charges contained in an indictment.”²⁹ The grand jurors may: “(1) indict a person for an offense . . . ; (2) direct the attorney to file a prosecutor’s information with a local criminal court . . . ; (3) direct the district attorney to file a request for removal to the family court . . . ; (4) dismiss the charge before it . . . ; [or] (5) submit a grand jury report.”³⁰

2. Secrecy

The grand jury is a secret proceeding.³¹ No person authorized to be present is allowed to disclose the nature or substance of any testimony heard, evidence, decision, or result.³² During the presentation, the parties allowed to be present are limited to: “grand jurors, assistant district attorney, defense counsel (maybe), witnesses, court officers, interpreter, clerk, video tape operator and stenographer.”³³ There are several reasons why these proceedings are secret.³⁴ The general

²⁶ See GRAND JUROR’S HANDBOOK, *supra* note 24; see also N.Y. CRIM. PROC. § 190.15 (1) (“A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated.”); *Nassau County Grand Jury*, NYCOURTS.GOV, <http://ww2.nycourts.gov/COURTS/10JD/nassau/cojgrandjury.shtml> (“[g]rand [j]urors serve for a term of four weeks.”) (last visited June 3, 2020).

²⁷ See GRAND JUROR’S HANDBOOK, *supra* note 24 at 5.

²⁸ *Id.*

²⁹ HON. RICHARD LEE PRICE, GRAND JURY PROCEEDINGS IN THE STATE OF NEW YORK, NEW YORK COUNTY LAWYERS ASSOCIATION 2, https://www.nycla.org/siteFiles/sitePages/sitePages530_0.pdf.

³⁰ N.Y. CRIM. PROC. LAW § 190.60(1)-(5) (McKinney’s 2019) (citations omitted).

³¹ N.Y. CRIM. PROC. LAW § 190.25 (4)(a) (McKinney’s 2019) (“Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.”); see also SECRET JUSTICE: GRAND JURIES, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS 2 (2004) (“The secrecy rule, adopted from England, has become an integral—some say essential—part of the American criminal justice system.”).

³² 32 N.Y. Jur. 2d Criminal Law: Procedure § 1180: Reasons for Grand Jury Secrecy.

³³ See HON. RICHARD LEE PRICE, *supra* note 29 at 1.

³⁴ *Id.*

purpose is to protect the people and functions within the system.³⁵ The Court of Appeals has noted that holding the proceeding in secret is done to:

prevent a person who is about to be indicted from fleeing; protect the grand jurors from interference by a person under investigation; prevent a person under investigation from tampering with prospective witnesses or lying at trial if the grand jury gives an indictment; protect an innocent person from unfounded accusations; assure prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.³⁶

Secrecy is strongly favored by public policy; it has been a “hallmark since its inception and is considered an essential core ingredient.”³⁷ “The secrecy surrounding a grand jury is guarded jealously because the confidentiality of its proceedings is necessary to ensure its continued effectiveness.”³⁸

3. Issues

Twenty-five years ago, Chief Judge Sol Wachtler made the now-famous comment that prosecutors can get grand juries to “indict a ham sandwich.”³⁹ It was also noted that “[t]he grand jury covers up a lot of stuff for the prosecutors.”⁴⁰ Although the grand jury has historical significance, there has been a push for it to be abolished and replaced with methods utilized by a number of other states.⁴¹ There are two primary groups of opponents to the grand jury system: “(1) those who characterize the grand jury as a worthless ‘rubber stamp’ of the prosecutor, and support elimination . . . and (2) those who view the grand jury as having the potential to be a

³⁵ See Reasons for Grand Jury Secrecy, *supra* note 32.

³⁶ See HON. RICHARD LEE PRICE, *supra* note 29 at 1.

³⁷ See Reasons for Grand Jury Secrecy, *supra* note 32

³⁸ *Id.*

³⁹ See Marcia Kramer, *A Judge Courts Controversy*, DAILY NEWS, February 4, 1985, at 12, <https://nydailynews.newspapers.com/image/486765844>.

⁴⁰ *Id.*

⁴¹ See KAMISAR ET AL., *supra* note 14. Currently, only eighteen states make indictment for felonies through the grand jury mandatory: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 946.

legitimate screening alternative to the preliminary hearing, but only if it is reformed to include various safeguards.”⁴²

The arguments that these groups point to generally include the fact that the grand jury is under the complete authority of the prosecutor, and that only rarely will a grand jury decide not to indict.⁴³ “The most important factor in the grand jury’s probable cause determination is the evidence presented during the proceedings, and the prosecutor is the sole source of the evidence upon which the grand jury must decide whether to indict.”⁴⁴ Besides supplying all of the evidence to make the decision, the structure of the grand jury is wholly dependent on the prosecutor;⁴⁵ and, due to the secrecy of the proceedings, there is no way to “check” the prosecutor: the grand jury is used as the “prosecutor’s shield from the prying eyes of the public.”⁴⁶

Those who oppose the grand jury wholeheartedly suggest that most grand jurors do not have enough background in the law and simply rely on the prosecutor to educate and help them apply it.⁴⁷ Further, it is argued that the abolition of the grand jury system would “remove the illusion that grand jurors are in control.”⁴⁸ This is discussed in an opinion piece published by the *Daily News* where the author recounts his time spent sitting on a grand jury.⁴⁹ He states that the grand jurors were poorly educated about their role in the criminal justice system.⁵⁰ Grand jurors had to listen to the instructions, but could not read them.⁵¹ When finally fighting to get a copy of

⁴² See KAMISAR ET AL., *supra* note 14 at 947.

⁴³ *Id.*

⁴⁴ See Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205 (2017), <https://harvardlawreview.org/2017/02/restoring-legitimacy>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See KAMISAR ET AL., *supra* note 14 at 947; see also *Grand Jury: Should the Grand Jury Be Abolished*, L. LIB. – AM. L. AND LEGAL INFO., <https://law.jrank.org/pages/7197/Grand-Jury-SHOULD-GRAND-JURY-BE-ABOLISHED.html> (last visited June 15, 2020).

⁴⁸ See *Grand Jury: Should the Grand Jury Be Abolished*, *supra* note 47.

⁴⁹ Michael Aronson, *The Strange Secrets of N.Y.’s Arcane Grand Jury System*, N.Y. DAILY NEWS (Sep. 9, 2009), <https://www.nydailynews.com/opinion/strange-secrets-n-y-s-arcane-grand-jury-system-article-1.403064>.

⁵⁰ *Id.*

⁵¹ *Id.*

the instructions, he was not allowed to share them with the others.⁵² He recounts that the prosecutors would routinely take evidence with them when the jurors deliberated, unless he advised them not to, and that he could only listen to the criminal statutes charged, again not being allowed to read them.⁵³ The author ends by telling the reader to “[j]ust give the DA the rubber stamp.”⁵⁴ This account shows exactly what opponents of the grand jury are worried about: the grand jury not being a check on the prosecutor but simply being a system with illusory control.

B. Discovery Reform

Discovery, broadly defined, is a formal process of information sharing between adversaries in a legal proceeding.⁵⁵ This information relates to witnesses and evidence that the sides will present at trial.⁵⁶ In New York, Article 245 of the Criminal Procedure Law governs discovery.⁵⁷ The reforms to discovery took effect on January 1, 2020.⁵⁸ “The changes ‘take New York from being dead last in discovery openness to being in the vanguard nationally.’”⁵⁹ Before the reform, New York’s discovery laws were referred to as “blindfold laws,” meaning that “defendants were kept in the dark about the evidence against them and forced many to decide whether to enter a

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *How Courts Work*, AMERICAN BAR ASSOCIATION (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery.

⁵⁶ *Id.*

⁵⁷ See generally N.Y. CRIM PROC. LAW § 245 (McKinney 2020).

⁵⁸ See KRYSTAL RODRIGUEZ, DISCOVERY REFORM IN NEW YORK: MAJOR LEGISLATIVE PROVISIONS, CENTER FOR COURT INNOVATION 1 (May 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf.

⁵⁹ See Beth Schwartzapfel, “Blindfold” Off: New York Overhauls Pretrial Evidence Rules, THE MARSHALL PROJECT (Apr. 1, 2019 7:00 AM), <https://www.themarshallproject.org/2019/04/01/blindfold-off-new-york-overhauls-pretrial-evidence-rules>; see also Ashley Southal & Jan Ransom, *Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/nyregion/prosecutors-evidence-turned-over.html> (“The overhauled law, written largely by public defenders, will fundamentally transform how trials are conducted in New York, moving the state from having one of the most restrictive rules in the country regarding turning over the government’s evidence – a process known as discovery – to having one of the most open.”)

guilty plea without knowing the strength of the case.”⁶⁰ All too often, many district attorney’s offices waited until the last minute before turning over evidence.⁶¹

There are many sweeping changes within New York’s criminal justice reform.⁶² Regarding discovery, one of the biggest changes is that “the prosecution must disclose evidence on a strict timeline.”⁶³ Previously, defense attorneys had to make motions to obtain information pretrial.⁶⁴ Now, prosecutors must automatically turn over all relevant materials in his or her possession⁶⁵ within fifteen days, subject to limitations.⁶⁶ When determining what is relevant, “judges must apply a ‘presumption of openness,’ favoring disclosure.”⁶⁷

Further, the reformed statute “enumerates [twenty-one] types of materials that prosecutors must turn over; several of these were not listed in the old statute.”⁶⁸ Notably, the new statute requires the prosecutor to turn over the names and contact information for any person with relevant information,⁶⁹ all statements by witnesses,⁷⁰ and all transcripts from grand jury witnesses, among

⁶⁰ See Southal & Ransom, *supra* note 59.

⁶¹ *Id.*

⁶² Dan M. Clark, *Prosecutors Brace for Sweeping Change as NY Criminal Justice Reforms Take Effect*, LAW.COM (Dec. 31, 2019 11:52 AM), <https://www.law.com/newyorklawjournal/2019/12/31/prosecutors-brace-for-sweeping-change-as-ny-criminal-justice-reforms-take-effect/?srlreturn=20200327222420>.

⁶³ DISCOVERY REFORM IN NEW YORK: SUMMARY OF MAJOR LEGISLATIVE PROVISIONS, CENTER FOR COURT INNOVATION 1, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery_NYS-Summary.pdf.

⁶⁴ *Id.*

⁶⁵ *Id.* The new statute includes any relevant material in the possession of law enforcement as in the possession of the prosecution to be turned over. *Id.* at 2.

⁶⁶ *See id.*; *see also* N.Y. CRIM. PROC. LAW § 245.10 (McKinney’s 2019). Note, amendments have been made to extend the timing requirements effective April 3, 2020. 2020 N.Y. Sess. Laws (McKinney).

⁶⁷ *See* DISCOVERY REFORM IN NEW YORK: SUMMARY OF MAJOR LEGISLATIVE PROVISIONS, *supra* note 63.

⁶⁸ *Id.*; *see also* N.Y. CRIM. PROC. LAW § 245.20 (1)(a)-(u) (McKinney’s 2019).

⁶⁹ *See* N.Y. CRIM. PROC. LAW § 245.20 (c) (McKinney’s 2019) (“The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.”)

⁷⁰ *See* N.Y. CRIM. PROC. LAW § 245.20 (e) (McKinney’s 2019) (“All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings.”)

other things.⁷¹ Prosecutors must submit all of this information as well as submit a certificate of compliance in order to announce ready for trial.⁷²

However, the statute allows for “parties [to] seek protective orders allowing some information to be withheld.”⁷³ It states that “any discovery [is] subject to a protective order.”⁷⁴

Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court. Should the court impose as a condition that some material or information be available only to counsel for the defendant, the court shall inform the defendant on the record that his or her attorney is not permitted by law to disclose such material or information to the defendant⁷⁵

When a protective order is requested, the statute requires that a prompt hearing be held if the defendant does not consent to it.⁷⁶ Further, “good cause” for the motion is determined by looking at a number of different factors.⁷⁷ Also, in the event of an adverse ruling on the motion, either

⁷¹ See N.Y. CRIM. PROC. LAW § 245.20 (b) (McKinney’s 2019) (“All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or co-defendant.”).

⁷² See DISCOVERY REFORM IN NEW YORK: SUMMARY OF MAJOR LEGISLATIVE PROVISIONS, *supra* note 63 at 2.

⁷³ *Id.*

⁷⁴ See N.Y. CRIM. PROC. LAW § 245.70 (1) (McKinney’s 2019).

⁷⁵ *Id.*

⁷⁶ See N.Y. CRIM. PROC. LAW § 245.70 (3) (McKinney’s 2019).

⁷⁷ See N.Y. CRIM. PROC. LAW § 245.70 (4) (McKinney’s 2019).

[T]he court may consider: constitutional rights or limitations; danger to the integrity of physical evidence or the safety of a witness; risk of intimidation, economic reprisal, bribery, harassment or unjustified annoyance or embarrassment to any person, and the nature, severity and likelihood of that risk; a risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, and the nature, severity and likelihood of that risk; the nature and circumstances of the factual allegations in the case; whether the defendant has a history of witness intimidation or tampering and the nature of that history; the nature of the stated reasons in support of a protective order; the nature of the witness identifying information that is sought to be addressed by a protective order, including the option of employing adequate alternative contact information; danger to any person stemming from factors such as a defendant's substantiated

party “may obtain an expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken.”⁷⁸

III. THE DISCOVERY REFORM AFFECTS A WITNESS’S WILLINGNESS TO TESTIFY IN THE GRAND JURY

This section discusses the negative implications of the new discovery provisions in New York’s criminal justice reform as it relates to the willingness of witnesses to participate in a criminal grand jury proceeding. Part III.A discusses witnesses and the grand jury in light of the reform from the point of view of a current Assistant District Attorney working in a child abuse/domestic violence bureau. Part III.B elaborates on three separate reported incidents where witnesses were unwilling to cooperate in the criminal process, including the grand jury, due to the implementation of the specific provisions of New York’s discovery law that mandate their identities and contact information be turned over to the defense. The first example is from Monroe County, New York, the next example is from the Bronx, New York and the final example is from North Greenbush, New York.

“This [discovery] law tells NY crime witnesses who see something to say... nothing.”⁷⁹ “One of the primary reasons why witnesses are hesitant to cooperate with an investigation is confidentiality.”⁸⁰ “But because New York Law requires that the evidence before a grand jury comes from witnesses with firsthand knowledge of the events, prosecutors must persuade often-

affiliation with a criminal enterprise as defined in subdivision three of section 460.10 of the penal law; and other similar factors found to outweigh the usefulness of the discovery.

Id.

⁷⁸ See N.Y. CRIM. PROC. LAW § 245.70 (6)(a) (McKinney’s 2019).

⁷⁹ David M. Hoovler, *This Law Tells NY Crime Witnesses Who See Something to Say... Nothing*, N.Y. POST (Feb. 13, 2020 8:11 PM), <https://nypost.com/2020/02/13/this-law-tells-new-york-crime-witnesses-who-see-something-to-say-nothing/> (“Why would anyone say anything in this new world of discovery? You would be putting yourself and your family at risk.”).

⁸⁰ Seth Barron & Ralf Mangual, *Big Risks in Discovery Reform; N.Y.’s New Law Tips the Balance Way Too Far in Favor of Defendants*, DAILY NEWS (June 3, 2019), <https://www.nydailynews.com/opinion/ny-oped-discovering-huge-holes-in-discovery-reform-20190603-7dczo26lu5fc7e46wvny4chfyy-story.html>.

terrified people to appear and testify.”⁸¹ It is often said that when asked if they are willing to testify in the grand jury, a witness will respond back with questions of their own, such as: “‘Will the defendant know who I am?’ ‘Will they know where I live?’”⁸² These comments demonstrate the fear suffered by victims. The requirement that a grand jury be done in secret, and the assurance that identities of witnesses will be protected played a large role in getting witnesses to cooperate in a criminal case and to do so truthfully.⁸³ Prosecutors used to be able to assure reluctant witnesses that “because New York values secrecy in the grand jury and the integrity of witnesses, in the vast majority of cases the defendant will not find out you testified.”⁸⁴ But since the new law requires that grand jury testimony be turned over automatically by prosecutors,⁸⁵ “[p]rosecutors will no longer be able to assure witnesses that their identity will be protected.”⁸⁶

A. *Attorney Testimonial*

During my research, I spoke to an Assistant District Attorney who currently works in a New York District Attorney’s Office. She told me about how the reform has affected the victims and witnesses she works with. We also discussed how the reform has affected her actions within the office and role as a prosecutor. She noted that, working in a family abuse and domestic violence bureau, the reform has not quite affected the witnesses she works with, as opposed to others, in this manner because typically all of the parties involved in the events know each other.

⁸¹ Daniel R. Alonso, *In Defense of Grand Jury Secrecy*, N.Y. DAILY NEWS (Dec. 11, 2014), <https://www.nydailynews.com/opinion/dan-alonso-defense-grand-jury-secrecy-article-1.2040971>.

⁸² See Barron & Manual, *supra* note 80.

⁸³ See Amber Phillips, *Grand Juries, Explained for Those Who Kinda Sorta Know What they Are*, WASH. POST (Dec. 9, 2017 8:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/12/09/grand-juries-explained-for-those-who-kinda-sorta-know-what-they-are/> (“Grand juries are great for getting witnesses to tell the truth: Because they are so secretive...”).

⁸⁴ Daniel R. Alonso, *Discovery Reform is Dangerous: As Advertised, the Legislation Will Simply Give Defendants Timely Access to the Evidence Against Them; Beware*, DAILY NEWS (Feb. 7, 2019 12:00AM), <https://www.nydailynews.com/opinion/ny-oped-discovery-reform-is-dangerous-20190204-story.html>.

⁸⁵ See N.Y. CRIM. PROC. LAW § 245.20 (b) (McKinney’s 2019).

⁸⁶ See Barron & Mangual, *supra* note 80.

However, she noted that in cases of domestic violence where the victim is actively trying to not be found, there is elevated fear among prosecutors in turning over this information. Additionally, in cases where there is not an existing relationship between the parties, there is a concern in turning over identification and contact information as well as grand jury testimony. Further, in preparing a case, Assistant District Attorneys have stopped telling victims and witnesses that the grand jury is a secret proceeding. Because grand jury testimony has to be turned over within the fifteen-day period mandated by the statute,⁸⁷ witnesses must be told that the defense, and possibly the defendant, will know that they participated in the grand jury, as well as the substance of what they said. Even in cases where a relationship exists, this does scare the potential witnesses.

B. Specific Cases Reported

Since the new discovery laws have been implemented there have been a number of cases reported affirming that fear has affected a victim's or witness's willingness to cooperate in the criminal justice process.⁸⁸ It is reported that "the requirement to turn over the names and contact information of witnesses to the defense within fifteen days is already wreaking havoc on prosecutions."⁸⁹ Although these examples reference specific cases, there is no reported number on the amount of cases in which witnesses are afraid to come forward, specifically due to the requirement that their identities and contact information be turned over to the defense. Further, in light of the current Coronavirus pandemic, the full effect of how the new discovery law will affect willingness of witnesses to testify in the grand jury cannot be fully measured.⁹⁰

⁸⁷ See N.Y. CRIM PROC. LAW § 245.10 (McKinney's 2019).

⁸⁸ See *infra* p. 11-12.

⁸⁹ Daniel Horowitz, *MS-13 Member's Suspected in Murder of Witness After NY Bail 'Reform' Law Forced Disclosure of Witness Address*, CONSERVATIVE REV. (Feb. 7, 2020), <https://www.conservativereview.com/news/horowitz-ms-13-members-suspected-murder-witness-ny-bail-reform-law-forced-disclosure-witness-address>.

⁹⁰ See Erin Durkin, *New York State Courts Suspend New Trials*, POLITICO (Mar. 13, 2020 5:10 PM), <https://www.politico.com/states/new-york/albany/story/2020/03/13/new-york-state-courts-suspend-new-trials->

In Monroe County, New York, there is one example; the District Attorney, Sandra Doorley, said that this exact problem manifested in a witness to a violent shooting.⁹¹ Doorley reported that the witness was “completely prepared to testify.”⁹² That is, until the witness was advised that her contact information and grand jury testimony would be released to the defendant.⁹³ After learning this information, the witness was no longer willing to participate.⁹⁴ “The witness became frantic and requested that the case did not move forward”⁹⁵ Further, she stated that she would not testify in the grand jury.⁹⁶ Only after an order of protection was secured was the witness convinced and willing to testify.⁹⁷ But the prosecutor used this example to reiterate the idea that next time, the option of an order of protection may not be available and the result could be drastically different.⁹⁸

Similar problems have been seen in the Bronx.⁹⁹ When a twenty-seven-year-old man was driving with his girlfriend near the Bronx River Parkway, his vehicle, a Jeep Grand Cherokee, was suddenly bumped by a vehicle behind him, a BMW.¹⁰⁰ Both vehicles then pulled over and a passenger from the BMW began to exchange information with the driver of the Jeep.¹⁰¹ While this was happening, two male passengers exited the BMW, clearly agitated.¹⁰² When the driver

1267013 (“Jury selection has also been suspended for upcoming trials, and no new grand juries will be formed unless required by exceptional circumstances.”).

⁹¹ See Horowitz, *supra* note 89.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Kyle Lawson, *Why S.I. Man Says Criminal Justice Reforms Made Him Drop Bronx Beating Case*, SILIVE.COM (Jan 31, 2020), <https://www.silive.com/news/2020/01/why-criminal-justice-reforms-made-si-man-drop-bronx-beating-case.html?outputType=amp&twitterimpression=true>; see also, Horowitz, *supra* note 89.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

told the men to wait, one of the men punched him in the face and then fled.¹⁰³ The victim made the decision to not file charges.¹⁰⁴ He credited this decision to learning about how the criminal justice reform laws would “mandate both he and his girlfriend turn over their names and addresses to the defense.”¹⁰⁵

Finally, this has also been seen in North Greenbush, New York.¹⁰⁶ On Sunday, February 23, 2020, police officers responded to a reported shooting.¹⁰⁷ Upon arrival, all parties had fled the scene.¹⁰⁸ Later, officers were able to obtain a video depicting the events: people gathered in vehicles and on ATV’s when an argument occurred and tensions built.¹⁰⁹ From the video, officers were able to identify a suspect and apprehend him.¹¹⁰ However, the officers reported that people were not willing to come forward.¹¹¹ The Police Chief, David M. Keevern, placed blame on the discovery reform, saying, “[w]itnesses were reluctant to cooperate because of fears that their identity would be immediately known to defendant”¹¹² He also noted that this case highlighted the most significant issue in the reform: that witnesses are being put in a position to either protect themselves or the public from danger, but not both.¹¹³

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Gregory Hoyt, *Police in New York Say Witnesses are Scared to Come Forward Thanks to ‘Bail Reform,’* L. ENFORCEMENT TODAY (Mar. 1, 2020), <https://www.lawenforcementtoday.com/police-in-new-york-say-witnesses-are-scared-to-come-forward-thanks-to-bail-reform/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (“Cases like this highlight the dangers hidden in the Discovery portion of Bail Reform. This was a case where citizens were forced to decide whether to place themselves in danger or by cooperating or to place the general public in danger by not cooperating.”).

IV. SOLUTION: WITNESS IDENTITY AND CONTACT INFORMATION FROM THOSE WHO TESTIFY IN THE GRAND JURY SHOULD ONLY BE PROVIDED TO COUNSEL

The criminal justice reform raises an issue of witness fear to testify being exacerbated by the requirement that their name and contact information be turned over to the defense and the defendant.¹¹⁴ In response to this issue, this paper suggests that the discovery law be amended to only allow the identity and contact information of those who participated by testifying in the grand jury be provided to defense counsel. It does not suggest that the defendant be restricted from viewing the substance of grand jury testimony, unless it would reveal the identity of the witness.

The New York criminal justice reform allows for either side to move for a protective order.¹¹⁵ As a result of granting the motion, “[t]he court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant”¹¹⁶ With fear of retaliation or intimidation suffered by witnesses and prosecutors alike, amending the law to require that this information will only be given to defense attorneys may help alleviate the problem. Thus, ensuring that witnesses still feel safe enough to come forward about crimes committed against them as well as testify truthfully about the events as they occurred in the grand jury.

The role of the defense attorney is, generally, to represent the client in all criminal court proceedings.¹¹⁷ However, in reality, it is much more than that.¹¹⁸ “The lawyer must advocate for

¹¹⁴ See *infra* Part III.

¹¹⁵ See *supra* text accompanying note 59.

¹¹⁶ See *supra* text accompanying note 59.

¹¹⁷ *Roles in the Criminal Justice System*, ANOKA COUNTY ATTORNEY’S OFFICE, <https://www.anokacounty.us/1434/Roles-in-the-criminal-justice-system>.

¹¹⁸ Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, NACDL (June 2012), <https://www.nacdl.org/Article/June2012-TheRoleofDefenseCounselinEnsur> (“Warrior for justice . . . counsel must ‘police the police’ . . . [and] attempt to ensure that the prosecutor is adhering to the professional requirement not merely to convict, but to do justice and comply with his obligations to turn over *Brady* material to the defense.”); see also CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Functions and Duties of Defense Counsel §4-1.2 (b) (4th ed. 2017) (“Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients . . . are to serve

the client’s stated interests . . . [but the lawyer] is not the decision-maker when it comes to important aspects of the representation.”¹¹⁹ “[T]he lawyer plays a critical role in helping the client make informed decisions.”¹²⁰ Further, it is said that the client has the right to know the law and the evidence when making his or her decisions.¹²¹ The solution proposed herein does not contradict these principles: defense counsel and defendants should have access to the substantive evidence the state has against them, however it proposes that the identities of witnesses and means to contact him or her be withheld from the defendant. This way, the defendant still has the knowledge of evidence and counsel can gather more information, but witnesses will still be able to keep their peace of mind.

The ABA suggests that “[d]efense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer’s services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense.”¹²² It also specifies that information should be “sufficiently detailed so that the client can meaningfully participate in the representation.”¹²³ However, the ABA goes on to say that although clients should be given access to copies of relevant documents, that access can be limited if “restricted by law or court order.”¹²⁴

In New York, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and... shall consult with the client as to the means by which they are to be

as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity)”

¹¹⁹ JONATHAN RAPPING, REDEFINING SUCCESS AS A PUBLIC DEFENDER, GIDEON’S PROMISE *in* 2013 SPRING PUBLIC DEFENDER ATTORNEY & INVESTIGATOR CONFERENCE 16 (2013), <http://www.ncids.org/Defender%20Training/2013SpringConf/AttorneyTrack.pdf>.

¹²⁰ *Id.*

¹²¹ *Id.* at 32.

¹²² CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Duty to Keep Client Informed and Advised About the Representation § 4-3.9 (a) (4th ed. 2017).

¹²³ *Id.*

¹²⁴ *Id.* at (b).

pursued.”¹²⁵ Further, “[i]n a criminal case, the lawyer shall abide by a client’s decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial and whether the client will testify.”¹²⁶ If the attorney does not abide by these decisions, there may be a claim for ineffective assistance of counsel.¹²⁷

By amending the discovery provisions of New York’s criminal justice reform to allow only defense attorneys to obtain the identification and contact information of those witnesses who testified in the grand jury, they would not be faltering in their duties of representation. The ABA makes an exception regarding access to information if the defendant is restricted by law or court order from seeing information.¹²⁸ This new rule would allow the defense attorney to comply with this recommendation by being able to provide substantive information to his or her client about the testimony given in the grand jury but not the contact information or identity. The judge would have to inform the defendant on the record so that the attorney him or herself would not be to blame; further, the attorney would inform and advise his or her client of the restriction.

In New York, attorneys would also be able to comply with their ethical obligations because they would still be able to advise their client about the substantive information before the client makes any decision that is strictly within his or her authority. Withholding contact information and identity of grand jury witnesses, but not substance, would allow clients to discuss how the objectives of their representation are pursued, and the attorney would have the information necessary to pursue that form of representation.

¹²⁵ N.Y. RULES OF PROF’L CONDUCT, R. 1.2 (a) Scope of Representation and Allocation of Authority Between Client and Lawyer (2017), <https://www.nycourts.gov/LegacyPDFS/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>.

¹²⁶ *Id.* at R. 1.2 (b).

¹²⁷ See MICHAEL S. ROSS, FEDERAL PRACTICE FOR THE STATE PRACTITIONER; A CONTINUING LEGAL EDUCATION COURSE, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 28 (Oct. 4, 2013), <http://www.nysacdl.org/wp/wp-content/noindex/FederalPractice2013/Ross.pdf> (citing to different cases concerning ineffective assistance of counsel).

¹²⁸ See Duty to Keep Client Informed and Advised About the Representation § 4-3.9 (a), *supra* note 121.

The grand jury, although riddled with issues, is a historical and traditional means of indictment in New York's criminal justice system.¹²⁹ Although there have been movements to abolish it throughout the years, there is no inkling that these movements will have any effect in the near future.¹³⁰ The public sees the secrecy of the proceedings to insure that witnesses feel free to tell the truth as outweighing its downsides.¹³¹ Therefore, the criminal justice system in New York must enact reformation that helps ensure that witnesses do not feel hindered in recounting their memory of the events in the grand jury while also adhering to a criminal defendant's rights when accused. Instead of abolishing the institution as a whole, the legislature should embrace the value it brings while seeking to cure the defects attached to it.

V. CONCLUSION

Until recently, New York has been far behind when it comes to criminal justice reform.¹³² It is one of the last states to adopt more liberal bail and discovery laws.¹³³ The new laws that overhauled the system were very necessary due to the repeated pattern of prosecutors withholding evidence from defendants until the last possible minute before trial.¹³⁴ But, these laws have had an unintended effect of instilling more fear into victims and witnesses of crime.¹³⁵ Even before the reform was put in place, prosecutors had to convince these individuals that it was safe for them to testify in the grand jury by assuring safety due to secrecy and confidentiality; even then it would not always work.¹³⁶ Now, prosecutors may no longer make those assurances.¹³⁷ Assistant District Attorneys can no longer tell the victims and witnesses that they work with that "their identity will

¹²⁹ See *infra* Part II.A.

¹³⁰ See *infra* Part II.A.

¹³¹ See *infra* Part II.A.

¹³² See *infra* Part II.B.

¹³³ See *infra* Part II.B.

¹³⁴ See Southal & Ransom, *supra* note 59.

¹³⁵ See *infra* Part III.

¹³⁶ See *infra* Part III.

¹³⁷ See *infra* Part III.

be protected,” because, in reality, the defense will know who the witnesses are within two weeks of testifying.¹³⁸

The current law mandates that prosecutors automatically turn over the names, contact information, and grand jury testimony from those witnesses who do decide to come forward within fifteen days.¹³⁹ This portion of the law conflicts with the statutorily protected purpose of New York’s grand jury: secrecy.¹⁴⁰ A “core-ingredient” of the grand jury, secrecy allows witnesses to come forward and truthfully discuss crimes that they witnessed or were perpetrated against them.¹⁴¹

In order to adhere to the principles of the grand jury method of indictment, while assuring that criminal defendants are not stripped of the rights they have finally gotten, changes to the law must be made.¹⁴² The discovery provision of New York’s criminal justice reform should be amended to allow access to identities and contact information of witnesses who testify in the grand jury to only defense attorneys in the pretrial phase.¹⁴³ Allowing defendants to have access to substantive information without identifying information would help them to understand the evidence against them and participate in creating their defense while defense attorney’s will be able to comply with their own ethical obligations.¹⁴⁴ This solution best balances the rights of defendants and the safety of the public and witnesses.

¹³⁸ See Barron & Mangual, *supra* note 80.

¹³⁹ See *infra* Part II.B.

¹⁴⁰ See *infra* Part II.A.

¹⁴¹ See *infra* Part II.A. See also Kramer, *supra* note 39.

¹⁴² See *infra* Part IV.

¹⁴³ See *infra* Part IV.

¹⁴⁴ See *infra* Part IV.