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Report

Destroyed by Discovery: How New York State's Discovery Law Destabilizes the Criminal Justice System

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Executive Summary

All prosecutors are required to hand over relevant material to defense attorneys prior to trial, a process referred to as "discovery." Discovery is fundamental to a fair trial because it is impossible for defendants to make informed plea-bargain decisions if they do not know the strength of the evidence that prosecutors have against them.

However, New York's 2019 discovery statute, Criminal Procedure Law Article 245 ("245"),[1] has crippled the state's criminal justice system with an untenable compliance burden that prevents it from being either just or appropriately adversarial. It has forced district attorneys' offices to triage cases and has harmed both the victims of crime and, in the long run, many criminal offenders. The NYS Legislature can correct the systemic harms caused by 245 and increase fairness to defendants, reduce administrative burdens on police and prosecutors, and rebalance risk so that the consequences of noncompliance align with substantive impacts on due process.

New York's new discovery rules, which went into effect in January 2020, were such an extreme and far-reaching version of "reform" that even famously progressive Manhattan District Attorney Alvin Bragg recently complained: "My Office's lawyers and support staff continue their herculean efforts in managing discovery-related obligations."[2] The Legal Aid Society, which represents and advocates for criminal defendants, correctly crowed that, rather than simply reinforcing prosecutors' discovery duties, as intended, 245 "is transforming New York State's criminal justice system."[3]

The new discovery obligations are indeed so herculean that NYS prosecutors have been able to meet them within the mandated time frames on only 21% of cases. In statewide local courts, they are met on 16% of cases, and in NYC local courts, that number dwindles to 13%.[4] And because discovery must now be met within New York's preexisting "speedy trial" time windows, on pain

of automatic dismissal, thousands of viable cases have been thrown out—not because justice demands it but simply because the compliance burden has proved too great. In NYC courts, dismissals rose from 44% of all disposed cases in 2019, to 69% in 2021. Statewide, dismissals rose by 14% in that period. Meanwhile, guilty pleas fell in NYC from 45% to 21%—and statewide, from 49% to 33%—as defense attorneys have, correctly, become more confident that cases will be dismissed rather than go to trial.[5]

Additionally, under the new discovery statute, prosecutors are forced to share witness information and grand jury testimony early on and even if a witness is not going to testify at trial.[6] Witnesses are granted less anonymity and, understandably, by all available measures and reporting, are choosing not to testify in increasing numbers of cases.

The statute, therefore, has correlated with a devastating rise in crime and a drop in arrests. In New York City, adult felony arrests fell by 14% between 2019 and 2021, while NYC shootings rose by 102% and murders rose by over 51%.[7] Citywide, felony and misdemeanor drug arrests combined fell by over 48%—even though illegal drug activity expanded, evidenced by drug overdose deaths up by nearly 80%.[8] Aggregated NYC crime clearance rates dropped in the first quarter of 2020 and, other than one quarter since, have remained below 30% since then. Outside NYC, felony arrests fell by 12% between 2019 and 2021,[9] while murders rose by over 56% and violent crime with a firearm rose by 35.5%.[10] Outside-NYC felony and misdemeanor drug combined arrests fell by over 45%,[11] while statewide drug overdose deaths rose by 37% from 2019 to 2020.[12]

At the same time, defense attorneys are under similar time constraints to read the newly extensive material, much of it irrelevant or duplicative. But with no repercussions for not doing so, defense attorneys frequently do not even open their discovery packages before their digital access passwords expire. According to sources with firsthand knowledge of this data, during at least the first year after 245 implementation, defense attorneys were failing to access discovery packages within their 30-day windows for a staggering 60% of cases.[13]

Not only has the system's efficacy dwindled under the crush of paperwork, but assistant district attorneys (ADAs) are also deciding en masse that a job with so much clerical drudgery and so little gratification is not worth the low pay and long hours. Between spring 2021 and spring 2022 alone, Manhattan and Brooklyn each lost about a fifth of their prosecutors—a trend that has continued in the six months since.[14] This mirrors the entire state, where numerous DAs report record 40% attrition rates and unfillable vacancies.[15] Further, they are losing seasoned prosecutors and are forced to try to recruit new ones right out of law school.

In order to fix the negative consequences of 245, while embodying its original intentions to improve fairness, the legislature should undertake the steps below. These recommendations do not seek to return discovery protocol to pre-2020 guidelines. Rather, they more incisively ensure that prosecutors turn over all material that defense attorneys want and need in order to provide the best counsel to their clients. At the same time, the policies below maximize the ability for every party—prosecutors, defense attorneys, and judges—to do their jobs as professionally, efficiently, and meaningfully as possible.

1. Mandate an "open file" policy across the 62 NYS district attorneys' offices, requiring that prosecutors make all non-privileged discovery material available to the defense as soon as they possess it.

2. The statute creates a new discovery standard: all material "related to" a case. This term is vague and expansive. For clarity and feasibility, the standard should be a requirement for material "relevant to" a case.

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3. Allow judges discretion to sanction the prosecution for broader noncompliance with discovery obligations in proportion to the harm caused by failure to provide materials. Further, such sanctions should apply only to the cases at hand and should explicitly not have ramifications for ADAs' law licenses.

4. Tie time frames for compiling and sharing to trial rather than to arraignment. This would bring NYS in line with both federal discovery standards and with other states, including Texas, which is frequently heralded as a model of progressive discovery practices.

5. Allow defense attorneys, prosecutors, and judges to have discretion to plea-bargain at any point in the process.

6. Order the sharing of witness identification information after a trial date is set, but no later than 30 days pretrial, in order to maximize the safety of witnesses.

7. Allow the defense to apply to the court for access to crime scenes, or, in the alternative, photographs and measurements, where these are material in case preparation or to a jury's determination of the facts.

8. While prosecutors compile discovery, automatically pause the Section 30.30 "speedy trial" clock[16] disassociate 245 from the state's "speedy trial" statute, as their linkage has led to thousands of procedural case dismissals.

9. Add oversight that captures whether and in what time frame defense attorneys access and review shared discovery material. Add penalties for not sharing reciprocal discovery. For instance, judges might officially record when defense attorneys violate discovery protocols.

10. Place the onus on law-enforcement agencies to share with prosecutors complete required police disciplinary and other records to be submitted to the defense during discovery-sharing. Amend 245 such that prosecutors not be penalized if these records are later found to be incomplete.

11. Rather than require all expert witnesses' business addresses, current curricula vitae, lists of each expert's publications, and lists of all experts' proficiency tests and results administered in the past 10 years, prosecution should be required to share:

    - Expert witnesses' complete disclosures of cases for which they testified within the past four years and, if applicable, their compensation for each.

    - Summaries of all testifying expert witnesses' opinions; their bases and reasons for those opinions; descriptions of any data used in forming such opinions; and descriptions of any exhibits that will be used to summarize such opinion.[17]

Introduction

Prosecutors are required to hand over relevant material to defense attorneys prior to trial, a process referred to as "discovery." Discovery is fundamental to a fair trial because it is impossible for defendants to make informed plea-bargain decisions if they do not know the strength of the evidence that prosecutors have against them. Existing discovery statutes grew out of the 1963 U.S.

Supreme Court decision in *Brady vs. Maryland*, which held that the accused has a constitutional right to discover exculpatory evidence held by the prosecution.[18] "Brady material" refers to just such pieces of evidence, which prosecutors are obligated to make available.

In most cases, substantive discovery material is sufficient for defendants (who, of course, know what they did or did not do) to decide whether to plead guilty or to go to trial. Plea bargains represent a benefit to guilty defendants, prosecutors, and taxpayers. Defendants can expect a lesser sentence than at trial and without the delays and uncertainty that trials entail. Prosecutors are also relieved of uncertainty and are freed from the highly involved work of collecting all the material and going through complex trial preparation. Instead, they can simply share the substantive and potentially exculpatory evidence that they have with defense and collect no further. And taxpayers are spared the expense of prolonged detention, supervision, and processing of defendants and the costs of juries, courtrooms, and administration associated with trials.

For years, defense advocates argued that New York State's pre-2019 discovery statute—Criminal Procedure Law Article 240—did not do enough to ensure that prosecutors follow through with their discovery obligation and what it is intended to safeguard. They argued that this induced defendants, even factually innocent ones, to accept plea bargains that they would have rejected with a fuller sense of the evidence against them.

Many reform proposals were put forward, aiming to tighten up, for example, the types of material that prosecution had to turn over to defense and the time frame in which they had to do it. Most of these came from progressive organizations. For instance, in 2015, the New York State Bar Association put together recommendations from its discovery task force, chaired by former Democratic gubernatorial appointees. They suggested shifts such as requiring that discovery include "police reports; increased disclosure of evidence and information favorable to the defense; intended exhibits; greater disclosure of expert opinion evidence; witnesses' criminal history information; timely notice of potentially suppressible property; and search warrant information."[19]

But the actual legislative change, which came in April 2019, was vastly more far-reaching than this and almost all other proposals. This was perhaps not surprising, as it was based on drafted legislation from none other than the Legal Aid Society, which provides criminal defense and advocacy.[20]

As this report will show, NYS discovery "reform" has had a deeply destabilizing effect on the New York criminal justice system—an effect that, without hyperbole, is creating a staffing and functioning crisis in prosecutors' offices statewide. It is also diverting limited police resources to searching for, collecting, reviewing, and producing materials for prosecutors, instead of patrolling streets and subways. By demanding that for every case, even material that is flatly irrelevant or redundant be turned over—and in an infeasibly short time frame—the law has burdened the system with a weighty, expensive, and retarding compliance burden (ironically, the very type of systemic bulkiness that advocates in 245 implementation hearings claimed it would reduce).

Most problematically, NYS's reform has hurt public safety by leaning too heavily on the defense's side of the scale. Chasing paper, line prosecutors are unable to build their cases and prepare for trial. Many cases, especially in the five counties of New York City, are simply dismissed because ADAs are unable to compile discovery for all their cases and must triage. Discovery time frames have radically magnified the impact of NYS's "speedy trial" laws, as prosecutors run out of time to try cases or file motions to extend defendants' detention while they assemble and redact limitless discovery documents and videos. Mandates to hand over revealing witness information and grand jury transcripts prior to trial have had a chilling effect on witnesses without whom cases

fall apart, contributing to plunging police clearance rates. In many jurisdictions outside NYC, the relationship between prosecution and other agencies has become strained as prosecutors harangue their counterparts for police reports and lab results.

This situation unarguably handicaps the people's representation against criminal defendants—and it has long-term negative consequences for defendants, as well. Higher dismissal rates have diminished the leverage that prosecution used to have to push offenders with substance abuse and mental health issues into specialty courts and treatment. Triage-based dismissals for repeat low-level offenders prevent them from receiving the "time-out" that might deter individuals from escalating levels of criminality or allow shoplifters with drug addictions to dry out. While more muted than for their counterparts, public defenders' offices have also experienced greater turnover, as qualified attorneys burn out from excessive, unnecessary discovery review. Additionally, the relationship between prosecutors and defense attorneys has become strained, as what was once an adversarial but collegial dynamic has become an unequal rivalry within a system that is inefficient, exhausting, and unfairly stacked.

Although advocates will tout the reduction in pleas as a triumph for defendants, in many cases these are caused by arbitrary compliance hurdles. Did the defendant commit a crime where eight officers, each with a separate body camera, happened to show up, or did the defendant interact with just one officer who did not write down much of the occurrence? Did the ADA who received the case have a paralegal adept at tracking down obscure pieces of paper, or one who gives up when he or she cannot easily obtain a piece of the case? Rather than increasing fairness, the new system lacks it. Two defendants who commit the same crime in the same way are now more likely to suffer different outcomes, based on pure chance.

Additionally, it is clear that, to a large extent, defense attorneys are not reviewing all the material that prosecution shares with them under 245 for the simple reason that it is largely immaterial to the case and the time frame for review is unmanageable. While this failure by defense does not necessarily harm defendants, it concretely means that the discovery "reform" does not—as advocates had argued—help them in any way.

In an age of exponentially increasing data, discovery collection that requires, for instance, every last piece of associated body-worn camera footage *no matter how irrelevant*, carries an intense financial burden. The indefinite storage and transmission cost of this degree of data—think: hundreds of hours of body-camera footage—is staggering, not to mention the hours required to review and redact reams of redundant or irrelevant material. This money could much more concretely help vulnerable New Yorkers who wind up in the criminal justice system by funding in-patient psychiatric care, tutoring, better facilities, or entry-level jobs.

The new discovery statute did accomplish two positive things: it established more efficient and digital systems for sharing trial and other material between agencies; and, although attached to ill-advised mandates, it began the process of enumerating all the documents that could be handed over to defense and specifying which ones should be handed over.

245 Substantially Changed Prosecution

NYS's Discovery Obligations Prior to 2020: CPL 240

Prior to January 2020, NYS prosecutors were bound by state Criminal Procedure Law Article 240,[21] dictating what they must turn over to criminal defendants upon a "demand to produce," i.e., an explicit request from defense attorneys. These materials centered on items that might

reasonably be relevant in trial, such as written, recorded, or oral statements that the defendant made to a law-enforcement agent, transcripts of testimony, or the results of physical and mental exams administered in association with the case. They were required to hand over "Rosario material"—broadly, witness statements.[22] Prosecutors also had to make a "diligent, good faith effort to ascertain the existence of demanded property" and to make it available.[23] Most important, they had to share "Brady material"—exculpatory evidence that the defense might use at trial.

Critics of 240 worried that prosecutors were not obligated to share sufficient material with defendants or with enough time to review it pretrial. Centrally, they asserted that lazy or unethical prosecutors were not living up to their discovery obligations or were even intentionally withholding evidence in order to push defendants to accept plea deals. Notably, by 2019, many of the 62 NYS district attorneys did not follow 240 as written; instead, they maintained versions of "open-file discovery" policies in their offices, permitting defense free access to whatever unprivileged information (i.e., not internal case notes or strategy) that they or their law-enforcement or laboratory partners had gathered as soon as they obtained it. This was advantageous to both parties, since it created the possibility for earlier case resolutions.

Nevertheless, in April 2019, the NYS Legislature passed Criminal Procedure Law Article 245, which took effect on January 1, 2020. Article 245 established new breadth and accelerated time frames for pretrial evidence-sharing. The new guidelines, as well as two amendments that passed in May 2020 and April 2022, are detailed below.

Automatic Discovery Materials

Under 245, prosecutors now have an enumerated list of automatically discoverable material to be collected regardless of whether it is actively requested by the defense or the likelihood that a case will go to trial. This list includes 22 categories, including all statements, transcripts of grand jury testimony, potential witness names and contact information, audio and video recordings, photographs and drawings, reports, exculpatory and impeachment material, tangible objects seized, and search warrant information.[24] The new guidelines also demand granular details, including a list of all expert witnesses' proficiency tests—and results must be turned over, along with their "name, business address, curriculum vitae, [and] a list of publications."[25]

The new categories, formed largely without input from law enforcement, were in many places not aligned with how information is collected and managed. For example, is "search warrant information" the warrant application, the transcript of the proceeding, the warrant itself, the property vouchers documenting what was seized, the contraband, the tactical plan, the after-action report, a database of warrant executions, an e-mail from a commanding officer to a borough commander indicating that a warrant was executed, or the video footage from the camera in the transport vehicle that transported someone other than the defendant?

Presumption of Evidence-Sharing

Under the statute, the prosecution's duty to disclose these materials to the defense covers "all items and information that relate to the subject matter of the case and are in the possession . . . of the prosecution or persons under the prosecution's direction or control." Literally everything relating to the case, however lacking in substance, must be disclosed other than proprietary "work product," defined as the prosecution's own "records, reports, correspondence, memoranda, or internal documents . . . which are only the legal research, opinions, theories or conclusions."[26]

The statute also creates a "presumption of openness,"[27] directing judges to favor disclosing information when applying the statute to specific rulings in pending cases. Significantly, the statute creates a presumption that prosecutors have all existing discovery material. This puts ADAs in a position of having to trust that police agencies have, in fact, given them every piece of paperwork, every photo, every last scrap of paper.

Specific Time Frames for Evidence-Sharing Pretrial

Under the original version of 245, prosecutors became required to meet the initial discovery obligations by 15 days post-arraignment, regardless of whether a defendant was detained or released at that time. Effective May 3, 2020, this was amended to consider a defendant's custody status post-arraignment, giving prosecutors 20 calendar days for defendants in custody and 35 days for those at liberty.[28] (This stands in sharp distinction to federal standards, where timelines for discovery disclosure are tied to trial dates. This is also true for Texas, a state whose discovery guidelines[29] were frequently cited by advocates for NYS discovery reform, including during the implementation hearings for 245).[30]

Additionally, where a defendant has been charged solely with traffic infractions or municipal offenses, discovery must be completed at least 15 days before trial.[31]

Sharing Witness Information

Named for the originating 1961 case decision, prosecutors have for decades been required to share "Rosario material" with the defense. This constitutes any prior written or recorded statement of a witness whom the ADA has called, or intends to call, at trial or a pretrial hearing, and relates to the subject matter of the witness's testimony. Previously, under 240, these disclosures were required only regarding witnesses whom the prosecution intended to call to testify at trial, and only concerning statements that related to the subject matter of the witnesses' testimony. Further, prosecution was not required to turn over this information until the commencement of trial.

These reassurances were critical because often, especially where violent crimes are concerned, a witness may be known to the defendant. This is doubly true for domestic violence and gang cases. A rational witness might fear that if a defendant knows that she will be testifying at trial, or if he knows that she testified at the grand jury, she will be in danger.

But 245 undoes these precautions and witness assurances. As of January 2020, disclosure of a witness's grand jury testimony must presumptively be turned over to the defense within 15 days after arraignment—later amended to 20 or 35 days, depending on defendant custody status. In addition to testimony, witness name and contact information must be turned over in the short time frame.

Further, the defense may now move for a court order to access a crime scene or other premises, even the very home of a victim or a witness. Not only might this clearly make witnesses reluctant to participate, but the legislation also did not delineate *how* the interviews or scene inspections would be structured and supervised.[32] This creates an additional layer of fear and uncertainty for potential witnesses.

Statute Amendments

As noted above, two rounds of legislative tweaks have been made to 245.

On May 3, 2020, the discovery disclosure timelines were extended slightly from the original 15 days and amended to consider a defendant's custody status post-arraignment, giving prosecutors a lengthened 20 calendar days for defendants in custody and 35 days for those at liberty.

A few caveats were added regarding the mandated sharing of witness names and contact information. Unless the court rules otherwise, and with notice to the defense, prosecution may now initially withhold identifying information of 911 callers, victims and witnesses of sex offenses and sex trafficking offenses, and victims and witnesses of defendants involved in criminal enterprises. Although, even for these categories, prosecution must share identifying witness information 15 days prior to the trial or a hearing, or as soon as is practicable. The defense can make a motion to receive these details sooner.[33]

Additionally, following May 2020, the defense counsel must advise the defendant of his right to obtain or waive discovery.[34]

In the April 2022 budget process, NYS Legislature passed amendments to limit the obligation to turn over discovery for traffic infractions[35] and to underscore that when prosecutors file a supplemental certificate of discovery compliance, they must provide a detailed basis for delayed disclosure. If the court determines that prosecution exercised proper due diligence, the court can rule that the initial certificate remains valid, even though it ultimately proved incomplete. This added process has only increased the clerical burden on ADAs.

245 Translates to Enormous Changes on the Ground

To non-practitioners, the new discovery guidelines under 245 may sound perfectly reasonable. After all, why not give the defense everything? But, especially in a digital and high-tech age of law enforcement, "everything" is an impossible and impractical amount—and collecting and sharing it all in circumstances where it has no utility for the case at hand is a ludicrous and Sisyphean task for public servants.

Hundreds of Thousands of Additional Man-Hours for No Purpose

In the sections below, we will look at how rarely prosecutors have been able to file certificates of compliance within the allotted time frames and what the impact has been for case outcomes and for ADA retention. But first, let's consider what 245's provisions mean in real terms.

Prior to 245, prosecutors collected discovery primarily on cases that were on a trial track. Consider small Cortland County (population ~47,000).[36] In 2018, the DA's office handled 1,614 felony cases, of which 156—just 9.67% of the total—were either indicted or advanced to superior court, where serious cases are considered.[37] Of these, only nine cases were tried—slightly more than half of 1% of the total. But since January 2020, exhaustive discovery collection has been required for every single filed criminal case, including all misdemeanors (and, until last April, all vehicle and traffic cases, as well).

For the Cortland County DA, this represents tens of thousands of additional cases requiring discovery. All this material must be reviewed in its entirety to ensure that sensitive information—such as undercover and confidential informant identities, victims' home addresses, or material relating to law-enforcement tactics and procedures—is addressed in protective orders and not inadvertently or prematurely divulged. While technology can help with some of the retrieval and sharing of discovery material, the reviewing and redacting processes require an enormous amount of human, manual labor. This translates into thousands of additional hours of grunt

work per year, almost all of it serving no practical purpose. Considering that pre-245, Cortland had just five ADAs and four administrative support staff members, the enormous employee burnouts described below make sense.

Consider that in 2018, in a much larger jurisdiction like New York County, there were 9,419 felony arraignments, not to mention 41,433 misdemeanor arraignments.[38] That year, only 146 felony cases—just over 1.5% of the number of felony arraignments—were disposed with a trial felony conviction. And only 46 misdemeanor cases—approximately one-thousandth of the total volume of misdemeanors arraigned—were disposed with a trial misdemeanor conviction. After 2020, tens of thousands of additional cases required discovery collection—preparation for trials that would never happen. No wonder, as is detailed below, hundreds of new positions were created in the five NYC DAs' offices for staff focused on compiling these purposeless discovery packages, and an essential number of ADAs have quit in frustration.

Enormous Amount of Paper-Gathering for Each Case

Now that we've considered what 245 represents in total caseload, it's helpful to consider how much material needs to be gathered for each case. In response to 245's demands, every DA office changed how it obtained discoverable materials from law enforcement and myriad other agencies. That means that there is enormous variation among counties, depending on their size, crime demographics, urban versus rural makeup, and the number and sophistication of the agencies that the DA's office partners with.

NYC has an enormous caseload, but its five DAs have the advantage of sharing one police agency: NYPD. Compare that with Westchester County, which has 43 law-enforcement organizations and 41 local courts served by eight local branch offices. Similarly, Orange County has 22 towns, 19 villages, and 3 cities with more than 40 different local law-enforcement agencies—which utilize 19 different computer operating systems. The county covers more than 75 judges, almost 40% of whom are not lawyers. Adding complexity, 65% of the county's courts meet at night, after normal business hours; many local town and village courts have antiquated systems and meet only once or twice a month.[39]

Bordering Vermont, Washington County has fewer than 61,000 residents[40]—less than 2.5% of the population of Kings County (Brooklyn)—and covers 22 local courts and nine police agencies, six of which are local departments, covering important shifts with part-time police officers.[41]

In the past, law enforcement delivered case reports by hand or via e-mail to prosecutors' offices. With the exponential increase in both the amount of material needed and the narrow timeline needed to collect and share it, counties with multiple agencies have struggled. Agencies have rapidly tried to adopt digital platforms for sharing discoverable materials; but for many in smaller offices, this required newly acquired tools such as multifunction printers and high-speed scanners. No wonder the New York State Association of Counties estimated that the cost of these and other measures to adapt to 245 could easily exceed $100 million.[42]

245 Has Required Vast Office Adaptations

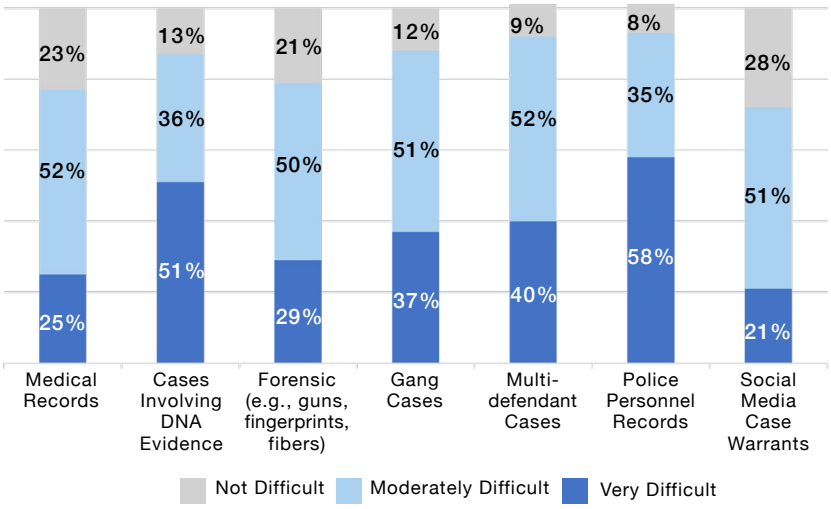
Considering the scope of the new requirements and agency limitations, it is not surprising that a NYS Division of Criminal Justice Services (DCJS) survey found that 93% of county DAs' offices adjusted discovery procedures before the end of the first year of implementation, the majority transitioning away from paper toward cloud-based digital discovery management. Some 85% of those offices now use the New York Prosecutors Training Institute's (NYPTI) Digital Evidence Management System (DEMS), and another 13% use similar systems such as eProsecutor, JustWare,

NICE:Investigate, PRO/Portal, or the Prosecutor Case Management System. This transition, of course, required additional training of attorneys and support staff on software and equipment, renovation of office space, and increased information technology staffing.[43]

According to an extensive survey conducted by NYS Office of Court Administration at the end of 2021, under 245, DAs struggled with obtaining certain types of records more than others (**Figure 1**).[44] For instance, it's harder to meet discovery timelines for cases needing compiled police personnel records and DNA evidence than for medical records or social media warrants. Note that prosecutors must continually check their case numbers in the various agency portals, or they may miss new record updates.

Figure 1

Difficulty Meeting Discovery Timeline in NYC



Source: NYS Office of Court Administration survey

Notably, the expanded requirements have created a perverse incentive among law enforcement to record less across all media. Less body-camera footage, investigation documentation, and disciplinary records now can mean a more manageable discovery workload. While the absence of these materials is difficult to measure, the incentive—and sometimes necessity—of economizing on documentation (within the bounds of officer discretion) was cited in numerous off-the-record interviews for this report.

245 Runs Down Prosecution's Speedy-Trial Clocks

It is impossible to grasp the degradation to prosecution in NYS caused by 245 without understanding the state's legislated time windows for prosecuting cases.

NYS's speedy-trial provision, CPL 30.30,[45] requires prosecutors to answer "ready" for trial within certain periods of time, depending on the type and gravity of offense and other specific parameters:

- Within six months of commencing a criminal action against a defendant accused of one or more offenses, including at least one felony;
- Within 90 days, where a defendant is accused of one or more offenses, including a misdemeanor punishable by a sentence of imprisonment of more than three months, and none of which is a felony;
- Within 60 days, where the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months, and none of which is a crime punishable by a sentence of imprisonment of more than three months; or
- Within 30 days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation, and none of which is a crime.

Critically, the penalty for not being ready on time is *case dismissal*. And under CPL 30.30(2) defendants who are in custody must be released if a prosecutor is not ready for trial within even more restrictive timelines.

Crucially, after 245's passage, prosecutors could no longer file "ready" for trial, thereby stopping the speedy-trial clock from running down toward dismissal, *until they filed a discovery certificate of compliance* (COC). As the Legal Aid Society acknowledged in a leaked internal document, the "new CPL 30.30 consequences may be the main incentive for DAs" to strive to meet the impossibly rigorous new discovery obligations.[46] Discovery compliance became a race against the clock to avoid automatic case dismissal.

Covid Closures Delayed the Hammer Drop of 245

The exact impact of the new law was blurred when the Covid-19 pandemic hit less than three months after the law took effect. On March 17, 2020, NYS temporarily suspended specific time limits for legal proceedings and curtailed court operations.

Critically, the 30.30 speedy-trial clock was paused on pending cases by executive orders of then-governor Andrew Cuomo, giving prosecutors more time to prepare and file discovery material and certify readiness for trial.

Nearly all DAs' offices responding to a DCJS survey reported that Covid delayed the impact of 245—with roughly half reporting that it did so "to a great extent."[47] This postponement of the statute's impact was not limited to prosecutors; only 5% of forensic lab survey respondents reported no delay from Covid.

In the short term, this beneficially gave prosecutors and others more time to transition to the new requirements and to prepare the hugely enlarged amount of material for trial. This extra time appeared doubly fortunate because, since 245 represented a criminal procedure law change, it was

applied to all existing cases, as well as new ones. Also advantageous, Covid initially suppressed some degree of crime and forced police to switch to a reactive, rather than proactive, level of activity, reducing arrests that would otherwise lead to more court cases.

But in the long term, Covid's onset masked the real challenges of meeting the burdens in the time frames that would soon be imposed. And the unprecedented backlogs caused by court closures—as well as lab and other agency closures—would add to the cumulative burden as pandemic shutdowns receded.

Further, remote work and staffing shortages required DAs' offices to adjust procedures that they had developed to comply with the law. Covid also impaired law-enforcement agency staffing and resources: sick, quarantined, or reassigned officers meant fewer personnel to assist with gathering discoverable materials.

Forced Dismissals: 245 Created a Case Triage Problem

After Covid measures eased and courts reopened, the problems created by 245 hit hard. It became immediately apparent that the time frames allotted to collect and turn over the vastly expanded discovery material were not sufficient. The real significance of this was not just that prosecutors, to an overwhelming degree, were failing to file discovery COCs in time. Rather, the problem was that the discovery burden was so time-consuming that ADAs were running out their entire speedy-trial time windows in the process. So numerous cases that otherwise, in a just system, would have been prosecuted were getting dismissed.

Erie County DA John Flynn described the inability of his Buffalo city office to keep up when courts reopened. "The [90-day] deadline came and went because I just physically can't do it," he said. Instead, they dismissed 145 misdemeanors, low-level, nonviolent cases in which no victim was involved.[48] "I have to give the defense attorney every single sheet of paper, every body-camera video, every test result, everything within 90 days or the speedy-trial clock runs out," Flynn explained.

The impact was even more pronounced downstate. With twice the population of Erie County,[49] Queens DA Melinda Katz described the triage post-pandemic: "Once the [speedy-trial and other] Executive Orders were lifted, our time and resources had to be focused on those cases that put the community most at risk."[50] It was impossible to gather comprehensive discovery material on the thousands of disposed cases pending; thus, an enormous number of them were either dismissed outright, or the 30.30 speedy-trial time clock ran out and the cases had to be dismissed.

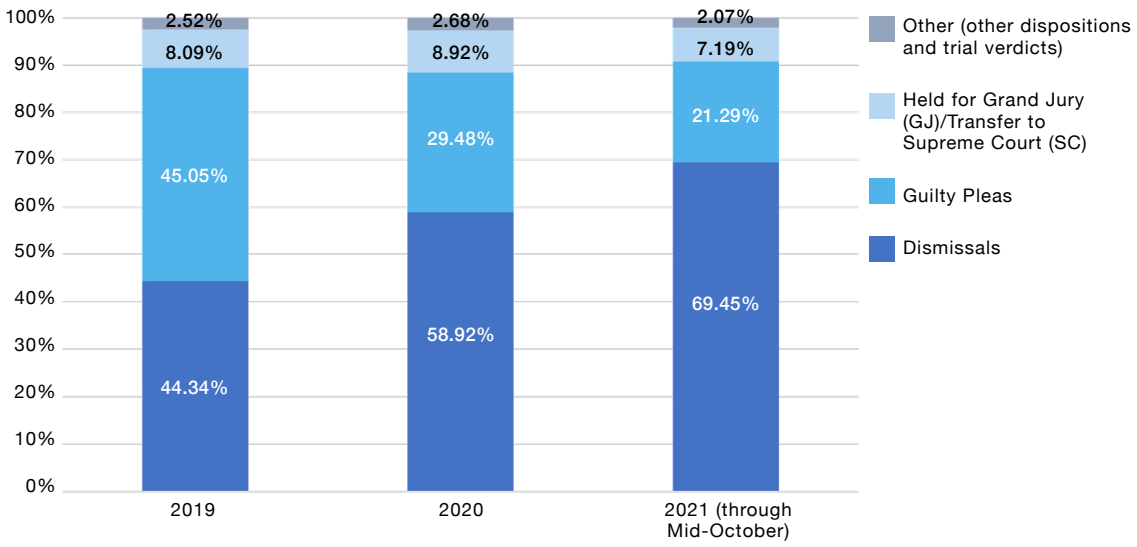
As DA Katz reported, ADAs began prioritizing filing certificates of compliance and statements of readiness for cases "with the most significant public safety impact, such as violent crimes, sex crimes, and domestic violence cases." Of course, even this triage process had a man-hour cost: "Staff reviewed every case to determine which could move forward and which should be resolved with a plea offer for disposition."

Overall Dismissal Rates Rose Exponentially; Guilty Pleas Fell Exponentially

Especially in case-heavy downstate, the toll of this triage was extreme. In the five counties of NYC (see **Figure 2**), dismissals rose from 44% of dispositions in 2019 to 69% in 2021, according to court data.[51] At the same time, guilty pleas more than halved: from 45% to 21% of cases.

Figure 2

Proportion of All Dispositions by Type in NYC

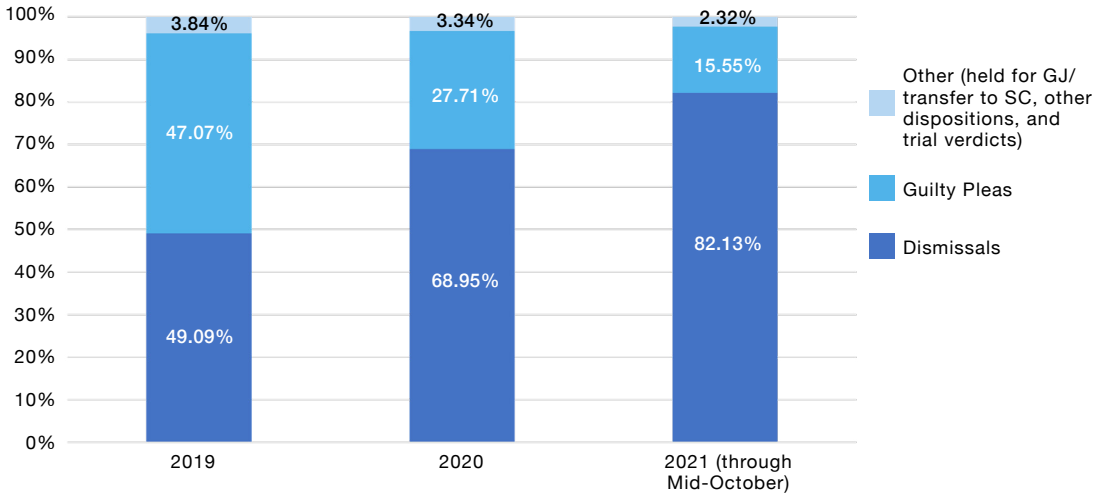


Source: NYS Office of Court Administration

For misdemeanor dispositions (**Figure 3**), which were deprioritized relative to felonies in the triage, dismissals rose from 49% in 2019 to a whopping 82% in 2021. Misdemeanor guilty pleas fell by two-thirds, from 47% to 16%.

Figure 3

Proportion of Misdemeanor Case Dispositions by Type in NYC

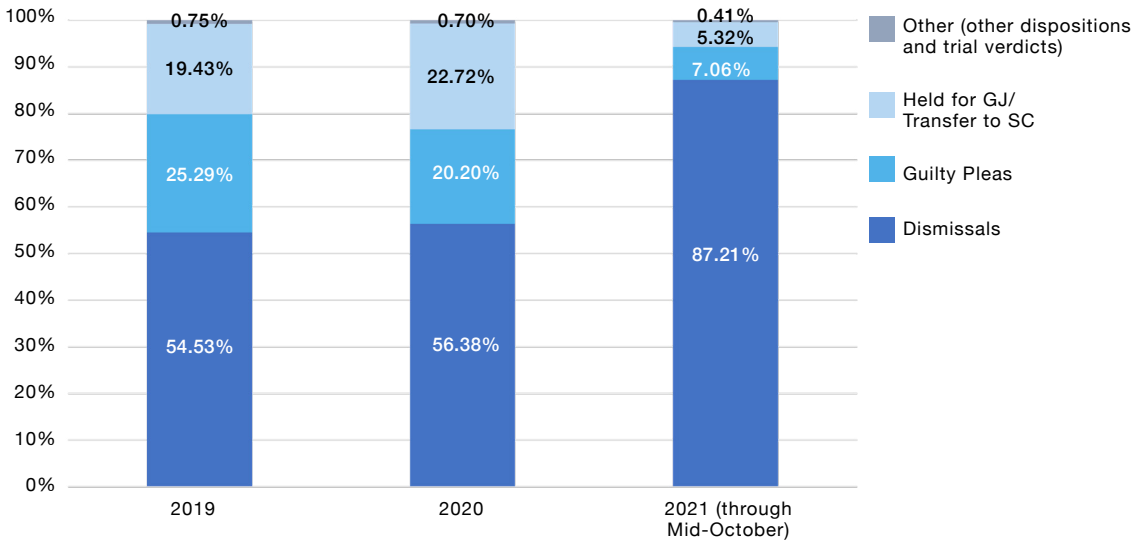


Source: NYS Office of Court Administration

For infraction and violation dispositions (**Figure 4**), the lowest priority in the case triage, dismissals rose even more precipitously, from 55% to 87%. Guilty pleas nearly vanished, dropping from 25% to 7% of disposed cases.

Figure 4

Proportion of Infraction/Violation Case Dispositions by Type in NYC



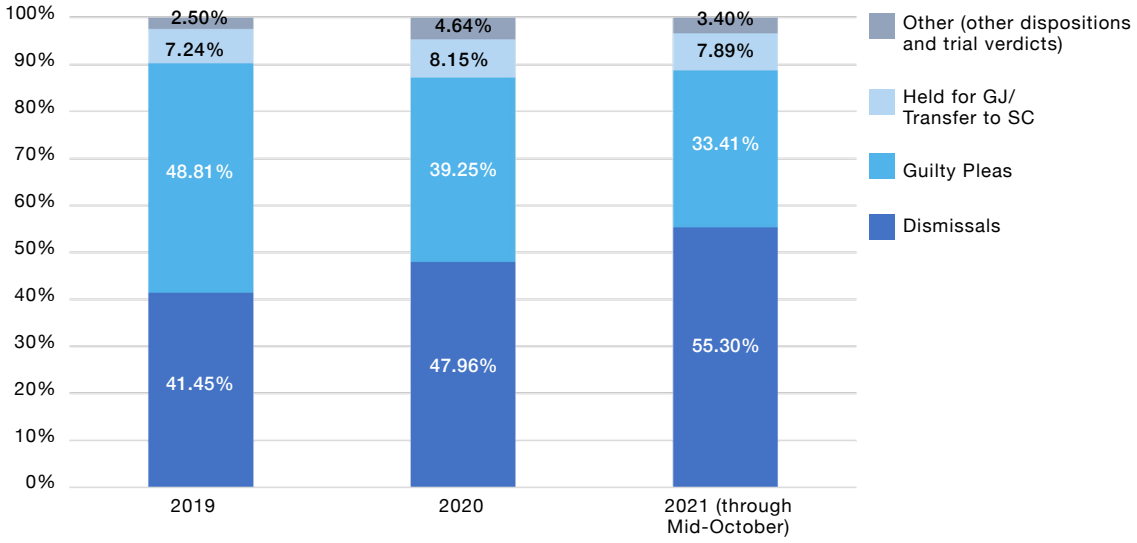
Source: NYS Office of Court Administration

Looking statewide, where caseloads are lower and therefore triage less acute, the trends are the same, though less dramatic.

Dismissals for all case types (**Figure 5**) rose from 41% of dispositions in 2019 to 55% in 2021, while guilty pleas fell from 49% to 33%.

Figure 5

Proportion of All Dispositions by Type in NYS

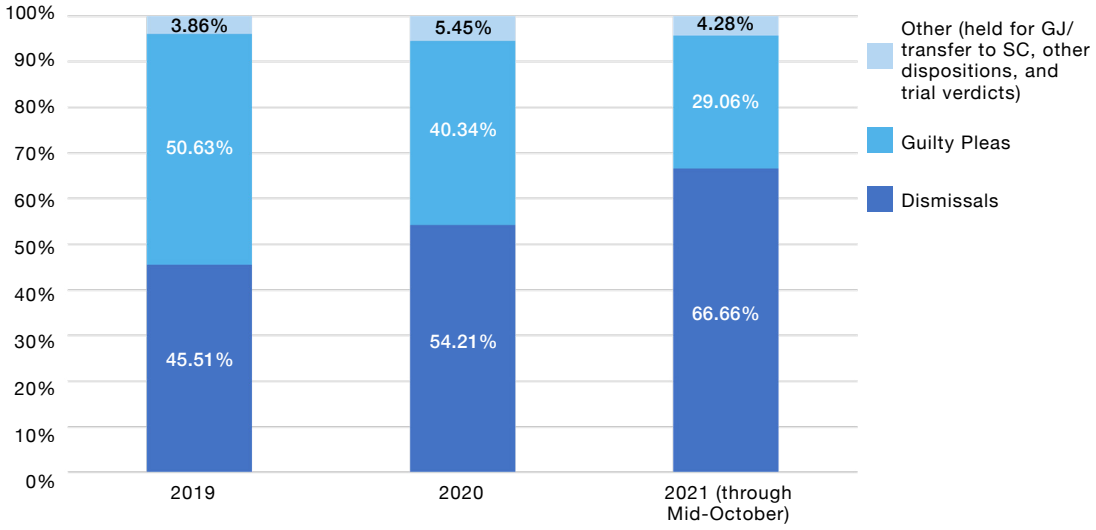


Source: NYS Office of Court Administration

Looking at misdemeanor dispositions (**Figure 6**), we see that statewide, as in NYC, changes are even sharper. Dismissals rose from 46% to 67%, while guilty pleas fell by almost half, from 51% to 29%.

Figure 6

Proportion of Misdemeanor Case Dispositions by Type in NYC



Source: NYS Office of Court Administration

To get a full sense of the pressure of the triage, it's important to remember that the overall real number of cases *fell* precipitously. In NYC superior and local criminal courts combined, case intake fell by 36% between the same periods in 2019 and 2021 (from 158,057 cases to 101,226). Despite there being 56,831 *fewer* cases, the number of cases for which ADAs were unable to answer "ready" for trial within the allowed time frame *rose* by 28%, from 7,505 cases to 9,676.[52]

Statewide, similarly, superior court intake fell 26% (from 30,334 to 22,490), and local courts saw case intake drop 37% (from 312,187 to 197,824). This suggests that under 245, the system cannot handle case numbers that have not even reached their pre-pandemic levels.

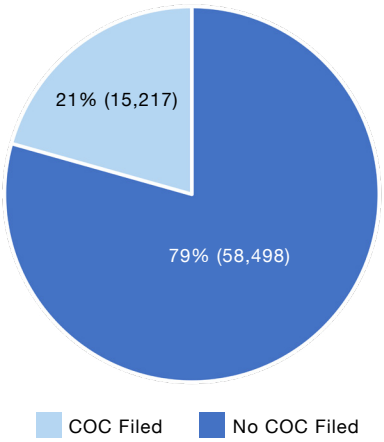
ADAs Unable to File Discovery COC

Even with 36% fewer cases to manage, why are ADAs able 28% less of the time to prepare for trial within the permitted CPL 30.30 time frames? And why are there even more cases, especially "lower-level" ones, for which ADAs are simply choosing dismissals to prioritize the rest?

It is largely because the burden of trying to file discovery COCs is nearly impossible (**Figure 7**). Statewide, prosecutors were able to file COCs for cases pending more than 20 days (the only public metric provided by the state to track COCs) on only 21% of cases.

Figure 7

Prosecutors Filing Discovery COCs for Cases Pending More than 20 Days in NYS

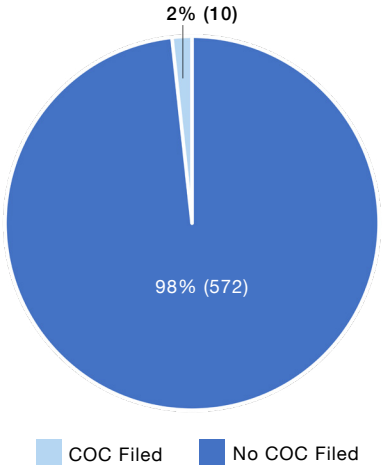


Source: NYS Office of Court Administration

But in some counties, those numbers are farcically worse. In Albany, prosecutors are filing COCs on only 2% of cases pending over 20 days (**Figure 8**). In Columbia County (**Figure 9**), prosecutors only hit 5%. In Jefferson (**Figure 10**), Madison, Otsego, and several other counties, prosecution has filed COCs on zero cases pending more than 20 days.

Figure 8

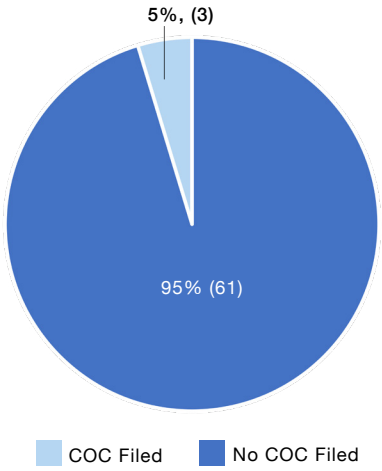
Prosecutors Filing Discovery COCs for Cases Pending More than 20 Days in Albany County



Source: NYS Office of Court Administration

Figure 9

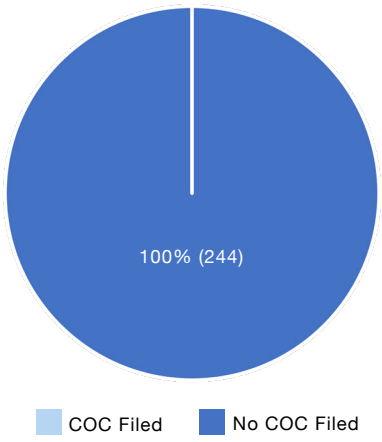
Prosecutors Filing Discovery COCs for Cases Pending More than 20 Days in Columbia County



Source: NYS Office of Court Administration

Figure 10

Prosecutors Filing Discovery COCs for Cases Pending More than 20 Days in Jefferson County



Source: NYS Office of Court Administration

These trends were corroborated by judges, as well. According to the extensive survey conducted by NYS Office of Court Administration at the end of 2021, only 20% of NYC judges reported that prosecutors' discovery obligations were met "most of the time."[53] Outside NYC, that number was higher—but still, only 65%.

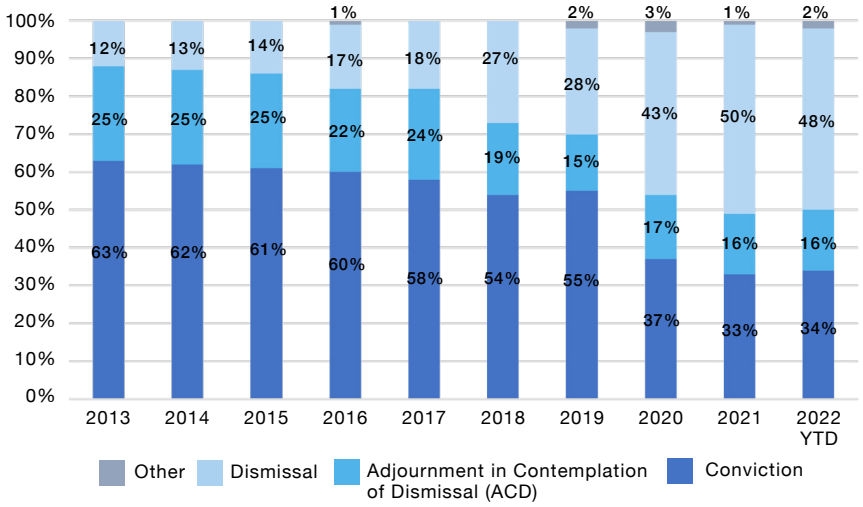
No wonder that judges also saw prosecutors' inability to prepare for trial—which is contingent on filing discovery COCs—before their 30.30 speedy-trial clocks ran out and defense attorneys could file motions to dismiss the cases. Indeed, a full 72% of NYC judge respondents reported

a great or moderate increase in 30.30 motions to dismiss cases being granted.[54] Also, 48% of surveyed NYC judges reported a great or moderate increase in 30.30 motions to release defendants from custody being granted; the same was reported by 40% of outside-NYC judges.[55]

While, at the time of writing, NYS Office of Court Administration has published court data only through October 11, 2021,[56] individual office data show that the increased dismissal rates downstate continued into 2022 (**Figure 11**). The Manhattan DA Office's data dashboard shows that in 2019, 55% of disposed cases ended in convictions, with 28% dismissed.[57] In 2020, those ratios reversed: only 37% cases reached convictions, while 43% were dismissed. As Covid's footprint receded in 2021, the trend only accelerated: just 33% of cases resulted in convictions, and a full 50% were dismissed. Year-to-date in September 2022, those dynamics held: 34% convictions and 48% dismissals.

Figure 11

Percentage of All Cases Disposed in New York County, by Type

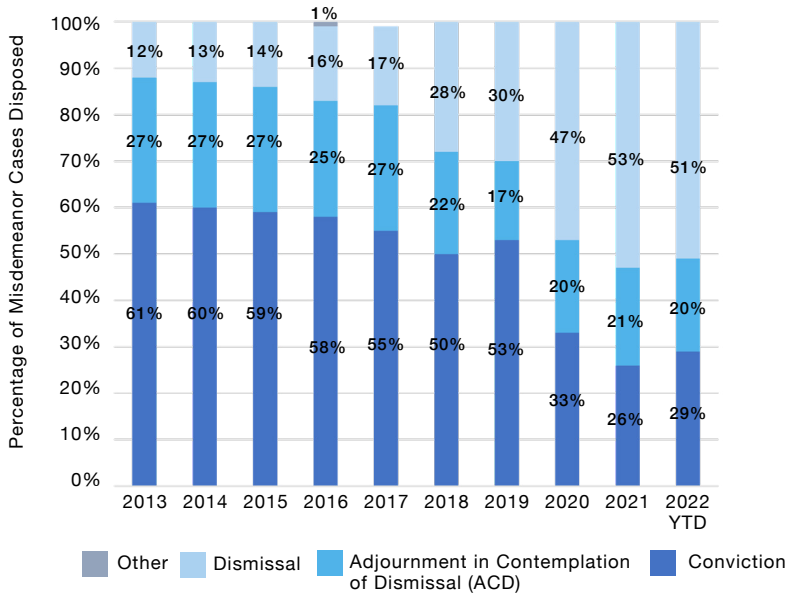


Source: Manhattan DA's Office's Data Dashboard

For misdemeanors (**Figure 12**), these shifts are again even more pronounced: the percentage of disposed cases that were dismissed year-to-date in September 2022 was over 66% higher than in 2019.[58] Meanwhile, convictions fell by over 40% in that time.

Figure 12

Percentage of Misdemeanor Cases Disposed in New York County, by Type



Source: Manhattan DA's Office's Data Dashboard

After 245 and Speedy-Trial Clocks, There Are Almost No Trials

As a final note on the relationship between 245 compliance and the forced running out of 30.30 speedy-trial clocks, it's important to underscore how few trials are being held in NYS. In 2019, Queens County had 80 misdemeanor trials; but in all of 2021, it had only five. In 2019, the county had 170 felony trials; but in 2021, there were just 17.[59] While there have been compounding factors, these reductions were largely the result of the pandemic. With misdemeanor court capacity down by a factor of 16 and felony capacity by a factor of 10,[60] the skyrocketing 30.30 dismissals were punishing a lack of trial readiness while virtually no trials were happening, officially "ready" or not.

245 Precludes Professionals from Plea-Bargaining

Prior to 245, prosecutors were free to plea-bargain at any time. This freedom gave further incentive to ADAs to enact "open file" discovery policies: the earlier they gave whatever material they possessed to the defense, the sooner a bargain might be considered and the case resolved for all parties. Remember that defendants know their own guilt; in many instances, the existence of incriminating evidence is known immediately, so diligent defense attorneys will want to begin negotiating as soon as possible in the interests of their eminently guilty clients. These defense attorneys are comfortable removing the unnecessary obligation both for ADAs to compile enormous extraneous material and for themselves to have to review it.

Under 245, however, prosecutors are effectively prohibited from initiating plea-bargaining with the defense prior to compiling full discovery. The defense may waive discovery—but prosecutors are left dangerously open to accusations that they are exacting the waiver to get dispositions faster or are conditioning plea bargains on it, which is explicitly sanctionable under 245.

As one upstate DA explained, he has seen a few trial-seasoned defense attorneys sign discovery waivers.[61] But these are the rare exceptions: in general, it is simply too risky for prosecutors, who have no certain protection against later accusations of coercion, which could cost them the case or potentially have future professional ramifications. For ADAs, it would mean putting the case entirely in the hands of the defense attorney.

This inability to launch right into negotiations or plea-bargaining without mountainous discovery, including, for instance, waiting for duplicative lab results, has only added to ADAs' time crunch and the intense case triage. By removing discretion from defense attorneys, prosecutors, and judges to plea-bargain early, not only does 245 eliminate opportunities for efficiency and certainty within the process; it also prevents professionals from being professionals. Paradoxically, this is especially harmful for defendants, since 245 unilaterally determines that defense attorneys are not competent to make appropriate decisions for their clients.

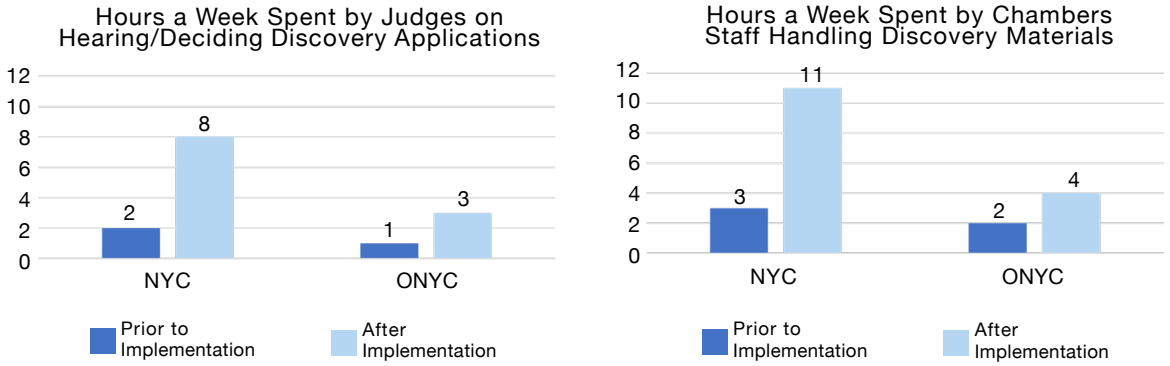
Slowing Down the Whole System

It is not only prosecutors who have been made less efficient and effective by 245. The Office of Court Administration's late 2021 survey found that, compared with what took place under the earlier discovery statute, NYC judges spent 400% more hours a week on hearing and deciding discovery applications, and their chambers staff spent 3.66 times as many hours a week handling discovery materials (**Figure 13**).[62]

Outside NYC (ONYC), judges spent 300% as many hours a week on hearing and deciding discovery applications and their chambers staff twice as many hours a week handling discovery materials.

Figure 13

245's Impact on Judges' and Chambers' Time Spent on Discovery



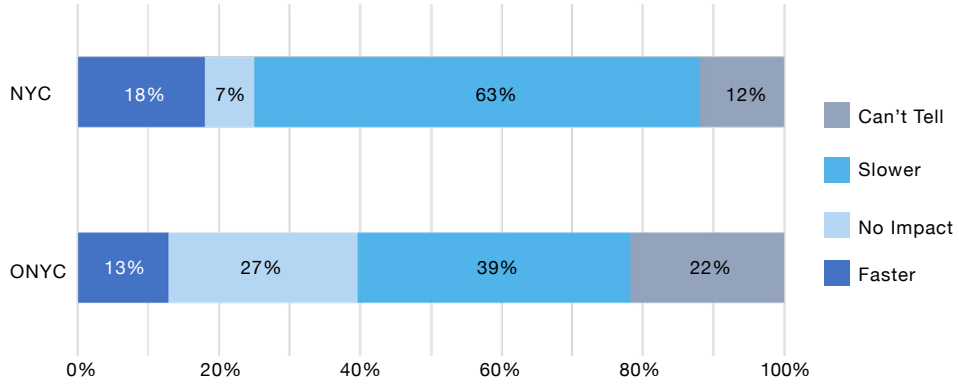
Source: NYS Office of Court Administration survey

The courts were slowed as judges issued a stunning increase in continuances: 80% more continuances in NYC and 66% more upstate.[63]

Among NYC judges who responded to the survey, 63% believed that the discovery legislation has led to slower case processing (**Figure 14**), as did 39% of courts ONYC.

Figure 14

245's Impact on Case Processing Time



Source: NYS Office of Court Administration survey

A final point: 245 has put an enormous degree of responsibility on judges to grant or deny 30.30 and discovery motions. Judicial discretion is an important and constructive part of our system; but when it increases, outcomes across the system can become less consistent. More pragmatically, as judges spend more time reviewing motions, the entire system can slow down.

Misdemeanor Prosecution Is Absolutely Critical for Public Safety

NYS's discovery statute passed in a period in which non-prosecution policies and the decriminalization of low-level offenses were politically hot. Individual local prosecutors' offices from Manhattan to Chicago to San Francisco have chosen to no longer prosecute offenses such as resisting arrest, trespassing, and prostitution, or to increase the threshold and reduce the sentencing for charges relating to things like shoplifting. In this environment, the increased dismissal of misdemeanor cases, particularly under 245, may seem inconsequential. But consistent criminal justice consequences for misdemeanor offenses are absolutely critical for public safety.

Unfettered low-level criminal offending destroys livelihoods, neighborhoods, and communities. Counter to popular narratives, the majority of black residents and of all residents in the fastest-growing U.S. cities want police to be *more* responsive, even to infractions like littering, graffiti, and public urination.[64]

Besides the public nuisance, communities are losing access to pharmacies and other businesses that cannot withstand the losses. In 2019, the Manhattan DA's Office had 3,343 misdemeanor convictions for petit larceny; in 2021, that number crashed to just 679 convictions.[65] Yet over the past two years, NYC robberies have increased about 40%, petit larceny rose 43%, and misdemeanor assaults are up 23%.[66] Even large chain stores have closed because of escalating and uncontrolled losses from shoplifting.[67] The lack of prosecution for such things as MetroCard fraud and transit theft-of-service has contributed not only to the MTA's coming $2.5 billion deficit[68] but also to the increase in transit crime over the past two years.

Indeed, not prosecuting these misdemeanors precludes vital opportunities to prevent or solve larger crimes. This is especially pertinent to many hate-crime attacks, which, at 604 incidents by the last week in 2022, have increased 47% in NYC since 2019 YTD.[69] Per reporting, many of the unprovoked violent street attacks on Asians and Jews were committed by individuals with lengthy misdemeanor records of the time likely to get triaged away under the pressures of 245.[70]

This is the more regrettable, since nearly half those arrested by NYPD for hate crimes suffer from mental illness, and, for this population, prosecution following earlier arrests could have provided an opportunity for supervised treatment.[71]

There is almost always a misdemeanor trail before a homicide. This is tragically true for vehicular homicides, as well. In 2019, the Manhattan DA's Office recorded 1,646 misdemeanor convictions for unlicensed driving; in 2021, with plummeting prosecution of these offenses, that number fell to only 628 convictions.[72] Not surprisingly, in that same period, NYC traffic deaths rose by 24%.[73] Reportedly 70% of serious crashes now involve drivers with suspended licenses or who are drunk and/or speeding—a crime for which there are no longer consistent consequences or deterrence.[74]

Finally, prosecuting misdemeanors makes it easier to solve later homicides—by, for instance, getting offenders' DNA on file.

The Discovery Burden Fully Precludes Local Prosecution of Major Cases

In April 2022, Frank R. James set off a smoke bomb and then shot 10 people on a Manhattan-bound subway, before going on the lam.[75] Under 245, the body-camera footage from the scores of responding officers and all notes recorded by the multiagency response to this mass shooting and manhunt would need to be collected for the case to be prosecuted locally. In other words, NYS's discovery statute indirectly mandates that all mass-shooting or large-scale crimes must, like that of Frank James, be prosecuted federally, or risk not being prosecuted at all. It would not be feasible, of course, for federal prosecutors to take on all the cases for which 245 burdens are overwhelming for local ADAs.

Staggering Financial Burden of Discovery Compliance

Implementation of 245 has been very expensive in initial investments in technology and training, as well as in ongoing and increasing costs of data-sharing, storage, and additional administrative staffing. As mentioned, myriad added processes and witness services have attached expenses. The extreme financial toll associated with this statute makes it important to consider whether these costs do the most to ensure a just and efficient criminal justice system, or whether investment elsewhere might achieve more.

Practitioners Calculated and Sounded the Alarm About 245's Expense

During NYS Senate 245 implementation hearings in late 2019, each district attorney's office expressed its concern and the need for additional financial resources, which these offices could not count on local legislatures to provide.[76] For example, a small county with roughly 100,000 residents proposed a budget increase of $170,000 for a paralegal and a confidential investigator, software to share discovery information, and related office supplies. Another small county's DA's office requested $200,000 for an additional ADA, an administrative assistant, extradition expenses, office equipment, and grand jury and stenographer costs. A medium-size county requested over $900,000 for additional staff resources, lab-testing services, expert testimony, translators, additional court reporters, and capital equipment needs.

The District Attorneys Association of the State of New York (DAASNY) requested $9.2 million from the governor's office for laboratories to handle the additional and expedited testing and exchange of information.[77] That is about a 50% increase over the laboratory services budget the year prior to the new discovery budget.

NYS Association of Counties estimated that the overall costs would easily exceed $100 million.[78] Representatives from NYPD had a similar need, testifying that for compliance with discovery and other criminal justice "reforms," the department would need nearly $100 million to cover hundreds of additional uniformed and civilian personnel within Patrol, Housing, and Transit Bureaus, the Police Laboratory, Communications Division, and Legal Bureau.[79]

Initial Funding: Over $100 Million for 245 Implementation

There was no funding provided in the original 245 legislation; but given these projected expenses, lawmakers agreed in 2020 to a budget that included a $40 million discovery compensation fund, transferred from deferred prosecution agreement funds maintained by the Manhattan DA's Office. The 57 counties ONYC were eligible for a share of the $40 million for expenses from April 1, 2020, through March 31, 2021. Funding was allocated based on counties' proportions of criminal court arraignments statewide and was used for discovery-related needs, including administrative support, equipment, software and data connectivity, and overtime. Counties were required to prioritize requests for its district attorneys' offices, local police departments, and sheriff's offices; funding also could support pretrial services and increased case supervision resulting from bail reform, nonprofit organizations, and forensic laboratories. By November 2021, 47 counties had received approximately $32 million, administered by DCJS.[80]

NYC included in its November 2019 budget plan city investments to support the implementation of discovery and other criminal justice reforms. These include approximately $75.3 million in funding and approximately 1,023 in additional baselined headcount across seven city agencies, including the District Attorneys and Special Narcotics Prosecutor, NYPD, the Law Department, FDNY, Department of Health and Mental Hygiene, Mayor's Office on Criminal Justice, and the public defense providers.[81] Separately, NYC's fiscal 2020 budget added baseline funding of approximately $35.4 million to support 729 new positions for discovery and bail reform for NYC's district attorneys.[82]

When the NYC Council published its four-year financial plan in March 2020, it noted: "Full-time budgeted headcount for Fiscal 2021 is 1,676 positions larger than the FT budgeted headcount for Fiscal 2020, primarily attributed to increases in headcount across multiple City agencies to comply with the State legislative changes to bail and discovery practice in criminal cases."[83]

2022–23 Budgets Demonstrate that 245 Continues to Be Expensive

In June 2022, DCJS notified counties ONYC that again in 2022–23, there would be awards of about $40 million, based on the average number of arraignments in each county from 2017 to 2021. The individual counties' allocations, the largest being almost $4.2 million for Suffolk, are listed below.[84]

Table 1

2022–23 Discovery Awards Outside New York City

County	Amount
Albany	$1,333,095
Allegany	$121,367
Broome	$1,111,295
Cattaraugus	$341,379
Cayuga	$270,714
Chautauqua	$827,970
Chemung	$424,248
Chenango	$156,648
Clinton	$347,813
Columbia	$214,702
Cortland	$246,869
Delaware	$137,399
Dutchess	$890,721
Erie	$4,032,678
Essex	$120,856
Franklin	$174,213
Fulton	$219,093
Genessee	$247,176
Greene	$252,129
Hamilton	$8,118
Herkimer	$153,228
Jefferson	$441,812
Lewis	$57,033
Livingston	$233,084
Madison	$237,168
Monroe	$2,757,688
Montgomery	$239,057
Nassau	$3,461,993
Niagara	$1,046,400
Oneida	$1,035,524
Onondaga	$2,190,628
Ontario	$404,131
Orange	$1,702,199
Orleans	$158,282
Oswego	$553,171
Otsego	$180,646
Putnam	$267,804
Rensselaer	$648,907
Rockland	$656,668
St. Lawrence	$400,863
Saratoga	$826,489
Schenectady	$776,043
Schoharie	$67,908
Schuyler	$36,660
Seneca	$133,059
Steuben	$402,241
Suffolk	$4,186,620
Sullivan	$340,716
Tioga	$115,955
Tompkins County	$245,440
Ulster	$789,318
Warren	$339,439
Washington	$204,440
Wayne	$311,561
Westchester	$2,722,763
Wyoming	$142,454
Yates	$54,122

Source: ALM (Law.com)

For fiscal year 2022–23, DAASNY has also requested from the governor $2.5 million to maintain NYPTI services, which includes assistance, training, and a case-management system to track cases, produce grant reports, and facilitate electronic discovery.[85] Included in this request is $1.5 million for the Prosecutors Case Management System and its companion DEMS,[86] as well as $375,000 for NYPTI's Witness Protection Program, which is of greater need because of 245's changes.[87] The governor's enacted budget for FY 2023 provides resources to support discovery reform implementation, "including $65 million in new investments to discovery that ensure public safety, including system-wide coordination, technology, expanded storage capabilities, and administrative support."[88]

Within NYC, the city council's Fiscal 2023 Preliminary Plan increased the budget for criminal justice reform implementation across the five counties' DAs' offices and the special narcotics prosecutor, from $46.2 million at adoption to $53.1 million.

This represents an increase from the original $35 million baselined investment to facilitate criminal justice reform added in the November 2019 financial plan. The original funding did not cover full implementation costs, and additional funding was baselined in the Fiscal 2022 Adopted Budget. The headcount across all offices for criminal justice reform implementation remains unchanged, at 729 positions. **Table 2** shows the Fiscal 2022 Adopted Budget, the Fiscal 2022 budget, and the Fiscal 2023 budget as of the Preliminary Plan.[89]

Table 2

Budget for Criminal Justice Reform Implementation, by County in NYC

Office	Fiscal 2022 Adopted	Fiscal 2022 Preliminary	Fiscal 2023 Preliminary
Bronx	$8,297	$8,300	$9,599
Kings	$9,800	$9,979	$11,432
New York	$12,999	$12,999	$14,553
Queens	$9,202	$9,152	$10,781
Richmond	$4,211	$4,536	$4,906
SNP	$1,639	$1,639	$1,862
Total	**$46,148**	**$46,605**	**$53,133**

Note: Dollars in thousands.
Source: NYC Council Budget

Funding Levels Will Be Hard to Maintain

The NYS Fiscal 2023 Executive Budget included a proposal to permanently require the Manhattan DA's Office to annually transfer $40 million of revenue from deferred prosecution agreements to the state's Criminal Justice Discovery Fund. The transfer would support local assistance grants to localities across the state to cover costs associated with discovery reform. According to the District Attorney of New York, this source of funding is unsustainable because it is based on the presumption that the office will continue to be involved with enough cases that yield sufficient revenue from deferred prosecution agreements.[90]

Lost Revenue

Since 245 forced DAs' offices to forgo prosecuting many low-level offenses associated with tickets and fees and fines, many counties lost the associated revenue. For instance, when filing certificates of compliance on traffic tickets was still fully mandated, rural jurisdictions could not cover the workload, dismissing tickets and the revenue associated with them.

Legislators Ignored the Screwy Math of Reform Advocates

The costs—both initial and sustained—of the new discovery law should not be a surprise to lawmakers. The costs were readily calculatable, and, in fact, prosecution, law enforcement, and other agencies presented them apprehensively before the law was implemented.

However, in hours of hearings, advocates for the statute argued simultaneously that:

- These anticipated budgets were false fearmongering.
- If the costs limited the ability of prosecutors to bring as many cases, it proved that the prosecutors did not need to prosecute those cases anyway.

- If prosecutors had less money, it must mean that other services (education, health care, and so on) had more money, which was good because those services do more for justice.

Representative of these arguments, Erin George, a campaign director for Citizen Action of New York, testified at the downstate and upstate NYS Senate hearings and was lauded and lavishly thanked after each hearing by presiding senator Jamaal Bailey, chair of the Codes committee. George stated:[91]

> Prosecutors continue to claim that implementing this law will cost enormous amounts of money. I'm not an attorney, but I do know—from many conversations, from being engaged in hundreds and hundreds of conversations, with prosecutors, law enforcement, defense attorneys, legislators, other policy advocates—that this is an exaggeration. I also believe that fundamentally reduces values for justice, fairness, and human life to dollar amounts….
>
> [DAs are] going to need to rethink how they prosecute, bring fewer meritless cases, and re-prioritize existing resources. Law enforcement should be treating arrests and prosecutions as limited resources, and thinking about discovery implementation as an opportunity to reallocate funds, and shift many cases out of the system completely because they never belonged there in the first place….
>
> The new discovery law is also going to lead to quicker, fairer, and more accurate case resolutions, which means fewer taxpayer dollars spent on maintaining mass incarceration. These are resources that can and should be invested in the things that truly create community safety and stability, like public education, affordable and stable housing, health care, community-based services, et cetera.

Of course, a functioning criminal justice system does have hard costs associated with its processes. Increasing compliance burdens will drastically expand these—to no one's benefit. Further, justice demands that prosecutors bring as many worthy cases as exist: artificially limiting them for budgetary reasons is not elevating justice but disappointing public safety. Indeed, it is at odds with the separation of powers: if the legislature has ruled certain behaviors to be criminal, it is not the role of criminal procedure law to, in effect, invalidate them. As for the idea that extending money to one agency, while slowing down its functioning, will magically create more money for other agencies: that makes no sense.

However, the NYS senators at the hearings, especially presiding Senator Bailey, praised and echoed these sentiments from defense advocates, no matter how illogical. Lori Cohen, president of NYS Association of Criminal Defense Lawyers, testified to prosecutors' underhandedness in describing the funds needed to implement 245: "When they come and ask you for $100 million, or they come and ask you for $30 million, I think you need to take that with a grain of salt."[92]

> Senator Bailey responded, inspired:
>
> I hope that you have less work and that district attorneys have less work. Because the ultimate reason why I'm a state legislator is to do good things for people. And the way that we do positive things for people is by funding youth programs as opposed to incarceration. ["Yeah," interjected Cohen.] It's by making more community centers.… I'm hopeful in 20 years … to see a record low in case loads for defenders and that district attorneys have less things to do.[93]

But to believe that 245 was a path to prosecutors having *lighter* caseloads or working *less* defied every piece of hard information about the statute. Why lawmakers were so willing to accept and endorse the fuzzy, idyllic math of defense advocates—and to echo their sentiment that the public is not served by having a robust criminal justice system—should be considered in future criminal justice policymaking.

245's Chilling Effect on Witnesses

Prior to 2020, witness information did not need to be turned over to the defense until the commencement of trial. This provided critical anonymity to individuals who might be testifying against family members, neighbors, or local gang members. Since many cases end in guilty pleas, the identity of these witnesses might never be shared—or a witness could choose to remain anonymous by testifying only before a grand jury but not at the trial itself. DAs' offices might maintain open-file policies but still control what details were turned over. An ADA with a sensitive victim could redact her name and contact information. On drug deals, for instance, he could take the "money shot" screen-grabs from a drug sale and turn over that image, while withholding witness information.

But under 245, even grand jury witness information must be shared with the defense, long before a trial is being prepared. Any grand jury testimony and any statements recorded during the investigation of a case are disclosable, regardless of whether the person who made the statement will testify in a hearing or at trial. Because this falls under the automatic discovery rules, disclosure must happen within 20 or 35 days (depending on defendant's custody status) of arraignment. Additionally, the defense may now move for a court order to access a crime scene or other premises, even including a victim's or a witness's own home.

Protective Orders Are Insufficient to Protect Victims and Witnesses

Under 245, a prosecutor can apply for a protective order to withhold information about an individual whose safety might be jeopardized. But the law lays out a complex procedure, requires tight timelines for hearings on protective orders and provides for a new intermediate appellate procedure. This dramatically increases the number of applications and the process's complexity, especially for jurisdictions like the Bronx, where DA Darcel Clark indicated during hearings that she intended to file for protective orders prophylactically on her cases.[94]

Administrative burden aside, protective orders cannot safeguard witnesses for three reasons. First, prosecutors cannot guarantee victims or witnesses that the judge will grant a protective order. Second, prosecutors and judges cannot accurately predict which defendants are likely to intimidate, threaten, harm, or kill the witnesses against them, or harm a person with evidence or information "relevant" to an offense charged or to a defense that may be asserted.[95] Third, witness or victim safety will rely precariously on the investigative bandwidth of an ADA, as he attempts, at the earliest stage of the case, to learn all factors about the defendant that might support the issuance of a protective order.

245's Chilling Effect on Witnesses

As widely predicted, this shift has had an enormous impact statewide on witness and victim willingness to testify. While there is no strict way to measure witness reluctance, every prosecutor interviewed reported that, with a curtailed ability to promise anonymity to witnesses, fewer witnesses agreed to cooperate. This looks different in urban counties—where drug and gang cases

are most affected—from the way it looks in rural counties, where it has undermined domestic violence cases. Additionally, in rural areas, the victim knows the defendant in the vast majority of victim-based crimes.

One rural DA reported:[96]

> I have a smaller caseload than urban regions. I know for me it's about three cases [that were affected]—but they were significant. I don't have the level of anonymous crime that other areas have. Nobody in [my county] has a "street" name because everyone went to school with the guy. We have fewer sensitive cases; but of those, [chilling of witnesses] had an effect. We had a shooting case. Because the discovery statute required us to disclose certain info, our key witness went to ground, which caused prosecution to falter.

Witness reluctance was compounded by contemporaneous 2020 bail "reform" legislation, which suddenly prevented judges from holding all but a very few individuals who had committed delineated offenses in jail pretrial. Judges are forced to release defendants back into the community even if they deem them a clear danger.[97]

The changes to NY's bail and discovery statutes together have an exponentially chilling effect. Consider a person who is walking down the block and sees a man beating up his girlfriend, and calls the police and gives a statement. The defendant is arrested, but that evening the witness comes home and finds him sitting on her front steps. And this scenario does not have to happen that often to convince people that they have to protect themselves.

Witness Reluctance Is Making It Harder for Police to Clear Cases

While there is no exact way to measure the *absence* of witness cooperation, a potential proxy measure of increased witness reluctance to testify since 2020 is the reduced ability of police officers to make arrests and close cases. In NYC, adult felony arrests fell by 14% between 2019 and 2021,[98] even while felony crimes shot up astronomically. The rise was especially pronounced in categories where witnesses are most often pivotal. Shootings rose by 102%, murders rose by over 51%; domestic violence felony assault victim complaints also rose by over 6%.[99] Citywide, felony and misdemeanor drug arrests combined fell by over 48%—even though illegal drug activity expanded, evidenced by drug overdose deaths that were up by nearly 80%.[100] And after years of resolving criminal cases at rates consistently over 30% (across seven reported criminal categories, including murder and rape), the city's clearance rate since 245 implementation has remained below 30%, with the exception of one quarter in 2021 that inched above.

ONYC, felony arrests fell by 12% between 2019 and 2021,[101] while murders rose by over 56% and violent crime with a firearm rose by 35.5%.[102] Domestic violence aggravated assault victim complaints rose by over 9%.[103] ONYC felony and misdemeanor drug combined arrests fell by over 45%,[104] while statewide drug overdose deaths rose by 37% from 2019 to 2020.[105]

245 Added Dramatically to Resources Spent Toward Witness Protection

In preparation for the new discovery rules, concerned DAs planned creative ways to bolster witness protection. At NYS Senate 245 implementation hearings in late 2019, Rensselaer County DA Mary Pat Donnelly hoped to hire extra investigators to help with crime-scene visits and victim protection. Jefferson County DA Kristyna Mills worried about witness statements ending up on social media, which has a very chilling effect.[106]

The related victim-services cost concerns were significant: in many counties, there is no sanctuary in which to place threatened witnesses, other than hotels. During hearings, Albany DA David Soares explained that his county could afford witness protection—removal to a hotel—for a month or two before trial. He would be reimbursed from NYPTI, which had a $250,000 statewide budget for witness protection. But with the new obligation to turn over material so early in the case, his county would not be able to afford what would become four, five, or six months: it would require a significant investment in witness protection funds. Albany, like all urban counties, has communities where victims and perpetrators live within blocks of each other, with friends and associates who all know one another. The ability to provide some measure of protection of witnesses sparks cooperation—and without the cooperation needed to bring cases to begin with, protection will be moot.[107]

ADAs who have trouble persuading nervous witnesses to testify may end up interviewing more potential witnesses before finding one who will testify: a time-consuming process and potentially expensive when, say, interpreters are required. (And this process further compounds the volume of discovery to be produced.)

DAs' offices have had to hire more investigators to work on cases where witnesses need to be relocated, and more victim and witness advocates are needed to assist ADAs in maintaining contact with fearful witnesses and to note when orders of protection are needed.

Of course, we do not have a measure of how many witnesses were actually harmed or further traumatized after their detailed information was quickly and more fully shared with violent individuals under 245 protocols.

Interagency Tensions Between Prosecution and Law Enforcement

NYS prosecutors are governed by the landmark federal cases from half a century ago that dictate some of the material they are obligated to hand over to the defense. As noted above, a key category is "Brady material," which demands voluntary disclosure of evidence that may be favorable or exculpatory to the defense. Prosecution's obligations developed further to require the collection and similar sharing of "Giglio" material: disclosures that may be used to impeach the credibility of prosecution witnesses—notably, including witnesses who are police officers.[108]

Under 245, *Giglio* burdens have increased because of the added time pressure and because of the number of officers' records and the granular details required to be compiled, regardless of whether they are pertinent to a case. For example, ADAs must now include unsubstantiated Civilian Complaint Review Board (CCRB) complaints for officers, even though these bear no weight, as they have not been validated. Prosecutors must turn over disclosure forms and paperwork for each potentially testifying officer, including detailed disciplinary records and lawsuit records—some of which the officer himself might not be aware of (e.g., the outcomes of city lawsuits). These often require an enormous amount of manual redaction, complicated by the frustrating vagueness in the actual *Giglio* demands of the new statute.

In NYC, collecting *Giglio* material is somewhat streamlined by the existence of a single, unified police agency: NYPD. Two years after 245 implementation, many Manhattan cops, for example, now have their disclosure forms on file—some even have copies that have already been redacted, saving ADAs from redundant legwork. But ONYC, each DA's office deals with numerous agencies: police forces for individual cities and townships, active sheriff's departments, state

police that respond to local crime, and so on. The Cortland County DA, for instance, works with seven police agencies, each completely independent of the others; and for any given case, multiple agencies may be involved.

In many jurisdictions, this has created counterproductive friction between prosecution and law enforcement. While justice dictates that police records should be available to both prosecution and defense, putting prosecution in the role of marshaling these records under pressure has bred resentment. In upstate counties, where myriad smaller law-enforcement agencies make for more complex dynamics and relationships, DAs have reported (in background interviews for this report) not only open hostility from local sheriff's offices on account of *Giglio* compliance, but even indications that police agencies have become less reliable in committing to record their officers' infractions. Rather than be forced to share these down the line with prosecution, they are disciplining their officers off the books—certainly, a step in the wrong direction.

Inescapably, under 245, the ultimate responsibility for collecting and turning over *Giglio* material rests with prosecutors. Police chiefs are not accountable for obtaining these records. Following Governor Cuomo's June 2020 repeal of 50-a, police disciplinary records became public and available for defense attorneys to access through Freedom of Information Law requests.[109] However, the statute still stipulates that prosecutors will be held responsible for collecting this information, together with all *Giglio* material. It might be tempting for ADAs to rely on defense to collect its own (now publicly accessible) police records; but if they do not do so, the lack of *Giglio* material can easily come up on appeal and a case can be overturned.

Additionally, judges do not want the burden of reviewing reams of disclosure pertaining to each officer involved in a case—to any degree, however passive or irrelevant—and have placed that burden fully on the prosecution.

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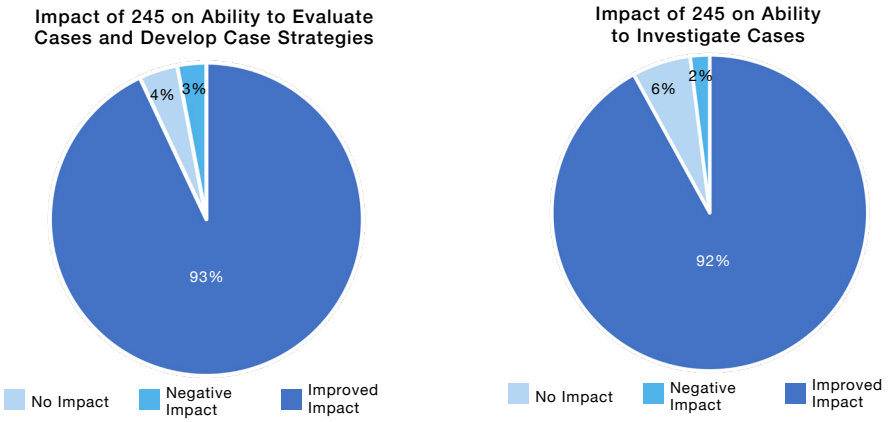
245 Favors Defense to a Destabilizing Extent

In March 2022, NYS Office of Indigent Legal Services surveyed more than 500 attorneys within the Chief Defenders Association of NY, NYS Defenders Association, NYS Association of Criminal Defense Lawyers, and NYS Office of Indigent Legal Services to gather their experience from the implementation of 245.[110]

In contradistinction to prosecutors' experience (**Figure 15**), they found that 93% of defense attorneys reported that 245 improved their ability to evaluate cases and develop strategies, and 92% found that it improved their ability to investigate cases.

Figure 15

Defense Attorneys' Experience with 245



Source: NYS Office of Indigent Legal Services survey

Defense Attorneys Not Actually Reviewing Material

Defense attorneys chronically do not review the discovery material compiled—a fact made awkwardly evident when the passwords associated with shared prosecution files expired before defense attorneys even logged in to access them. According to sources with firsthand knowledge of this data, during at least the first year after 245 implementation, in many jurisdictions defense attorneys were failing to download discovery packages within their 30-day windows in over half of cases.[111]

Among defense lawyers, solo practitioners are particularly challenged in reviewing the greatly increased material. This was highlighted by survey respondents, including this characteristic comment:

> As a solo practitioner I don't have the staff and resources to download, label, organize and digest the discovery. I also don't have the technical knowledge of the various players that are needed for the different types of media files. While the panel members do have access to discovery management paralegals, there are not enough to go around and there is a long wait to find one available to work on the case with me. There is no funding available to 18B attorneys for technology purchases or training, so we have to purchase it ourselves and absorb the cost on our own.... The discovery laws and processes are too time-consuming to allow for attorneys to "inherit" cases on the eve of trial and be ready in a short period of time.[112]

The following comment perhaps best captures the overall sentiment of the defense attorney responses about discovery reform's positive impact on the fairness of criminal proceedings: "One of the most important acts in criminal justice reform. Thank you to the legislature for delivering this for our clients."[113]

A salient theme emerging from the survey comments is the voluminous amount of discovery that is now disclosed and the increased amount of time that defense attorneys must spend to review discovery, including: "Why do the passwords expire after a short period of time? Frequently I

download zip files only to be unable to open them up later, and then I can't access the materials without a new password";[114] and "Files and documents (both video and audio) expire after thirty days, placing burden on counsel to assume measures to protect discovery materials."[115]

Defense Attorneys Can Now Sabotage Prosecutors' Speedy-Trial Window

In a Legal Aid Society leaked internal 245 guide from January 2021, it noted that changes to 30.30 speedy-trial rules "are especially important in misdemeanor cases."[116] The new legislation created opportunities for defense attorneys to delay misdemeanor cases from moving forward—*while* the speedy-trial clock kept running. An unscrupulous defense attorney could delay filing motions to suppress evidence until the last possible moment, all while the window before the ADA must dismiss the case keeps closing. Defense attorneys can easily take advantage of this new leverage, contributing to the vastly increased dismissal rates, especially on low-level offenses.

Defense Attorneys Not Filing Reciprocal Discovery

Under 245, defense attorneys must provide "reciprocal" discovery within 30 days after the prosecution has served a COC. But when they fail to do so, the repercussions can fall on the prosecutors. Consider a case where the defense does not provide the ADA with reciprocal discovery. The judge may respond by imposing sanctions on the defense attorney—but even then, the defendant can claim ineffective assistance of counsel, with the ultimate outcome that the evidence will be precluded and any conviction will get reversed that could theoretically impact their law licenses.

Prosecutor Mass Attrition

Given the vast increase in workload and inefficiencies, it is not surprising that prosecutors' offices have universally experienced staffing calamities, with exiting ADAs citing 245 for their burnout. The untenable level of stress and anxiety is especially tied to ADAs' requirement to certify that they have turned over every piece of discoverable material. If police officers have it, prosecution is deemed to have it. If police fail to share material in their possession, ADAs may be sanctioned—an enormous risk and pressure that could theoretically impact their law licenses.

Many among the 30 respondents to an October 2022 survey of NYS DAs' offices reported 40% ADA attrition rates since 245 implementation and the deterioration from a steady stream of qualified applicants to months with no applicants at all.[117]

NYC's higher-profile offices have staffing crises. In June 2021, a leaked e-mail from the Bronx DA's Office indicated that its trial bureau alone was down 42 ADAs and nine supervisors—units whose staff is disproportionately affected by the discovery workload.[118] In April 2022, it was reported that the Bronx was already down a total of 104 ADAs since the previous summer.[119] As of August 2022, Manhattan is seeking to hire ADAs in at least 11 units, including child abuse and sex crimes, as well as six supervisors.[120] Even the office's famously progressive DA, Alvin Bragg, told the NYC Council that "record attrition" is due to "unprecedented evidentiary demands" from 245.[121] He reported: "Faced with these unprecedented evidentiary demands, we've experienced record attrition, as our ADAs burned out and sought less demanding jobs for more money." He added that his office needs more staff, "to be able to comply with the new discovery requirements and keep up with staff attrition."[122]

From April 2021 to April 2022, Manhattan and Brooklyn each lost about a fifth of their prosecutors,[123] a trend that continued in the six months since. Even the smaller Staten Island DA's Office lost 10% of its prosecutors in the first three months of 2022.[124]

Most attorneys are drawn to the low-paying, intrinsically high-stress role of prosecutor by a passion for making a difference for crime victims. But the soaring rates of case dismissals and inability of ADAs to devote sufficient time to case development as they scramble to collect discovery documents had meant that the central gratification of the role itself—representing the people and seeking justice—has been monumentally removed.

Current starting annual salaries for ADAs in NYS are in the range of $65,000; the pay inches up slowly over years of service, but generally never matches what even a first-year associate makes at a law firm. But demoralization under the new discovery statute has made it more appealing for prosecutors to be lured away even by other public-sector jobs. As one county DA explained: "Suddenly, the job changed overnight to just litigating over stuff that has no relevance to a case. That's debilitating. [Prosecutors] can go work for social services from 8:30 to 4:30 and get paid more, with a lot less stress."[125]

This is especially true in NYS capital Albany and adjoining counties, where the lure of local higher-paying state agency positions accelerates the exodus. Just in the first six weeks of summer 2022, five ADAs left the Albany DA's Office, following a raft of senior prosecutors who migrated over the past year to roles with the Departments of Labor and Civil Service, among others. Between April and July, five ADAs abandoned neighboring Rensselaer, including seasoned prosecutors heading for state agencies,[126] leaving that office now with a 30% vacancy.[127]

Catastrophically, offices are finding it impossible to fill those positions, let alone with experienced candidates. One upstate DA's office reported historically receiving qualified ADA applications every month, but has now gotten only one résumé in the past year—from an applicant in Australia.[128] This situation is exacerbated by the popularity of anti-law-enforcement sentiments and narratives, especially within law schools, an otherwise fruitful ground for ADA recruitment.

In Cortland County, the DA's office reportedly has experienced a 50% staff turnover rate since 245. The office went from generally operating with 10% vacancy rate in litigation staff to as high as a third of the trial attorney positions empty.[129]

Even Legal Aid Society's head of the criminal defense practice has acknowledged that increased workloads have decreased morale (said also for public defenders) and that higher salaries would be necessary to make the job competitive.[130]

Conclusion and Recommendations

Discovery statute 245 has had a catastrophic impact on New York's criminal justice system that has correlated with exponentially rising crime. As noted above, between 2019 and 2021, NYC shootings rose by 102% and murders rose by over 51%.[131] ONYC, murders rose by over 56%, and violent crime with a firearm rose by 35.5%.[132]

While 245 is demonstrably harmful for the victims of crime, it has serious long-term negative consequences for offenders, as well. The statute has also correlated to a large decrease in criminal defendants receiving treatment for drug abuse and mental illness. This is largely because, as more cases are dismissed, fewer defendants have incentive to accept services, and fewer prosecutors

or judges have any leverage to help. In Queens County, individuals offered services from crime victim advocacy fell by 12.49% between 2020 and 2021—even as criminal court appearances *rose* by 60.65% (from 75,448 to 121,212) and dispositions rose by a full 86.93% (from 18,119 to 33,871).[133]

The consequences for offenders are tremendous, as Jefferson County DA Kristyna Mills stated:[134]

> I fear that these laws may have unintentionally legalized misdemeanor level possessions of dangerous narcotics such as heroin, methamphetamine and cocaine. Overburdened labs across the state typically do not test misdemeanor weight narcotics unless that testing is needed for trial. Under this new law, in order for us to declare that we are ready for trial, arguably that testing must have been completed. I fear that there is no possible avenue in which these labs will be able to test these smaller amounts without enormous increases in staffing and funding.
>
> Where before we could get a plea to a misdemeanor based upon a presumptive field test, get individuals addicted to these substances placed on probation and into rehabilitation facilities or divert them into these programs, now they will have no incentive to do so because they will learn that we cannot comply with discovery and cannot meet our speedy trial burdens. These cases will ultimately be dismissed. This is at the expense of our addicted population who often need the incentive of probation or diversion programs to help them get treated and stay clean.

In order to fix the negative consequences of 245, while embodying its original intentions to improve fairness, the legislature should undertake the steps below. These recommendations do not seek to return discovery protocol to pre-2020 guidelines. Rather, they more incisively ensure that prosecutors turn over all material that defense attorneys want and need in order to provide the best counsel to their clients. At the same time, the policies below maximize the ability for every party—prosecutors, defense attorneys, and judges—to do their jobs as professionally, efficiently, and meaningfully as possible.[135]

1. Mandate an "open file" policy across the 62 NYS district attorneys' offices, requiring that prosecutors make all non-privileged discovery material available to the defense as soon as they possess it.

2. For clarity and feasibility, the discovery standard should be a requirement for material "relevant to" a case. This would replace the statue's standard of all material "related to" a case.

3. Allow judges discretion to sanction the prosecution for broader noncompliance with discovery obligations in proportion to the harm caused by failure to provide materials. Such sanctions should apply only to the cases at hand and should explicitly not have ramifications for ADAs' law licenses.

4. Tie time frames for compiling and sharing to trial rather than to arraignment. This would bring NYS in line with both federal discovery standards and with other states.

5. Allow defense attorneys, prosecutors, and judges to have discretion to plea-bargain at any point in the process.

6. Article 245 should be amended to require sharing witness information after a trial date is set but no later than 30 days pretrial, in order to maximize the safety of witnesses.

7. Allow the defense to apply to the court for access to crime scenes, or, in the alternative, photographs and measurements, where these are material in case preparation or to a jury's determination of the facts.

8. Disassociate 245 from the state's "speedy trial" statute, as their linkage has led to thousands of procedural case dismissals.

9. Add oversight that captures whether and in what time frame defense attorneys access and review shared discovery material. Add penalties for not sharing reciprocal discovery. For instance, judges might officially record when defense attorneys violate discovery protocols.

10. Place the onus on law-enforcement agencies to share with prosecutors complete required police disciplinary and other records to be submitted to the defense during discovery-sharing. Amend 245 such that prosecutors not be penalized if these records are later found to be incomplete.

11. Rather than require all expert witnesses' business addresses, current curricula vitae, lists of each expert's publications, and lists of all experts' proficiency tests and results administered in the past 10 years, prosecution should be required to share:

    - Expert witnesses' complete disclosures of cases for which they testified within the past four years and, if applicable, their compensation for each.

    - Summaries of all testifying expert witnesses' opinions; their bases and reasons for those opinions; descriptions of any data used in forming such opinions; and descriptions of any exhibits that will be used to summarize such opinion.[136]

About the Author

Hannah E. Meyers is a fellow and director of policing and public safety at the Manhattan Institute. Her writing has appeared in numerous publications, including the New York Times, Wall Street Journal, Tablet, New York Post, Washington Examiner, NY Daily News*, and* City Journal*. Meyers provides frequent commentary for TV, radio, and podcasts, including CNN and Fox News. She is an appointed member of the New York State Domestic Terrorism Task Force.*

Prior to joining MI in 2020, Meyers managed corporate and private investigation teams for an international firm and directed research strategy for a counter-extremism NGO. She served for five years with the Intelligence Bureau of the New York City Police Department, partnering with detectives on counterterrorism investigations and bringing one of the first state-level terrorism cases to conviction. During her time at NYPD, Meyers also supervised an intelligence analysis team and was seconded to the FBI. Earlier in her career, she did think-tank research pertaining to terrorism and human rights, was a contributing writer on a variety of topics, and served as deputy director of policy for a New York State gubernatorial nominee. Meyers holds an M.A. in international relations from Yale University—for which she performed research embedded with British law enforcement—and a B.A. in government from Dartmouth College.

Endnotes

1 Criminal Procedure (CPL) Article 245.

2 Alvin Bragg, "Written Testimony: City Council Public Safety Committee, FY23 Budget & Oversight Hearings," City Council Public Safety Committee, Mar. 18, 2022.

3 John Schoeffel and Peter Mitchell, "CPL 245 'Discovery'—Issues and Advocacy," Legal Aid Society, updated, January 2021.

4 "Discovery Reform: Court Activity Dashboard," NYS Unified Court System Division of Technology and Court Research.

5 Ibid.

6 CPL § 245.20(1)(c).

7 "Criminal Justice Statistics," NYS Division of Criminal Justice Services (DCJS).

8 "Unintentional Drug Poisoning (Overdose) Deaths," NYC Health, April 2022. Between the first two quarters of 2019 and that same period in 2021, overdose deaths rose from 689 to 1,233.

9 "Criminal Justice Statistics," DCJS. Outside-NYC (ONYC) felony arrests fell from 55,812 in 2019 to 48,938 in 2021.

10 "County Crime Rates," DCJS.

11 "Adult Arrests 18 and Older: 2012–2021," DCJS.

12 Nick Reisman, "New York Saw Record Overdose Deaths in 2020, Health Officials Say," *Spectrum News1*, Apr. 5, 2022.

13 Per October 2022 interviews with source familiar with this data.

14 Jonah E. Bromwich, "Why Hundreds of New York City Prosecutors Are Leaving Their Jobs," *New York Times*, Apr. 4, 2022.

15 Informal survey of 30 NYS district attorneys' offices conducted in October 2022.

16 CPL § 30.30.

17 Federal Rules of Criminal Procedure, Title IV, Discovery and Inspection, Rule 16 (a)(1)(G). Government's Disclosure; information subject to disclosure. https://www.federalrulesofcriminalprocedure.org/title-iv/rule-16-discovery-and-inspection/

18 *Brady v. Maryland*, 373 U.S. 83 (1963).

19 Task Force on Criminal Discovery, "NYSBA Report of the Task Force on Criminal Discovery," New York State Bar Association, Jan. 30, 2015.

[20] "New York Legal Aid Attorneys Recognized for Reform Efforts and Training," New York State Defenders Association press release, July 24, 2019.

[21] CPL Article 240.

[22] In *People v. Rosario*, the New York Court of Appeals established the "Rosario rule," mandating that prosecutors in criminal cases disclose to the defense all witnesses' prior recorded statements that are material to their testimony. These recorded statements are commonly referred to as "Rosario material" and may include a witness's prior testimony, written statements, notes, and reports.

[23] CPL Article 240.

[24] Sandra Doorley, " 'The Right Thing': Ethical Guidelines for Prosecutors," Ethics and Best Practices Subcommittees of DAASNY Committee on the Fair and Ethical Administration of Justice, 2021.

[25] CPL § 245.20(1)(f).

[26] CPL § 245.65.

[27] CPL § 245.20(7).

[28] Office of Justice Research and Performance, "Implementation of 2020 Discovery Law Changes," NYS Division of Criminal Justice Services, November 2021.

[29] "Chapter 39. Depositions and Discovery," Texas Code of Criminal Procedure.

[30] *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019.

[31] Doorley, "The Right Thing," 25.

[32] *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019 (statement of Oleg Chernyavsky, assistant deputy commissioner, Legal Matters, NYPD).

[33] Krystal Rodriguez, "Discovery Reform in New York: Major Legislative Provisions," Data Collaborative for Justice, May 2022.

[34] "Waiver of Discovery," NYS Unified Court System, May 3, 2020.

[35] CPL § 245.10(1)(a)(iii).

[36] "New York Counties by Population," New York Demographics by Cubit.

[37] *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Oct. 28, 2019 (statement of Patrick Perfetti, DA of Cortland County).

[38] "Data Dashboard," Manhattan DA's Office.

39 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019 (statement of David Hoovler, president of District Attorneys Association of the State of New York).

40 "New York Counties by Population."

41 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Oct. 28, 2019 (statement of Anthony Jordan, DA of Washington County).

42 *Public Hearing: Implementation of Discovery Reform (S1509 – Part LLL)* (statement of David Hoovler).

43 Rossana Rosado, "Implementation of 2020 Discovery Law Changes: Update," NYS Division of Criminal Justice Services, December 2021.

44 Lawrence K. Marks, "2021 Judiciary Annual Report on the Implementation and Impact of CPL Article 245," NYS Unified Court System, Nov. 3, 2021.

45 CPL § 30.30.

46 Schoeffel and Mitchell, "CPL 245 'Discovery'—Issues and Advocacy," Legal Aid Society, updated, June 2022.

47 Rosado, "Implementation of 2020 Discovery Law Changes: Update."

48 Olivia Proia, "Almost 150 Court Cases Dismissed in Buffalo City Court, More to Come," WKBW Buffalo, Feb. 18, 2021.

49 "New York Counties by Population."

50 Interview with author.

51 At the time of writing, NYS Office of Court Administration had made the data public through mid-October 2021. That is the period considered here. In December 2022, the discovery dashboard was updated for the first 11 months of each year.

52 Ibid.

53 Marks, "2021 Judiciary Annual Report on the Implementation and Impact of CPL Article 245."

54 Ibid.

55 Ibid.

56 In December 2022, the Office of Court Administration updated the data on its discovery dashboard and reconfigured it to represent rates for the first 11 months of each year.

57 "Data Dashboard."

58 Ibid.

59 Melinda Katz, "Brave Justice: Annual Report 2021," Queens DA's Office, March 2022, p. 23.

60 Ibid.

61 Interview with author.

62 Marks, "2021 Judiciary Annual Report on the Implementation and Impact of CPL Article 245."

63 Ibid., 8.

64 Michael Hendrix, "Metropolitan Majority: The Survey," Manhattan Institute, Sept. 14, 2021.

65 "Data Dashboard."

66 NYPD CompStat Unit, CompStat 29, no. 51, Police Department City of New York.

67 See, e.g., Michael Gartland et al., "Manhattan Rite Aid Pharmacy Closing After Rash of Thefts, Customers and Workers Say," *NY Daily News*, Jan. 21, 2022.

68 Ana Ley, "The Pandemic Wasn't Supposed to Hurt New York Transit This Much," *New York Times*, Aug. 15, 2022.

69 NYPD CompStat Unit, CompStat 27, no. 52, Police Department City of New York.

70 See, e.g., "Homeless Man Charged in Chinatown Sucker Punch of Asian Woman Has 17 Prior Arrests," *abc7NY*, June 1, 2021; "Man Charged in Feces Attack and Alleged Anti-Semitic Harassment Is Released," *Spectrum News NY1*, Mar. 2, 2022.

71 Ari Ephraim Feldman, "Half of People Arrested in Connection with a Hate Crime Are Mentally Ill, NYPD Officials Say," *Spectrum News NY1*, May 3, 2022.

72 "Data Dashboard."

73 Nicole Gelinas, "Crash Curse," *City Journal*, Summer 2022.

74 Nicole Gelinas, "Adams Must Go After Excessive Speed Demons to Curb Rising Traffic Deaths," *New York Post*, May 8, 2022.

75 Rebecca Davis O'Brien, "Frank James to Plead Guilty to Terror Counts in Brooklyn Subway Shooting," *New York Times*, Dec. 21, 2022.

76 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)* (statement of David Hoovler).

77 J. Anthony Jordan, "Summary of Budget Requests Made by the District Attorneys Association of the State of New York (DAASNY) to Governor Kathy Hochul for Fiscal Year 2022–2023," DAASNY, Dec. 3, 2021.

78 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)* (statement of David Hoovler).

79 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, (statement of Oleg Chernyavsky).

80 Rosado, "Implementation of 2020 Discovery Law Changes: Update."

81 Latonia R. McKinney, "Fiscal 2020–2024 Preliminary Financial Plan Overview," report to the Council of the City of New York Committee on Finance, Mar. 2, 2020.

82 Jordan, "Summary of Budget Requests Made by DAASNY."

83 McKinney, "Fiscal 2020–2024 Preliminary Financial Plan Overview," 16.

84 Brian Lee, "8 New York DAs Haven't Applied for Payment of Discovery Reform Costs, as 2nd Round of Earmarks Approach," *New York Law Journal*, July 28, 2022.

85 Jordan, "Summary of Budget Requests Made by DAASNY."

86 Ibid.

87 Ibid.

88 Kathy Hochul and Robert F. Mujica, Jr., "We Are NY: FY 2023 Enacted Budget Financial Plan," NYC Division of the Budget.

89 Jack Storey, "Report on the Fiscal 2023 Preliminary Plan: District Attorneys and Special Narcotics Prosecutor," NYC Council Finance Division, Mar. 18, 2022.

90 Ibid., 6.

91 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Oct. 28, 2019 (statement of Erin George, civil rights campaign director of Citizen Action of New York).

92 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019 (statement of Lori Cohen, president of New York State Association of Criminal Defense Lawyers), 3:57:00.

93 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019 (statement of Sen. Jamaal T. Bailey, chair of the NYS Senate Standing Committee on Codes), 4:01:30.

94 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Sept. 9, 2019 (statement of Darcel D. Clark, DA, Bronx County).

95 Ibid.

96 Interview with author.

97 Jim Quinn, "More Criminals, More Crime: Measuring the Public Safety Impact of New York's 2019 Bail Law," Manhattan Institute, July 28, 2022.

98 "Adult Arrests 18 and Older: 2012–2021," DCJS. Adult felony arrests fell from 69,938 in 2019 to 60,107 in 2021.

99 "Domestic Violence Victim Data by County: 2019," DCJS. Domestic violence felony assault victim complaints also rose from 7,917 to 8,404.

100 "Unintentional Drug Poisoning (Overdose) Deaths," NYC Health. Between the first two quarters of 2019 and that same period in 2021, overdose deaths rose from 689 to 1,233.

101 "Criminal Justice Statistics," DCJS. Felony arrests fell from 55,812 in 2019 to 48,938 in 2021.

102 "County Crime Rates," DCJS.

103 "Domestic Violence Victim Data by County: 2019," DCJS.

104 "Adult Arrests 18 and Older: 2012–2021," DCJS.

105 Reisman, "New York Saw Record Overdose Deaths in 2020."

106 *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Oct. 28, 2019.

107 Ibid.

108 *Giglio v. United States*, 405 U.S. 150 (1972).

109 "What Has Been Learned from Police Disciplinary Records? A Lot," *lohud*, Dec. 6, 2021.

110 NYS Office of Indigent Legal Services et al., "The Impact of Discovery Reform Implementation in New York," report of a Defense Attorney Survey.

111 Per October 2022 interview with source familiar with this data.

112 NYS Office of Indigent Legal Services et al., "The Impact of Discovery Reform Implementation in New York," 25.

113 Ibid., 14.

114 Ibid., 21.

115 Ibid., 22.

116 Schoeffel and Mitchell, "CPL 245 'Discovery'—Issues and Advocacy," Legal Aid Society, January 2021.

117 October 2022 informal survey of 30 NYS DAs' offices.

118 George Joseph, "Amidst High Case Volume, Bronx Prosecutors Struggle with Attrition and Low Pay," *Gothamist*, June 3, 2021.

119 Bromwich, "Why Hundreds of New York City Prosecutors Are Leaving Their Jobs."

120 "Legal Staff Employment," Manhattan DA's Office.

121 Bragg, "Written Testimony."

[122] Ibid.

[123] Bromwich, "Why Hundreds of New York City Prosecutors Are Leaving Their Jobs."

[124] Ibid.

[125] Interview with author.

[126] Robert Gavin, "DA Offices Grapple with Continued Exodus of Attorneys," *Times Union,* July 15, 2022.

[127] August 2022 interview with a NYS DA.

[128] August 2022 interview with a NYS DA.

[129] Conversation with previously cited NYS DA.

[130] Bromwich, "Why Hundreds of New York City Prosecutors Are Leaving Their Jobs."

[131] "Domestic Violence Victim Data by County: 2019," DCJS.

[132] "County Crime Rates," DCJS.

[133] Katz, "Brave Justice: Annual Report 2021."

[134] *Public Hearing: Implementation of Discovery Reform (S1509–Part LLL)*, NYS Senate Standing Committee on Codes, Oct. 28, 2019 (statement of Kristyna Mills, DA of Jefferson County).

[135] Some of these recommendations are similar to those made in 2014 by the New York State Justice Task Force, which was convened by Chief Judge Jonathan Lippman. See, "Report of the New York State Justice Task Force of its Recommendations Regarding Criminal Discovery Reform," February 2014.

[136] Rule 16. Discovery and Inspection; Government's Disclosure