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NYPD

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NEW YORK STATE SENATE FINANCE COMMITTEE
NEW YORK STATE ASSEMBLY WAYS AND MEANS COMMITTEE
JOINT LEGISLATIVE HEARING ON 2020-2021 EXECUTIVE BUDGET
HEARING ROOM B, LEGISLATIVE OFFICE BUILDING, ALBANY
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Good morning Chair Krueger, Chair Weinstein and members of the Senate and Assembly. I am Oleg Chernyavsky, Assistant Deputy Commissioner of Legal Matters for the New York City Police Department (NYPD). On behalf of Police Commissioner Dermot Shea, I am pleased to testify before the Senate Finance Committee and Assembly Ways and Means Committee.

I wish to start by stating that reforming the criminal justice system was necessary. The Senate, Assembly and Governor rightly identified inequities in our State's criminal justice system and moved to remedy these inequities.

When it comes to bail, it is unfair and unjust for two individuals who commit the same crime to be treated differently as a consequence of their respective net worth. A rich, violent offender should not be released on cash bail, while their poor counterpart is held in jail because he or she doesn't have the money to get out. Judges should have the ability to treat both of these individuals equally by having the option to remand them into custody, without bail, based on the danger they pose to the community. Individuals posing no threat to public safety, who commit low-level offenses, should not be in jail because they cannot afford bail.

When it comes to discovery, it was unfair for a defendant to be placed in a position to take a plea in their case without having the necessary documents to make an informed decision. It was also unfair for defendants to receive discovery materials on the eve of trial. You were right to identify this issue and seek to correct it. However, allowing the accused to have timely access to necessary documents should not require risking the safety of crime victims and witnesses, or leaving them frightened to report crimes or assist in keeping their neighborhoods safe. Criminal laws should be crafted in ways that protect the accused, but do not discourage those who are victimized.

The NYPD, therefore, supports granting judges the discretion to remand suspects whom they determine pose a threat to public safety or pose a risk of flight. To be clear, we are not advocating for routine remands for such individuals, but that remand should be one of the options available to judges. We believe that it is important for New York State's judges to reserve this discretion for those who truly threaten public safety based on the severity of the crimes for which they are arrested or based on their recidivist criminal history. Granting judges this discretion will allow them to make the determination on a case-by-case basis. If a judge determines someone to be a risk to public safety, the judge should be required to state on the record, with specificity, the basis for that determination. Defendants can certainly be afforded the opportunity to challenge such a determination. This approach would eliminate the inequities of a cash bail system while allowing

judges the discretion to prevent the inequities of exposing the public to those seeking to do them harm.

Our society has long relied upon judges to settle disputes, determine what is in the best interests of our children and vulnerable populations, decide custody disputes, grant orders of protection, decide guilt or innocence, instruct juries, and make sentencing determinations, to name a few of the responsibilities we vest in judges. Given all of these judicial responsibilities, why would we question our judges' integrity or motives when determining whether an individual poses a risk to public safety and whether that person should be detained pretrial? If judges apply the law improperly or exercise their discretion arbitrarily, our court system has a tested and respected framework that allows defendants to challenge such improper determinations.

In addition to the consequences of the new bail law, the impact of the new discovery reform laws cannot be understated. There are issues with the new discovery law that go far beyond dollars and cents. As a result of the new law, valid evidence can be suppressed and solid cases dismissed on the grounds of incomplete discovery, even when such failures are inadvertent or immaterial. As the discovery rules are applied in case after case, we run the risk that dangerous criminals will elude prosecution due to technicalities. While we all want a system that is fair to the accused, we should also have one that is fair to victims and witnesses.

In one of the most troubling provisions of the law, the names and contact information of every witness to a crime and every victim of a crime will now be disclosed to the defense within 15 days of arraignment. These new discovery rules, combined with new bail reform provisions, place victims and witnesses at risk of intimidation or retaliation. Violent criminals are being returned to our communities and will know the names and addresses of their accusers. Knowing that their names must be revealed discourages witnesses from cooperating with investigations.

While the Department realizes that protective orders are available under the new law, these orders are not issued with regularity. In fact, the law only permits their issuance for "good cause", and we have already seen instances in which protective orders have been rejected or in which judges have required affidavits from victims attesting to why they feel threatened in order to meet the legal standard of "good cause." We are seeing cases in which prosecutors are not permitted to make oral applications for protective orders and cases in which requests for protective orders are bogged down in litigation lasting for days. More distressingly, without knowing in advance whether protective orders can or will be secured, police and prosecutors are no longer able to assure witnesses at the inception of a case that their identities will be protected. We can't have a truly safe city when witnesses and victims are afraid to call the police.

Nor can we have a criminal justice system that delivers justice to victims if prosecutorial resources are diverted from prosecuting viable cases because they are bogged down for days on end drafting and arguing motions and appeals to protect victim and witness identities and reviewing hundreds of records to determine what needs to be redacted, all in less than 15 days. We are already seeing requests for search warrants being denied by prosecutors because of a lack of resources, and the number of cases prosecutors are declining to prosecute is on the rise. I firmly believe that legislators did not intend for viable cases to be turned away because of resource issues or dismissed based on technicalities stemming from inconsequential nonconformities with discovery

requirements. You sought fairness for the accused, not the creation of discovery traps and speedy trial landmines that erode fairness for those victimized.

While the NYPD believes that defendants should have all relevant evidence before accepting any plea bargain and should not be receiving discovery materials on the eve of trial, the pendulum has swung too far against the interests of victims and witnesses. Therefore, the NYPD proposes four critical changes that preserve public safety while still maintaining the improvements you enacted to ensure the fairness of the trial process.

First, we propose a staggered discovery process where defendants would receive information, such as body camera video, arrest reports, complaint reports, field tests in drug cases, intoxilizer results in drunk-driving cases, and memo book entries needed to make an informed decision about plea bargains within 30 days of arraignment. Additional discovery would be provided at reasonable intervals before trial.

Second, we would revise the rules about the release of sensitive information concerning the identities of victims and witnesses, or information that may tend to identify victims or witnesses. Currently, it is the district attorney's burden to make the case that this information should be withheld to protect the safety of victims and witnesses. The burden should shift to the defense to establish that revealing this information early in the case is critical to the case. Otherwise, this information would be provided within a reasonable period before the start of trial. Under this approach, the presumption of protection for witnesses and victims will encourage more cooperation, prevent witness intimidation and give judges the discretion to decide when and how witness identities are released.

Third, the prosecution must be allowed to answer "ready" when the prosecution has substantially complied with the discovery requirements. Judges would therefore have the discretion to tailor remedies based on the extent and materiality of any missing documents. This way, cases would not be dismissed based on speedy trial violations over inadvertent untimely disclosures of materials that are not significant to the case. A case should not be dismissed because of the inadvertent failure to provide in time the memo book entry of the eighth police officer at the scene of a crime, which contains no information pertinent to the crime.

Finally, protective order applications should be automatically sealed so that they do not become part of the trial record. If they are automatically sealed, the prosecution remains in control of protecting their witnesses and victims. Should the protective order be denied, prosecutors would then have the option of withdrawing the case without exposing their witnesses should they determine that withdrawal is in the witnesses' best interests.

The New York City Police Department favors criminal justice reforms, but within a framework that continues to maintain safety for the people of New York City and that continues to protect victims of crimes.

In recent years, working with the Mayor, our partners in the City Council and many advocacy groups, the NYPD has dramatically altered its practices to ensure fairer, more equitable policing. The results of our shared work are obvious. In 2019, we arrested 173,188 fewer people than we

did in 2014, the first year of Mayor de Blasio's term; we issued 273,617 fewer criminal court summonses; and members of the NYPD stopped nearly 670,000 fewer people than in the high-watermark year of 2011. These decreases came even as we achieved historic lows in crime. The numbers are remarkable. In 1990, we had 2,242 murders citywide compared to 319 last year, a decrease of 86 percent. We had 100,280 robberies in 1990 compared to 13,369 last year, a decrease of 87 percent. We had 122,055 burglaries in 1990 compared to 10,778 last year, a decrease of 91 percent.

This turnaround did not happen by accident. It is the product of the hard work of our police officers in collaboration with the communities we serve. What makes our continued crime- fighting success so extraordinary is that we have been able to achieve significantly greater public safety with a much smaller enforcement footprint. This achievement is a product of balanced criminal justice reforms enacted in New York City in a thorough, measured and collaborative process. We worked with the Mayor, the City Council and advocates to ensure that changes to the law accomplished the goal of greater fairness and equity in our criminal justice system, while at the same time allowing the Department to protect the safety of all New Yorkers.

We favor laws that are both fair to victims of crimes and those accused of committing them. The time has come to work together to make the necessary fixes that achieve the goal of creating a fairer criminal justice system for all New Yorkers. We stand ready and willing to work with the Senate, Assembly and the Governor to accomplish this equitable goal.

Thank you for the opportunity to appear before you today.