NEW YORK STATE SHERIFFS' ASSOCIATION

27 ELK STREET

ALBANY, N.Y. 12207

TELEPHONE (518) 434-9091

FAX (518) 434-9093

2020 Joint Legislative Budget Hearing: Public Protection

February 12, 2020

Written testimony submitted on behalf of the New York State Sheriffs' Association
by Association President, Washington County Sheriff Jeffrey Murphy

Esteemed Members of the Legislature,

Thank you for considering my written testimony. My name is Jeffrey Murphy and I am the Sheriff of Washington County and the current President of the New York State Sheriffs' Association. It is my hope that I can impress upon you the depth of concern that I and my colleagues in law enforcement share about the fate of public safety in New York State at this time.

It remains the opinion of many Sheriffs that the criminal justice reforms that were passed last session as part of the budget were an overcorrection. Whatever perceived problems there were at the time with our systems of bail and discovery, we remain convinced that they could have been solved in a less drastic fashion, with input from law enforcement professionals.

What we are confronted with now is a rigid scheme for both bail and discovery that does not give enough discretion to police, prosecutors, judges and, more importantly, enough consideration to witnesses and victims.

Consider our new bail system first. Before, judges were vested with the authority to make individualized determinations about a defendant's likelihood to return to court and set bail or release accordingly, regardless of the charge. Now, they must abide by a paint-by-numbers method for determining whether bail is applicable, much less appropriate, with bail or remand only and option for "qualifying offenses" or crimes subsequently committed after being released on their own recognizance.

This is a monumental change. *Under the new law, over 400 crimes now require mandatory release.* And while it is oft repeated that this would only apply to misdemeanors and non-violent felonies, this is simply not the case. Iterations of certain violent felonies, like burglary and robbery, are specifically exempted from being considered a qualifying offense for bail. Additionally, the lion's share of drug felonies are also exempted, even if it is an A level felony. So, persons apprehended for selling drugs to children, or caught in possession of multiple kilograms of heroin will be released on their own recognizance.

We in law enforcement struggle to divine how these changes can be thought of as an improvement to our criminal justice system. Is it rationale to think that a person who is caught with thousands of bags of heroin will show up to court once released, and face the prospect of a decades long prison sentence? How is this consonant with our efforts to combat the opioid epidemic? And just because a crime is technically "non-violent", does not mean that the crime didn't involve physical aggression or result in trauma to a victim.

Other states that have pursued bail reform have, at the very least, also permitted judges to consider a defendant's threat to public safety when making a determination about whether to order pre-trial detention. In fact, 47 states permit judges to consider public safety in this regard. New York is not one of them. The combined effect of prohibiting judges from even considering bail or pre-trial detention for a host of crimes, as well refusing to allow them to assess a defendant's risk to public safety, will be that our communities will become less safe. Already, crime rates are rising in some major metropolitan areas like New York City and Buffalo. We cannot afford to wait to make the changes that are necessary.

Roughly a year ago, the Sheriffs' Association joined with the New York State Association of Chiefs of Police and the District Attorneys Association of New York in calling upon the legislature to adopt the Justice Task Force's recommendations on bail reform. I do so again now.

These recommendations state that there should be a presumption of release in most instances for those who commit misdemeanor or non-violent felonies and who pose little or no flight risk. However, this presumption should be allowed to be rebutted for certain crimes or where there is a significant risk that a defendant will not return to court. In addition, with regard to the public safety, a judge should be permitted to consider whether a defendant poses a credible risk to an identifiable person or group of persons when considering whether to remand pre-trial.

We implore the legislature to reconsider the recommendations of the Justice Task Force and embrace reasonable, common-sense reform with regards to bail.

Unfortunately, bail is only half of the problem. Also, included in last year's criminal justice reforms was a complete overhaul of the discovery process for criminal cases. While less sensational than bail reform, it is equally impactful for law enforcement, and potentially as dangerous for our communities.

The new discovery rules require automatic disclosure of all evidence related to the subject matter of a defendant's case within 15 days of arraignment. Though there are extensions built in, they are not sufficient. Without a lengthening of the automatic discovery timelines, or financial

support from the state, local police agencies and prosecutors will be unable to keep up with discovery demands. The amount of material and data that has to be collected, analyzed, collated, and redacted is enormous.

When law enforcement and prosecutors fail to meet their discovery obligations within the statutory timeframe, the result will be the dismissal of otherwise meritorious cases. This would be a miscarriage of justice, not a balancing of the scales between the People and the defense.

Additionally, the automatic disclosure of victim and witness information should be reconsidered. Many defendants want to find out as much about witnesses as soon as possible not to unearth exculpatory information, but to identify, target and intimidate witnesses who possess incriminating information. Witness tampering and intimidation represents a fundamental threat to the rule of law. It makes it more difficult to detect crimes, because many will go unreported to the police. It also makes it extraordinarily difficult to prosecute crimes because it deprives the prosecution of credible witness testimony. Witness intimidation is cited as a primary reason for witnesses recanting statements at trial. Research suggests that intimidation is most likely to be carried out against our society's most vulnerable people, children, elderly, immigrants, victims of domestic violence.

Prematurely exposing the identity of witnesses will result in more harassment, intimidation and violence against innocent citizens. Witnesses will increasingly refuse to cooperate if they know that their name, address and contact information will be given to the defendant well before trial. Public confidence in the criminal justice system will be shattered. It is true that prosecutors are able to apply for protective orders when appropriate, but there is no guarantee that one will be granted. And, with the volume of cases that pass through the criminal justice system every day, there is always the risk that a case slips through that warrants a protective order, but does not receive one due to unintentional lack of scrutiny.

Much time and thought has been spent on how to remedy many of the errors made in last year's budget legislation, but we cannot lose sight of what is before us. There are several things proposed in this year's budget that are troubling to Sheriffs, chief among them being the renewed push to legalize recreational marijuana use in New York.

We acknowledge at that outset that as law enforcement professionals, and members of the executive branch of government, it is the Sheriffs' responsibility to enforce those laws which are duly enacted by the legislature. Whatever the final outcome may be after this legislative session, Sheriffs will uphold the law. Even so, it is the opinion many Sheriffs that whatever meager gains could be achieved through legalization will be far outweighed by the negative consequences that will result from this legislation.

From a front-line law enforcement perspective, an increase in marijuana use among the general populace (which the legislation is sure to engender) would be taxing upon all law enforcement agencies, especially with regards to detecting and successfully prosecuting a charge of Driving While Ability Impaired by Drugs (DWAI), where the intoxicating agent is marijuana. Unlike a case of Driving While Intoxicated (DWI) involving alcohol, DWAI-Drugs is more difficult to prosecute given the fact that there is no drug testing procedure or device equivalent to a breath

chemical alcohol test. That is, while a breathalyzer will render a blood alcohol level which can be presented to a jury, a blood test for THC will reveal the presence of the drug, but not give a clear indication of a person's level of intoxication. Furthermore, such a blood test must be administered by a qualified healthcare professional upon the consent of the arrestee, or over the arrestee's consent only in the case of a traffic accident resulting in serious injury, death or upon a court order. Therefore, in the majority of cases, the roadside observations of the police officer who initiates a stop for suspicion of DWAI-Drugs become crucial. It is expensive and time consuming for a police officer to become such an expert, and it seems almost certain that Sheriffs' Offices will need more deputies to become certified should there be any relaxation of the current marijuana laws. Also, K-9 units which are trained for drug detection will have to be replaced, as they are all trained to detect marijuana.

But no matter how diligent law enforcement is in detecting and arresting drivers impaired by marijuana, there will almost certainly be an increase in traffic fatalities. In analyzing the effects of legalization in Colorado, the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA), found the following:

- Since recreational marijuana was legalized, marijuana related traffic deaths increased 151 percent while all Colorado traffic deaths increased 35 percent
- Since recreational marijuana was legalized, traffic deaths involving drivers who tested positive for marijuana more than doubled from 55 in 2013 to 138 people killed in 2017.
- The percentage of all Colorado traffic deaths that were marijuana related increased from 11.43 percent in 2013 to 21.3 percent in 2017.
- A Colorado Department of Transportation survey found that 69 percent of self-identified marijuana users admitted to driving after having consumed marijuana.

Also, another study from Washington state has revealed that since the state legalized recreational marijuana, the number of fatal crashes involving THC has doubled. To ignore these statistics and pass this legislation would be a Faustian bargain…a marginal tax revenue increase at the expense of people's lives. And there is no guarantee that this initiative will be the financial windfall that some expect it to be. As has recently been shown in California, the creation of a legal marketplace for marijuana does not eliminate the black market. To the contrary, it promotes the black market, which is invariably cheaper and has no barriers to entry. And as is almost always the case, along with the operation of any illicit trade comes violence.

The contradictory nature of this proposal is also evident when viewed within the larger scope of the budget and legislation passed last year. This same budget also seeks to end the apparent scourge of flavored e-cigarettes and vapor products, as well as continue New York's campaign to discourage tobacco use, while simultaneously proposing to legalize marijuana. This becomes doubly preposterous when considering that one of the main arguments for legalization from last year—that current marijuana enforcement disparately impacts marginalized communities—is no longer viable. The legislature's decision to de-criminalize possession of up to 2 ounces of marijuana and expunge past convictions for the same renders that argument moot.

Finally, there remains the fact that the Federal Government still classifies marijuana as a schedule I controlled substance. Because of this, established financial institutions continue to

disavow the marijuana industry in states which have legalized recreational use. The result is that marijuana is strictly a cash business, one that will be ripe for exploitation in any number of ways, from robbery to money laundering.

We hope that these concerns will be taken into consideration as legislators and the Executives deliberate over whether to legalize recreational use of marijuana in New York State.

Another item of proposed legislation in this year's executive budget would authorize counties to enter into inter-governmental service agreements for the purpose of sharing a jail. Sheriffs oppose this measure for several reasons. While this may seem to be a benign measure, aimed at consolidating services (and reducing expenses) of participating municipalities, this is simply not the case. There are significant legal and logistical hurdles that would need to be overcome before any such agreement could be ratified.

First, the transfer, removal or diminution of any power of an elected officer can only be accomplished through a local law subject to a mandatory referendum. A municipality that chose to transfer the responsibility of operating the county jail from their own Sheriff to another would thus have to submit this action to public consideration at the ballot box. This legal conclusion was endorsed in an Attorney General's opinion:

"Since local laws need only be consistent with the general State laws, a charter or non-charter county may enact a local law transferring responsibility for the operation of its jail from the Sheriff to [a] county commissioner of corrections…Such a local law, however, is subject to a mandatory referendum in that it would transfer the power of an elected officer." 1990 N.Y. Op. Atty. Gen. (Inf.) 1133.

Even if steps were taken to put such a proposal to a public vote, there would remain further legal complications.

To unilaterally transfer, without collectively bargaining, the responsibility of maintaining custody of one counties inmates to another, the transferring county would engage in an improper employer practice as defined by Civil Service Law § 209-a(d). An employer commits an improper practice if it alters, without prior good-faith negotiation, a term or condition of employment. (*See generally*, State (Governor's Office of Employee Relations) v. PERB, 116 A.D.2d 827, 1986). Hypothetically, a county, represented by both the County government and the Sheriff as co-employers, must first negotiate transfer of these essential duties and functions. Romaine v. Cuevas, 305 A.D.2d 968, 969 (App. Div. 3rd 2003). I do not believe any Sheriff, as a necessary party to such negotiations, will consent to this unwise transfer.

Furthermore, I would direct you to a 1992 Attorney General decision which takes the position that the Sheriff's obligation to maintain custody of inmates and be the administrator of the county jail is a non-delegable duty. To wit: "In our view, the delegation of the maintenance and operation of a county jail…is not authorized under current law. Not only is there no specific authorization for such a delegation, but we believe that a delegation would be inconsistent with the many provisions of law giving the Sheriff specific responsibilities in the custody of detainees and prisoners." 1992 N.Y. Op. Atty. Gen. 26. Though it is true that the plan now being debated

does not contemplate transferring the operation of a county jail to another entity, but rather sharing a facility, or having an existing jail house multiple counties inmates, the legal opinion set forth is still persuasive. This obligation is specifically entrusted to the Sheriff of initial jurisdiction and cannot be delegated without statutory authority, which the proposed legislation fails to adequately do.

Finally, even if the legislation were sufficiently perfected to survive judicial scrutiny, there remains the plain fact that such an arrangement is simply a bad idea. Counties will still be responsible for paying for the costs of housing their inmates, wherever that may be, and paying correction officers to transport them even greater distances to and from court. These same distances will likewise have to be traversed by the family and counsel of incarcerated individuals. This proposal does not serve justice, nor will it make local governments more cost efficient.

Another proposal in the executive budget that concerns Sheriffs is one that would allow Sheriffs to operate specialized mental health wards within their facilities. Specifically, this bill would allow Sheriffs, at their discretion, to provide mental health treatment within the jail to persons charged with felonies in an attempt to restore them to competency in order to stand trial.

Sheriffs see little value in this initiative, as they already struggle to care for mentally ill inmates who are *not* so sick that they've been deemed incompetent. It has long been our opinion that mentally ill individuals who are sick to such a degree are best treated in a hospital setting, not in a correctional setting. As it is, Sheriffs have difficulty finding space in State mental health hospitals for people who simply cannot be treated while incarcerated. A true solution to this problem would be for the State to invest in more bed space for sick inmates. Sheriffs will continue to do their best to treat the people committed to their custody, whether they be afflicted with mental or physical ailments. But this initiative would be asking too much, and we fear would only be a prelude to a future, unfunded mandate that Sheriffs and jails provide this service.

All that said, Sheriffs do see many worthy proposals within the budget language: the banning of "ghost guns", closing the rape intoxication loophole, banning fentanyl analogues…Sheriffs agree that these are things that will only make New York safer and more just.

It is our hope that you will give these concerns due consideration. We remain eager to work with you to improve public safety in New York.