# Protect Kalief's Law:

## *The History And Importance Of Discovery Reform*

## Removing the Blindfold:
## Why we modernized our discovery laws

Under the former discovery rules, aptly called the "blindfold law," New Yorkers accused of crimes were entitled to receive discovery (basic police paperwork, 911 call recordings, body worn camera footage, surveillance footage obtained by the police, exculpatory information, etc.) within 15 days of a defense request for discovery. Unfortunately, this rule was routinely ignored by prosecutors because there were no consequences for breaking it. In Manhattan, prosecutors routinely and infamously waited until the day before the trial began to share what they had with the defense. This was often years after the case began.

Prosecutors got away with breaking the rules and withholding discovery because of the weakness of the enforcement mechanism. To have sanctions (i.e., dismissal or exclusion of evidence from the trial) imposed for the violation of the rules, the defense had to demonstrate prejudice. The problem with that standard was that once the defense had the evidence, albeit years after the case began and witnesses' memories faded, the defense could no longer demonstrate prejudice because it now had the evidence. Before discovery was shared and without any idea what information was missing, the defense also could not effectively argue prejudice. In general, the only remedy the defense could hope to obtain was more delay to prepare for trial, further denying the person accused of the crime a speedy trial.

Meanwhile, the prosecutor could declare to the court that they were "ready for trial" within days of a person's arrest –often at their arraignment! - and long before gathering and reviewing all of the evidence in a case. Once they had declared that they were "ready," they could delay the trial for months or years while the person who was accused sat in jail or, if not detained, lost their job while the case remained open.

The consequences of the blindfold law on New Yorkers were devastating. The law prevented the defense from adequately preparing for trial and conducting thorough pre-trial investigations. But even more troublingly, it allowed prosecutors to place people accused of crimes in the untenable position of deciding whether to take their case to trial or accept a plea without ever seeing the evidence against them. In fact, a person routinely waited for a trial for 2 or 3 years, often locked up at Rikers Island, without seeing a shred of the evidence against them. As time passed, the prosecutor would inevitably make a "one-time" offer to a lesser crime that would get the person out of jail or dramatically reduce their protentional sentence, again, before the defense had an opportunity to review the evidence.

Because of this system, many people in desperate circumstances accepted pleas to crimes that they didn't commit, contributing to New York's shamefully high rate of wrongful convictions.[1] On the other hand, New Yorkers who refused to plead guilty were subject to prolonged detention and other life-changing consequences. This Hobson's choice had a disparate impact on Black and brown boys and men. A stark reality that continues to this day.

Take for example, the case of Kalief Browder, the 16-year-old boy from the Bronx who was wrongly accused of stealing a book bag in 2010 and sat on Riker's Island for 3 years awaiting his trial because his family couldn't afford to pay the $3000 to bail him out. He, unlike many, refused several plea offers that would have gotten him out of jail. Meanwhile, the prosecutor's office, who claimed they were trial ready within 6 months of his arrest, thereby avoiding a "speedy trial dismissal", dragged Kalief's case out over the course of 3 years despite having no evidence of his guilt. Their sole witness—the man who accused Kalief of robbing him—had left the country, the witness statements that the prosecutor withheld were inconsistent, and, in short; there was nothing to corroborate guilt. Kalief maintained his innocence and desire for trial and the case was not dismissed until, three years after his arrest, the prosecutor had no choice but to admit to the court they could not prove the charges. Mr. Browder, only a teenager, suffered tremendously during those three years and tragically took his own life in the years after his release.

Kalief Browder's story is devastating, but his legal circumstances were not unique. Prior to discovery reform, too many people waited for too many years in city jails, insisting on their right to a trial, while prosecutors played games with a system rigged in their favor, suffering

---

[1] New York State ranks 3rd in the nation after Illinois and Texas for the most exonerations and Brooklyn, Manhattan and the Bronx rank in the top ten counties in the Country with the highest number of exonerations.

zero consequences for delaying justice and withholding evidence. New Yorkers can't afford to go back to the way things were.

## How Did Discovery Reform Remove the Blindfold?

The 2019 reform, called "Kalief's Law" in honor of Kalief Browder, sought to rectify these longstanding problems of delay and disclosure by bringing New York in line with modern discovery practices. The most crucial feature of Kalief's Law is that it prohibits prosecutors from stating "ready" on a case before gathering all of the case evidence and sharing it with the defense. The law creates an incentive for the prosecutor to review and share discovery earlier in the case, and it prevents them from stopping the speedy trial clock with unfounded declarations of "readiness" before they are truly ready to proceed to trial.

The reforms also prevent prosecutors from acting as the gatekeepers of information; a practice that has time and again proven to result in wrongful convictions. Since 1963, prosecutors have been under a Constitutional obligation to disclose exculpatory evidence in their possession, regardless of whether a state's Discovery rules require such disclosure. Despite this Supreme Court precedent, however, legal experts and law professors across the Country routinely observe that there is an inherent problem with delegating to the prosecutor the task of determining what evidence is or is not favorable to the defense. Prosecutors are focused on whether the evidence before them conforms to their theory of the case, but they don't know whether evidence may or may not be consistent with the theory of defense. Also, unless required to obtain *all* material that relates to the case, prosecutors may never learn of exculpatory evidence.

Given these inherent problems the New York legislature simplified the prosecutors' obligations by requiring that they simply obtain all materials related to the case from law enforcement and disclose them to the defense. This ends the age-old problem of prosecutors only obtaining and sharing items that *they* view as important or consistent with *their* theory of prosecution. This type of discovery law is known as "open-file" discovery and is embraced by many U.S. states. Prior to the enactment of Kalief's, New York was one of the four most regressive states in the Country when it came to criminal discovery laws. Now, New York serves as model for justice and fairness.

**Since being implemented in January 2020, the reforms have worked. Prosecutors have begun providing discovery early in the case and can no longer delay cases for years without providing the defense with the evidence.**

ALLIANCE TO PROTECT
Kalief's Law

# THE GOV'S PROPOSAL BRINGS BACK THE BLINDFOLD

The Governor has proposed sweeping changes to repeal our landmark discovery laws; changes she justifies with inaccurate rhetoric and unfounded claims. These changes will not "reduce delays," "streamline case processing" or "close the loopholes," as the Governor claims. If enacted, her proposal would gut Kalief's Law while decreasing efficiency and increasing the potential for wrongful convictions and prolonged pretrial detention.

## THE LEGISLATURE SHOULD WHOLLY REJECT THESE MISGUIDED PROPOSALS TO REPEAL OUR DISCOVERY LAWS AND "INTENTIONALLY OMIT PART B" FROM ONE HOUSE BUDGETS

### THE GOVERNOR'S PROPOSAL WOULD

- End Open-File Discovery in NY: The Governor's proposal will bring us back to the days when prosecutors decided which pieces of evidence are "relevant" to "the charges" and which allowed them to withhold evidence from the defense. The proposal also allows them to redact any information from discovery material that they deem irrelevant to the charges without getting approval from a judge. Together these changes enable prosecutors to withhold potentially favorable information from the defense. If adopted, this proposal would mark the end of open-file discovery in New York and bring us back to the days of wrongful convictions.
- Allow Police to Withhold Evidence: Currently, the law ensures that the police cannot hide evidence by requiring prosecutors to disclose all the evidence in the possession of the police before they can state "ready for trial." This rule is vital because most evidence in a criminal case is collected by police. The Governor's proposal removes that requirement. Instead, prosecutors would only be required to disclose evidence in their actual possession (anything in the possession of the police would be deemed only in their constructive possession). This means that police decide what evidence gets disclosed to the defense, creating a system that rewards police intransigence and will require protracted litigation to obtain basic evidence. At best, the police will have no incentive to turn over critical discovery.
- Turn the Discovery Law into a Set of Guidelines Instead of Enforceable Rules: The proposal turns a law that ensures fairness and transparency through meaningful enforcement into a toothless guideline that will lead to prolonged pretrial incarceration and wrongful convictions. Under the current law, prosecutors have expansive time frames to hand over all evidence in a case: 90 days for misdemeanor cases and 6 months for felonies, with numerous exceptions that expand the speedy trial clock, including necessary motions by both the prosecution and defense. Under the Governor's proposal, prosecutors would be able to stop this clock without turning over evidence and with no meaningful consequence for their failure to do so. Cases will drag on, and people who can't afford their bail will languish in jails waiting to see the evidence against them, as there would no longer be any incentive for timely disclosure of evidence.

**To the extent that prosecutors struggle to obtain evidence from the police in a timely way, A825/S613 (Lasher/Myrie) provides the solution by giving prosecutors direct access to police databases, no other amendments to CPL 245 should be entertained.**

ALLIANCE TO PROTECT
Kalief's Law

# DEBUNKING THE RHETORIC ON DATA

## Are 41% of Felony Cases Prosecuted in NYC Being Dismissed? NO!

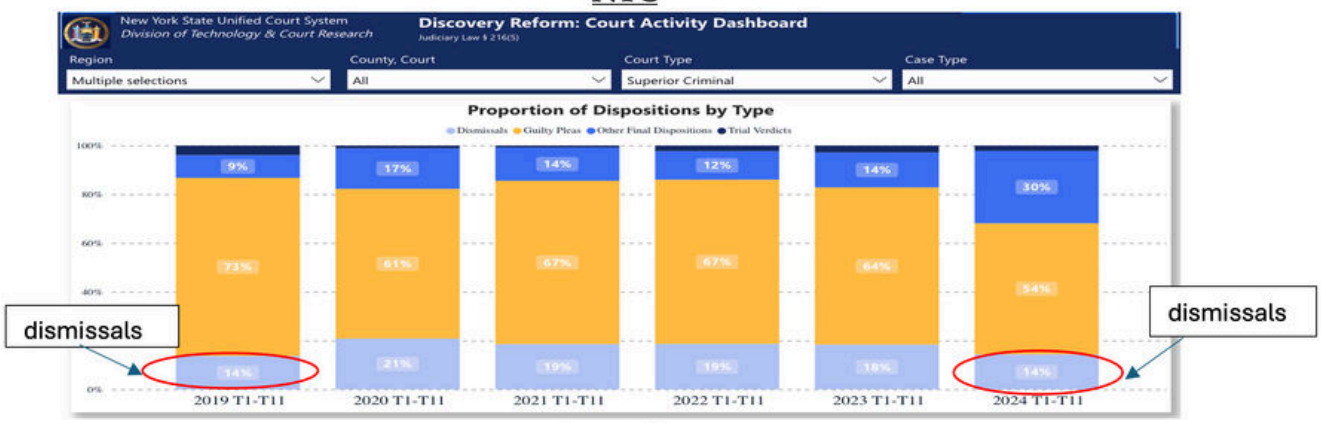
This data is derived from DCJS data that tracks the disposition of cases based on arrest charges and not charges at arraignments. These metrics are not useful in assessing discovery reform's impact. Arrest charges are what the police write down on their paperwork—not what ultimately gets charged in court. This is an important difference because it is common knowledge in the criminal legal system that police officers frequently make "felony arrests" for offenses that do not amount to felony conduct.

In order to prosecute a felony to trial, a prosecutor must present the case to a grand jury and obtain an indictment. At that point, the case is transferred from local criminal court to superior court. With the limited exception of disclosing a person's own statements to police, prosecutors aren't required to provide ANY discovery in felony cases until after the case is indicted. Therefore, in order to meaningfully assess the impact of the discovery law on felony case dismissals, we must look at superior court data.

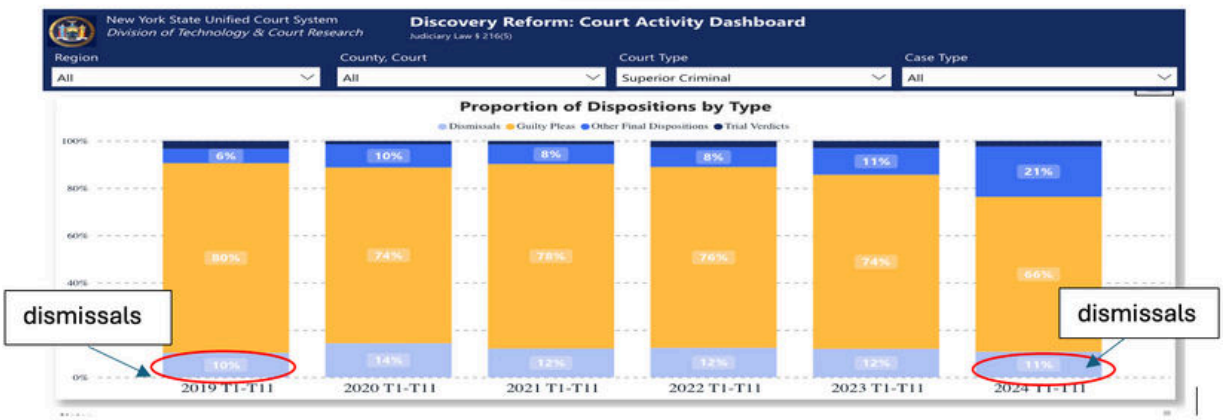
## Has Discovery Reform Resulted in More Dismissals in Superior Court? NO!

Dismissal rates in Superior Courts (where felonies get prosecuted) are THE SAME now as they were before discovery reform.

**NYC**




**Statewide**

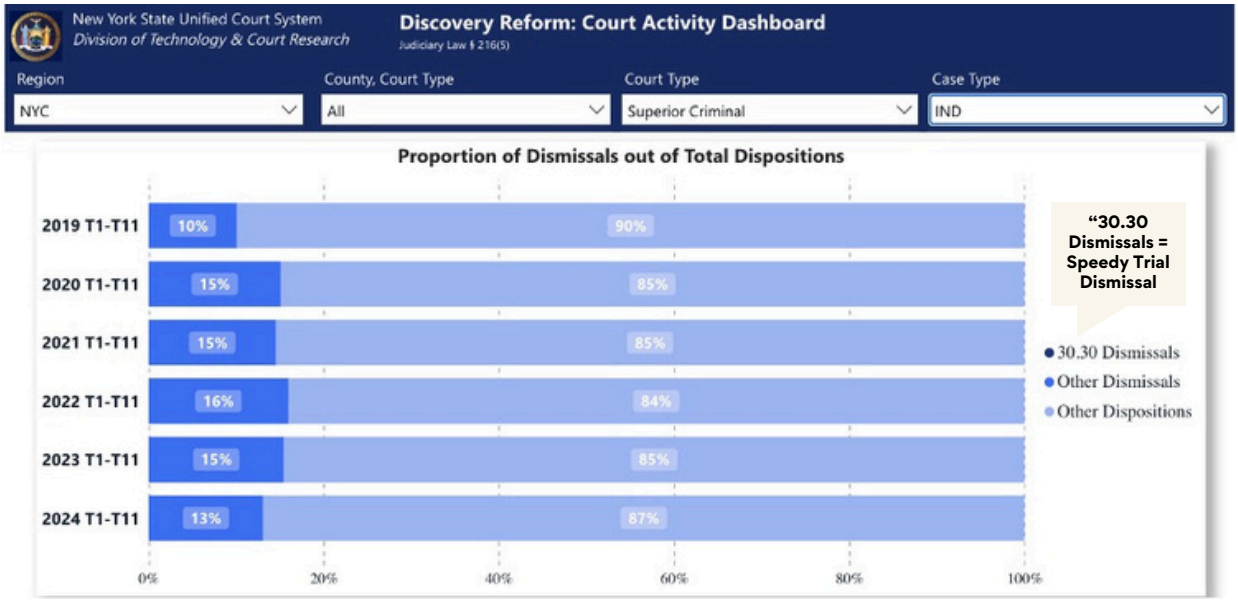


ALLIANCE TO PROTECT
Kalief's Law

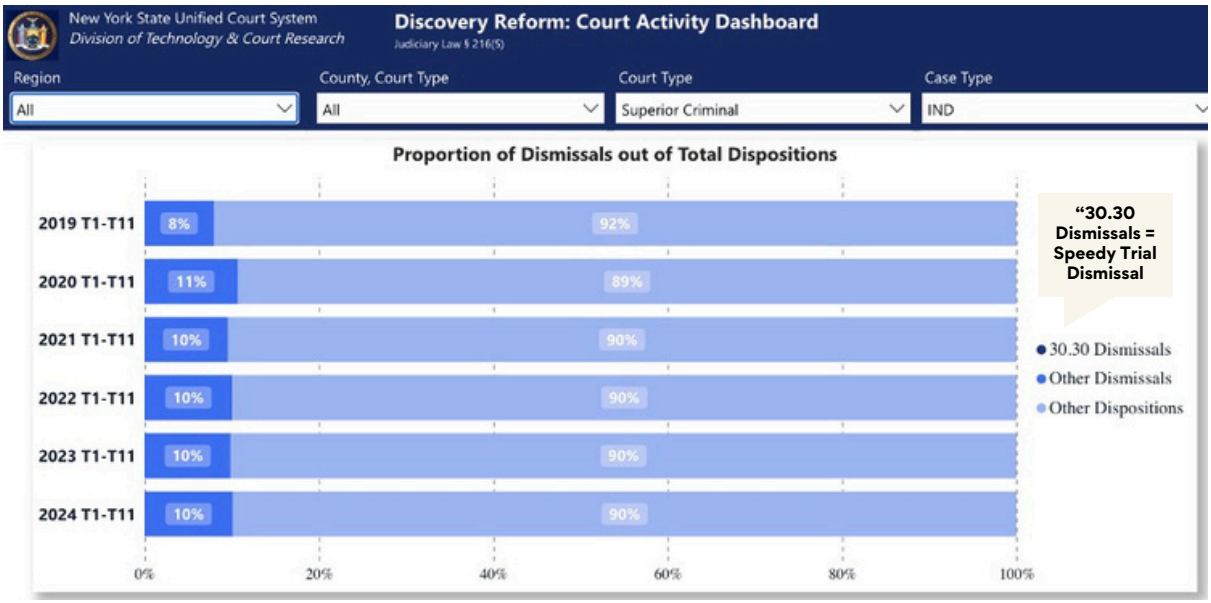
## Are all Dismissals Related to Discovery? NO!

The only form of dismissal that results from discovery non-compliance, is speedy trial dismissal. Since 2019, speedy trial dismissals have accounted for fewer than 1% of dismissals in superior courts across the state, including in NYC.

**NYC**




**Statewide**




**Bottom Line: serious cases are <u>not</u> being dismissed at a higher rate because of discovery reform.**

ALLIANCE TO PROTECT
Kalief's Law

# JUDICIAL DECISIONS HIGHLIGHT THAT THE GOVERNOR'S JUSTIFICATIONS FOR GUTTING KALIEF'S LAW ARE NOT BASED IN FACT

*CASES ARE NOT DISMISSED IF PROSECUTORS ARE DILIGENT AND MAKE REASONABLE INQUIRIES AND EFFORTS TO OBTAIN DISCOVERY PRIOR TO DECLARING READY FOR TRIAL*

## YOU DON'T HAVE TO TAKE OUR WORD FOR IT – TAKE IT FROM THE COURT OF APPEALS:

"Under the terms of the statute, the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' . . .

Although the statute nowhere defines "due diligence," it is a familiar and flexible standard that requires the People "to make reasonable efforts" to comply with statutory directives . . .

Reasonableness, then, is the touchstone. . .

**There is no rule of 'strict liability;' that is, the statute does not require or anticipate a 'perfect prosecutor.'"** ***People v. Bay*, 41 N.Y. 3d 200 (2023)**.

## BUT WHAT'S HAPPENING IN TRIAL AND LOWER APPELLATE COURTS?

### CASES ARE *NOT* DISMISSED BECAUSE OF DEFENSE DELAY – SO-CALLED "LYING IN WAIT"

Trial courts will deny challenges to missing or late discovery if defense attorneys do not notify the prosecution about missing discovery "as soon as practicable." Thus, in a felony case, a court found that had the defense attorney "minimally perused" the discovery, the missing items, including body worn camera, would have been immediately detected. The court held, "[c]onsequently, because of defendant's unreasonable inaction and undue delay in notifying the People of discovery defects and/or challenging the People's COC as soon as practicable, this Court declines to charge the People with all speedy trial accruals since its filing of the original COC on November 30, 2020." *People v. Smith*, 79 Misc. 3d 649, 657-58 [Queens Co. Sup. Ct. 2023].

A few months ago, an appellate court reaffirmed what defense attorneys already knew: defense delays in challenging the validity of a CoC result in denials of defense challenges. The Second Department's Appellate Term, held that "CPL 245.50 (4) (b) provides that, '[t]o the extent that the party is aware of a potential defect or deficiency related to a [COC] or supplemental [COC], the party entitled to disclosure *shall* notify or alert the opposing party *as soon as practicable*' (emphasis added). In addition, CPL 245.50 (4) (c) provides that

'[c]hallenges related to the sufficiency of a [COC] or supplemental [COCs] *shall* be addressed by motion *as soon as practicable*' (emphasis added). Here, as defendant's first notification of any deficiency in, or challenge to the sufficiency of, **the COC was 72 days after the prosecution filed its COC, when defendant filed his motion, defendant's motion, under the circumstances presented herein, was properly denied as untimely.**" *People v. Seymour*, 84 Misc. 3d 23, 25 [App Term 2024], lv to appeal denied, 42 NY3d 1022 [2024].

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

Of course, when prosecutors wait until the very last minute to file their first CoC and the defense has no time to make a challenge prior to the expiration of the speedy trial clock, courts hold prosecutors accountable. For example, "when the People filed their COC and SOR on June 18, 2024, 90 days of speedy trial time were chargeable to the People. However, the People's COC was improper and did not stop the CPL § 30.30 time. The CPL § 30.30 time was not effectively stopped until August 2, 2024, when defendant filed the instant motion. CPL § 30.30 (4) (a). The People were charged 135 days of speedy trial time from March 21, 2024, to August 2, 2024, when defendant filed the instant motion. CPL 30.30 (4) (a)." *People v. Jackson*, 2024 NY Slip Op 24315 (Crim. Ct. Oct. 21, 2024).

**CASES ARE *NOT* DISMISSED FOR FAILURE TO MEET THE 20 AND 35 DAY TIMEFRAMES IN THE STATUTE:**

A court has never found that the People's failure to turn over discovery - in 20 days (for incarcerated individuals) or 35 days (for those who are at liberty) - should result in a dismissal. Article 245 does not allow for such dismissals. A Queens court found that **"[i]n over two and a half years since discovery reform was enacted, there has not been a single published decision where a court dismissed a case simply because the People missed the 20-day or 35-day discovery deadlines."** *People v. Nisanov*, 78 Misc. 3d 1224(A)(Queens Crim. Ct. 2023)(emphasis added) (in dismissing the case, using the 90 day speedy trial clock, the court noted that the People did not seek a protective order).

**CASES ARE *NOT* DISMISSED FOR FAILURE TO DISCLOSE EVERY "SINGLE SHRED OF EVIDENCE":**

Appellate courts are now finding that when the prosecution exercises due diligence, discovery compliance does not have to be absolute. Just last month, the Second Department reversed a trial court's dismissal, holding: "[t]he People correctly contend that the 53-day period from August 20, 2021, to October 12, 2021, was excludable under the CPL 30.30 (4) (g) exceptional circumstances exclusion in view of the voluminous discovery materials involved here and the People's diligent efforts in producing them." *People v. Santiago*, 231 A.D.3d 871 (2nd Dept. 2024).

The prosecution's "due diligence" does not require the prosecution to turn over every single item of discovery. Thus, the People's failure to turn over an essential item, like grand jury minutes, does not lead to the invalidation of a COC and dismissal of a case. For example, when "the People expressly acknowledged their obligation to provide the grand jury minutes. . . once they obtained the completed transcript, and provided those minutes once they became available," the Court found that the prosecutor was diligent. *People v. Drayton*, 231 AD3d 1057 (App. Div. 2d Dept. 2024)(internal citations omitted).

Trial courts also find that perfect compliance is not always necessary: "CPL article 245 does not require the impossible before the People may certify their compliance under CPL 245.50 and announce ready for trial. But it does demand that the People use diligence, act in good faith, and take reasonable steps to ensure that discoverable material is turned over before filing a COC. Had the legislature intended dismissal of the information based upon the People's failure to deliver a single item of qualifying material, it would have made such strict liability intent plainly clear in the statute. If that were the case, there would be no need for the discretionary and remedial provisions found in article 245." *People v. Weiss*, 79 Misc. 3d 931 (Queens Crim. Ct. 2023) (internal citations omitted).

In fact, courts routinely recognize that the People may validly certify compliance even when items are missing. Another court recently held, "the CPL clearly contemplated situations where not every single item of discovery would be turned over prior to the filing of a certificate of compliance, specifically by enacting CPL 245.60, 245.55, and CPL 245.80." The court further found that "[n]owhere within CPL 245 nor within CPL 30.30(5) is there a requirement that the People disclose every discovery item under CPL 245.20(1) prior to filing a COC." *People v. Sellie*, 77 Misc.3d 1234(A)(Schenectady Cty Ct 2023)(citing *People v Pierna*, 74 Misc 3d 1072, 1088 [Crim. Ct., Bronx County 2022], quoting, *People v. Bruni*, 71 Misc 3d 913; *People v. Barralaga*, 73 Misc 3d 510; *People v. Erby*, 68 Misc 3d 625; *People v. Gonzalez*, 68 Misc 3d 1213(A); *People v. Perez*, 72 Misc. 3d 171 [NY County Supreme Ct. 2021]").[1]

In other cases, mistakes are not held against the People: "inadvertently omitting discoverable material gathered in good faith should not invalidate a COC." *People v. Moore*, 2021 NY Slip Op. 21187 (Kings Cty Sup. Ct. 2021).

Conversely, when the prosecution fails to turn over multiple items of discovery, courts can find that the prosecution did not exercise due diligence. The Fourth Department held that the prosecutor's unexplained belated disclosure of multiple items of discovery (body worn camera footage, a forensic report, and disciplinary records for nine police officers) amounted to a lack of due diligence. The Court was troubled in particular by the forensic report which had been prepared six months before the initial COC. *People v. Baker*, 229 A.D.3d 1324 (4th Dept. 2024).

[1] The court also noted that the People's obligation did not include items that the defense could subpoena on its own.

**CASES *ARE* DISMISSED WHEN PROSECUTORS WAIT UNTIL THE LAST MINUTE TO OBTAIN EVIDENCE AND FAIL TO DEMONSTRATE DILIGENCE:**

When the People wait until the last minute before the speedy trial clock expires, courts can consider this as a factor in assessing due diligence. For example, in one case, "the People filed a COC on the 89th day after arraignments—with one day remaining on their speedy-trial clock—and they did so without first discharging their discovery duties. When the People filed their COC, they had made no efforts at all, let alone good-faith and diligent ones, to make the complainant's medical records or the FDNY ambulance call report available. In addition, they had inexplicably failed to disclose an NYPD police report called the 'Dangerous Animal/Bite Report' from their actual or constructive possession . . . these failures rendered the People's COC invalid. …**It is not the defense attorney's job to help the People meet their own discovery obligations before the expiration of the People's own C.P.L. § 30.30 deadline. This is especially true when the People file on the 89th day after arraignments.."** *People v. Ajunwa*, 75 Misc. 3d 1220(A) [Bx. Crim Ct 2022].

In another case, ". . . [t]he People failed to certify the case for 210 days, failed to respond to the bill of particulars, and chose not to file a responsive motion to defendant's omnibus motion." . . . in assessing due diligence, the court found "this case appears to lack complex or voluminous discovery. From the facts . . ., it appears this case was initiated by a call to the 911 center, which led to a search warrant being issued for two physical locations. In this relatively simple fact pattern, it should have been obvious to the People that 911 materials including a recording of the call should have been automatically turned over to defendant . . . While standing alone, the failure to turn over the 911 call until December 7, 2023, under the circumstances explained by the prosecution is not dispositive, it is **one factor** this Court has considered." *People v Hoskins, (2024 NY Slip Op 50133(U)(Monroe Cty Ct.) (Emphasis Added); See also, People v. Carmona, 79 Misc. 3d 1236(A) (Mount Vernon Town Ct. 2023)*.

**CASES *ARE* DISMISSED WHEN THEIR COMPLIANCE IS SO EGREGIOUS THAT IT CONSTITUTES BAD FAITH**

Courts find that when multiple obvious items are missing, the People fail to satisfy due diligence. Thus, in a particularly egregious case which also contained exculpatory evidence, a court found that the belated disclosure of three different body worn camera recordings invalidated the People's COC. The court explained, "[t]he officers' body-worn camera recordings reveal a history between the responding police officers and the complaining witness. One officer is recorded saying 'I get it, we know he [complainant] is a problem' and 'if [complainant] attacks you, run away.' Another officer states 'Calvin [complainant] is a victim? Ok, change of pace.' And a third officer asks, 'Calvin [complainant], why are we here all the time, bro?' Defendant notes that at least two other officers 'express incredulousness that the complainant is not being charged as the aggressor in the instant case' during the body-worn camera recordings. These comments suggest significant contact between the complainant and the police that may be discoverable as evidence and information concerning the complainant's prior bad acts." *People v. Darren*, 75 Misc.3d 1208(A)(NY Cty. Crim. Ct. 2022).

In another case, when the prosecution could have learned that additional witnesses existed simply by talking to the officer who was at the scene, a court found that they failed to exercise

due diligence: “Police Officer Cosby, who had been included on the People's list of trial witnesses, appeared in court to testify in the event the case proceeded to trial and told the prosecutor that there were four additional law enforcement officers who had been at the scene of the incident but who were not documented in any of the Nassau County Police Department (NCPD) paperwork….The People failed to explain . . . why they did not speak to Police Officer Cosby before filing their CoC.” *People v. LaClair*, 79 Misc. 3d 8, 11 [App Term 2023], lv to appeal denied, 39 NY3d 1155 [2023]

**CASES *ARE* DISMISSED WHEN PROSECUTORS ENGAGE IN PASSIVE INACTION: FAILING TO RESPOND WHEN NOTIFIED OF MISSING MATERIAL:**

When defense counsel notifies the prosecution of missing items, the prosecution must act upon these conferrals. In one case, a court found**:** “[i]nitially, given that on September 9, 2022, defense counsel had provided to the People an enumerated list of requested disciplinary records, the People cannot credibly argue that discovery provided four months later on January 5, 2023, and only after court directive…**. The time elapsed amounts to passive inaction by the People which lacks good faith and reasonableness**.” *People v. Amissah*, 79 Misc.3d 401 (Bx. Crim. Ct. 2023) (citing *People v Mclean*, 77 Misc 3d 492, 497 [Crim Ct, Kings County 2022]; *Erby*, 68 Misc. 3d at 633; People v Sime, 76 Misc 3d 1107, 1111 [Crim Ct, Kings County 2022]; *People v Aguayza*, 77 Misc 3d 482, 488 [Sup Ct, Queens County 2022]).

**PROSECUTORS DON’T TAKE ADVANTAGE OF THE MANY OPTIONS THAT THE STATUTE GIVES THEM TO AVOID CONSEQUENCES…**

**WHEN PROSECUTORS REQUIRE ADDITIONAL TIME TO OBTAIN MATERIAL, THE STATUTE PERMITS COURTS TO AMEND THE TIMEFRAMES:**

The prosecution can utilize “safety valves” found throughout article 245, but rarely do so. As one court put it, “[T]he Legislature anticipated circumstances that would necessitate amending the statutory timeline to comply with disclosure obligations and the People were provided recourse to request that the court modify their deadline to comply. …"[w]hen the discoverable materials are exceptionally voluminous or, despite diligent, good faith efforts, are otherwise not in the actual possession of the prosecution, the time period in this paragraph may be extended pursuant to a motion pursuant to subdivision two of section 245.70." *People v. Amissah*, 79 Misc.3d 401 (Bx. Crim. Ct. 2023)((citing *People v. Castellanos*, 72 Misc 3d 371, 374 (Sup. Ct., Bronx County 2021)).

Conversely, in another case, when the People waited until two days before the speedy trial expired, the court rejected “the People's eleventh-hour request to treat their ‘notice of non-disclosure’ as a motion to extend the discovery period. The notice was “not accompanied by any notice of motion, did not contain any return date, and the court did not set a motion schedule.” *People v. Luna,* 80 Misc. 3d 1217(A) [Queens Crim. Ct. 2023].

**THE STATUTE EMPOWERS PROSECUTORS TO SHIELD SENSITIVE INFORMATION BY MOVING THE COURT FOR A PROTECTIVE ORDER.**

Immediately after implementation of article 245, individual judges of the various appellate divisions provided guidance on protective orders. *See e.g.* *People v. Bonifacio*, 179 A.D.3d 977 (2nd Dept. 2020)(better practice to give the defense notice of a motion for a protective order with opportunity to be heard); *People v. Beaton*, 179 A.D.3d 871 (2nd Dept. 2020); *People v. Belfon*, 179 A.D.3d 981 (2nd Dept. 2020); *People v. Nash*, 179 A.D.3d 982 (2nd Dept. 2020)(People can shield substance of protected information during argument about motion for protective order); *People v. Griggs*, 180 A.D.3d 853 (2nd Dept. 2020); *People v. Reyes*, 179 A.D.3d 1098 (2nd Dept. 2020). *See also* *People v. Escobales*, 204 A.D.3d 1157 (3rd Dept. 2022); *People v. Stroud*, 190 A.D.3d 1085 (3rd Dept. 2021)(given extremely sensitive nature of case, trial court properly exercised discretion to conduct hearing entirely ex parte); *People v. Artis*, 179 A.D.3d 1440 (3rd Dept. 2020)(establishing de novo review standard).

More importantly, a motion for a protective order is deemed a pretrial motion. Speedy trial time is stopped (or excluded) while these motions are pending. *People ex rel. Farbman v. Brann*, 197 A.D.3d 1054 (1st Dept. 2021); *People v. Torres*, 205 A.D.3d 524 (1st Dept. 2022) leave to appeal denied, 39 N.Y.3d 942 (2022).

**These cases illustrate that even when faced with the threat of dismissal, prosecutors fail to obtain basic and significant evidence from the police.**

**If you take away their only incentive to comply–the threat of dismissal–why should we trust that prosecutors will disclose evidence?**

**IN NYC, WHERE PROSECUTORS ARE REQUESTING CHANGES TO THE LAW, POLICE ROUTINELY FLOUT THE LAW AND HIDE POLICE MISCONDUCT:**

Courts have long recognized police intransigency with discovery compliance. One judge wrote: "[i]t is no secret that our criminal legal system has long ensconced police misconduct behind an 'incoherent mess' of inconsistent constitutional law. After New York's 2020 discovery reforms, there is no reason for that to continue in our state. 'By enacting CPL Article 245.20, the legislature chose to impose stricter disclosure obligations for the People whereby 'the People now have a statutory duty to disclose all evidence and information—including that which is known to police—that tends to impeach the credibility of a testifying prosecution witness."' (*Hamizane*, 80 Misc 3d at 11 [quoting *People v. Figueroa*, 78 Misc 3d 1203[A], at *2 [Crim. Ct., Queens County 2023]). Yet over four years later, the People continue dragging their feet into the new world. This court will not do the same. Under the plain text of Article 245, the People were required to disclose their police witness's misconduct records. Their failure to diligently follow the law renders their statement of readiness illusory." *People v. Mesa, 82 Misc. 3d 1237(A) (Queens Crim. Ct. 2024).*

In another egregious case, the police refused to turn over records unless the prosecutor first sought a protective order. The court wrote: "when the People request material such as IAB logs from the NYPD, the only statutorily appropriate response by the NYPD, pursuant to the discovery statute, is to "ensure" the free "flow" of this material to the People. The court can fathom no reading of the discovery statute that permits the NYPD to impose additional preconditions—e.g., demanding the minutes of court proceedings or requiring the filing of a protective order motion—for handing over IAB material that the State Legislature has decreed to be in the People's possession. . . The People cannot be made to **jump through a series of NYPD-crafted hoops** to receive discoverable material that the New York State Legislature deems to be in the People's possession—unless the People allow themselves to be made to so jump." *People v. Chimborazo*, 81 Misc. 3d 442 (BX Crim. Court 2023).

**Even if we could trust prosecutors to comply without an incentive, we can't allow for a system that makes it easier for the police to hide evidence.**

**Enacting S613/A825 will ensure that the police cannot hide evidence and simultaneously make It easier for prosecutors to do their due diligence without depriving the accused of access to the evidence against them.**