
Discovery in the Dark:

New York's Secret Evidence Rules

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The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right to due process. The NYCLU fights for a fair, transparent, and accountable criminal justice system.

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INTRODUCTION

Discovery is the process by which parties to a court case exchange evidence before trial. It is essential to informed decision-making, trial strategy, and settlement negotiations. In the criminal justice system, where a defendant's life or liberty may be at stake, discovery also determines whether we honor the constitutional guarantee that you are presumed innocent until proven guilty. Discovery rules determine whether an accused person has access to the government's evidence – not only evidence of guilt, but also of innocence – so that the person, with the aid of an attorney, can make informed decisions about how to proceed with a defense.

Unfortunately, New York's criminal discovery system, constitutionally *required* to give accused persons a fair shot at justice, often falls far short, leaving the accused in the dark about evidence that might set them free, reduce their punishment, or at least give them a way to aid in their own defense. The result is a cost New Yorkers pay every day in loss of freedom, loss of property, loss of dignity, and loss of faith in the justice system.

As this report explains in detail, most states long ago abandoned these unfair practices, and now give defendants broad, early access to evidence. Crucially, states with longtime open discovery laws have succeeded in protecting the rights of both defendants *and* witnesses. Studies show no link between open discovery and witness intimidation. And no state has ever turned back.

It's time for New York to catch up. After tireless advocacy by grassroots coalitions, defense attorneys, civil rights and civil liberties organizations, scholars, judges, and dedicated legislators, New York is poised to enact critical reforms that will improve access to evidence – and thereby, access to justice – for all persons accused of crimes. The NYCLU hopes this report will help move us toward that goal.

A note about this report: This report is presented in two parts. The first is a short overview of New York's criminal justice system, meant to give lawmakers, policy professionals, and lay readers a general understanding of what happens, from start to finish, when the government accuses someone of a crime. The second part is a deeper dive into part of that system: *the rules of criminal discovery*.

A BRIEF OVERVIEW OF THE CRIMINAL JUSTICE PROCESS¹

The Arrest

An arrest is when someone suspected of a crime is taken into custody by the police. A person may be arrested if a police officer sees them commit a crime, or if police obtain an arrest warrant after an investigation reveals sufficient evidence of a crime. Under the Fourth Amendment to the Constitution, all arrests must be supported by *probable cause*, which, very generally, means police have enough facts to *reasonably believe* a crime has been committed under the circumstances.

The Charge

Most accused persons first encounter the criminal justice system upon arrest. However, a criminal case doesn't really begin until the government charges that person with a crime. A charge is a formal accusation of criminal wrongdoing, and once charged, the accused person is referred to as a defendant. Under New York law, charges are categorized based upon the severity of the allegations as: (1) violations, (2) misdemeanors, or (3) felonies.

Violations, like disturbing the peace or obstructing traffic, are the least serious offenses, and generally are punishable by no more than 15 days in jail.

Misdemeanors are more serious than violations, and are punishable by anything between probation and up to a year in jail. In 2017, the most recent full year for which New York has published data, roughly 290,000 people statewide were charged with misdemeanors.² As discussed in greater detail below, many misdemeanor defendants languish in jail while the charges against them are pending, often because they do not have access to the evidence that might establish their innocence, or at least allow them to make an informed plea decision.

Felonies are the most serious crimes with which a person can be charged. They include violent acts like murder, rape and assault, but also many types of drug

¹ This section is loosely adapted from the New York State Unified Court System's "Court Help" Page, *Criminal Case Basics*, which offers greater detail in a style friendly to the general public. Readers may view it at: <https://www.nycourts.gov/courthelp/Criminal/caseBasics.shtml> (last visited February 8, 2019).

² Individuals 16 and older, and juveniles prosecuted in adult courts. See New York State Division of Criminal Justice Services, *New York State Adult Arrests Disposition Report*, p.5. April 20, 2018. Available at: <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> (last visited February 8, 2019). Readers may need to cut and paste this link into their browser address bar. PDF on file with NYCLU).

offenses, as well as offenses like theft, arson, and serious financial crimes. They are usually punishable by at least a year, and as much as life, in prison.³ Just under 200,000 people were charged with felonies in New York state in 2017.⁴

The charge is set forth in a document filed by the prosecutor called an *information*, or in cases where the charge is determined by a grand jury (more on grand juries below), an *indictment*. An *information* is also sometimes referred to as a *complaint*.

The prosecutor decides what charges are filed. If the prosecutor decides not to file any charges, the accused person is released.

Arraignment

Arraignment is the first time a defendant appears in court. At arraignment, the defendant is informed of the charges against them, and is given an opportunity to plead either guilty or not guilty. The defendant may bring a lawyer, and if he or she cannot afford one, may be assigned one at that time.

If the defendant is in jail at the time of arraignment, the judge may set bail, which is an amount of money a defendant who is released from jail must deposit with the court to guarantee his or her return for future court dates. The judge also may release a defendant on his or her “own recognizance” (a practice commonly referred to as “R.O.R.”) which is simply a promise by the defendant to return without having to pay bail. In certain felony cases or where a defendant has a history of more than two felony convictions, the judge may not grant bail at all, but choose to *remand* a defendant back to jail to await trial. A defendant who cannot afford to pay his or her set bail amount remains in jail.

A Note about Plea Bargaining

Plea bargaining is a negotiation in which the prosecution and the defense talk about settling a defendant’s case without a trial. The “bargain” usually involves the defendant admitting guilt – rather than forcing the prosecution to prove guilt in court – in exchange for the prosecution’s promise to ask the court to impose a lesser sentence, usually shorter jail time or probation. A plea bargain counts as a conviction, and its effect is the same as if the defendant had been found guilty by a jury.

Parties may plea bargain at any time, but it usually happens early, before the defendant spends too much time in jail or incurs too many costs. *Prosecutors do not*

³ New York State does not have the death penalty.

⁴ *Id.* at pp.2-4

have to plea bargain, however, and if they do, they're still free to set conditions, such as deadlines for acceptance of a plea offer or promises from the defendant not to sue if prosecutorial or police misconduct has occurred. Moreover, prosecutors' authority to plea bargain narrows considerably once a defendant has been indicted,⁵ so prosecutors hoping to secure a plea have a strong incentive to do so before indictment. This makes pre-indictment discovery – something discussed below – all the more crucial.

The vast majority of criminal convictions in New York – roughly 97% – are the result of plea bargains. And as we discuss below, defendants plead guilty for many reasons, some of which have nothing to do with guilt.

Preliminary Hearings and Grand Juries

After arraignment, if there is no plea deal, some cases proceed to a preliminary hearing, at which the parties present evidence and the judge decides whether the case should go forward. Felony cases proceed to what is known as a *grand jury*, which is a group of at least sixteen people assembled by the court to decide whether there is enough evidence against the defendant to have a trial.

Grand jury proceedings are controlled largely by the prosecutor. The grand jury may hear witness testimony and review documents or other evidence. The defendant may testify, and may have an attorney present, but the defendant's attorney does not submit evidence. Only the prosecutor submits evidence to the grand jury. The defendant may ask the grand jury to call witnesses, but the grand jury does not have to honor that request. Grand jury proceedings are secret, and neither jurors nor attorneys may discuss what happens inside.

After reviewing the evidence, the grand jury may vote to *indict* the defendant on whatever charges the evidence supports. The grand jury may approve the prosecutor's charges, but if the grand jury decides the evidence supports a less serious charge than the prosecutor has requested, charges may be reduced. If the grand jury thinks the evidence is insufficient to support a particular charge, that charge will be dismissed by the court. If the grand jury does not approve any charges, the case will be dismissed, and the defendant is free to go.

Grand jury proceedings are recorded and transcribed, and witness testimony given at a grand jury hearing may in some cases be used as evidence at trial.

After indictment, the defendant is *arraigned* on those charges approved by the grand jury (note that this may be the defendant's second arraignment), informed of the new or amended charges against him or her, and given another

⁵ NY C.P.L. §220.10(4).

opportunity to plead guilty or not guilty. The court at this time also may adjust the defendant's bail to reflect any amended charges.

If the defendant pleads not guilty at arraignment, the court will set a trial date.

Other Pretrial Matters

Prior to trial, the defendant's attorney may ask the court to suppress – that is, prohibit the prosecutor from offering at trial – certain types of evidence, especially evidence improperly obtained by the police via wrongful arrest, illegal search, coercion, or in violation of a defendant's constitutional rights. The court will decide at a pretrial hearing whether the evidence may be admitted.

Once pretrial hearings are complete, the matter proceeds to trial.

Trial and Appeal

New Yorkers have a right to jury trial for all felonies, as well as the most serious type of misdemeanor (known as a "Class A" misdemeanor). All other charges are tried before a judge. At trial, the prosecutor must present sufficient evidence to convince the jury, or the judge, that the defendant is guilty of every element of a crime beyond a reasonable doubt. This is called the *burden of proof*, and it rests *completely* with the prosecution. The defendant is presumed innocent, and does not have to prove anything. In fact, the defendant does not have to offer any evidence at all. If strategically appropriate, he or she may offer something that discredits or contradicts the prosecution's evidence, but it's not necessary.

If the defendant is found not guilty – that is, *acquitted* – they are released, and generally cannot be tried again for the same offense. The matter is concluded. If, however, the defendant is convicted, the judge will hand down a sentence.

Once a defendant is convicted and sentenced, he or she may wish to appeal or otherwise challenge their conviction. The appeals process is complex and time-consuming; this report does not discuss it except to observe that a defendant may appeal a conviction on the grounds that the prosecution did not disclose critical evidence to the defendant, particularly evidence that the defendant did not commit the crime. As discussed below, however, those appeals are very difficult to win.

This brings us to discovery.

WHAT IS DISCOVERY, AND WHY IS IT IMPORTANT?

Discovery is the process by which parties to a court case exchange evidence before trial. In New York’s civil courts – that is, in lawsuits between private parties, like slip-and-fall cases, contract disputes, medical malpractice actions, and so on – where the stakes almost always are limited to money or property, discovery is thorough, open, and often quite time-consuming. Opposing sides share documents, interview witnesses, inspect physical evidence, and hire experts to offer scientific opinions. These exchanges happen long before trial, and the parties are usually well aware of each other’s strengths and weaknesses months before they appear in court.

Things are different in New York’s criminal courts. There, where accused individuals may spend months in jail before trial, with their freedom or life at stake, discovery is not so generous. Prosecutors are permitted to withhold police reports, witness names, witness statements, and other vital information until the day of trial. They may introduce surprise witnesses at the last minute, subjecting a defendant to what some practitioners call “trial by ambush.” They may withhold exculpatory evidence – that is, evidence suggesting a defendant is not guilty – unless, in their sole discretion, they deem it material to the case. And with astonishing frequency, they can induce defendants into taking a plea bargain without ever seeing the government’s evidence.⁶

This is backward. And in only a handful of states is the cost of such a backward arrangement – a cost paid in loss of personal freedom, loss of human dignity, and loss of public faith in the criminal justice system – more apparent than in New York.

This section of this paper details the most significant constitutional deficiencies in New York’s criminal discovery laws, contrasts New York’s criminal discovery system with fairer, more modern systems utilized by states similar to New York, proposes reforms, and briefly discusses the merits of some of the reforms under consideration this session.

THE PROBLEM IN NEW YORK

The United States Constitution guarantees⁷ a fair trial – including information about the offenses charged, the right to confront one’s accusers and

⁶ And of course, like most structural flaws in our criminal justice system, these practices disproportionately wreak havoc on individuals and families of color, juveniles, undocumented immigrants, the urban and rural poor, and other historically marginalized communities.

⁷ That guarantee is rooted chiefly in two Constitutional provisions: the Sixth Amendment and the Due Process clause of the Fourteenth Amendment. The Sixth Amendment sets the terms of criminal trials: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

compel witnesses to appear and testify on one’s own behalf – to anyone charged with a crime. The United States Supreme Court has said “comprehensive discovery affords counsel a full opportunity to prepare the case, rather than be hijacked by surprise evidence.”⁸ Nearly every other state has adopted discovery rules that allow defendants timely access to all critical evidence (*more below*). The New York State Bar Association’s Task Force on Criminal Discovery acknowledged in 2014 that “the feasibility and effectiveness of broad and early discovery in criminal cases have been well tested and clearly established.”⁹ And bipartisan and nonpartisan committees, think tanks, advocacy groups, scholars and practitioners have for decades pointed out the flaws in New York’s antiquated criminal discovery rules and suggested reasonable reforms.

And yet New York’s criminal discovery rules remain deeply flawed, creating unjust outcomes, undermining the public trust, and devastating the lives of those thousands of New Yorkers who every year get caught up in the criminal justice system.

The most significant of those flaws are:

- (1) No Pre-Plea Discovery** – Almost all New York defendants plead guilty instead of going to trial, but as a rule, they are not entitled to any discovery before accepting a plea. As a result, they give up their constitutional right to a trial and choose to go to prison or pay hefty fines without a glimpse of the state’s evidence.
- (2) Lack of Witness Information** – New York prosecutors are not required to identify witnesses who will testify against the defendant until the start of trial,

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

The Due Process clause of the Fourteenth Amendment requires the government to provide fair procedures in any action affecting an individual’s life, liberty or property: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV (emphasis added).

⁸ *Wardius v. Oregon*, 412 U.S. 470, 473-74 (1973) (“[t]he end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.”).

⁹ See New York State Bar Association Task Force on Criminal Discovery, *Final Report*, p.2 December 1, 2014. Available at: <https://www.nysba.org/WorkArea/DownloadAsset.aspx> (last visited February 7, 2019).

leaving defense attorneys with little or no time to investigate witnesses' claims or prepare for cross-examination.

(3) Incomplete Production of Evidence – Prosecutors are not required to produce witnesses' past statements (which may contradict what a witness is about to say at trial) until a jury has been selected and sworn, and need not produce witnesses' grand jury testimony or past criminal history until the start of trial. In addition, prosecutors generally are not required to produce police reports, warrant applications and supporting materials, and information about electronic surveillance – at all.

(4) Nondisclosure of Evidence Favorable to the Defense – Despite recent court-ordered changes to discovery practice, New York's criminal discovery law does not require prosecutors to produce *all* evidence of a defendant's innocence; instead, prosecutors must turn over only that evidence they deem *material* – or important – to the case.

This section of the report addresses each flaw in turn.

Flaw #1: No Pre-Plea Discovery

By sheer number of defendants affected, the single greatest problem with New York’s criminal discovery system is that defendants who wish to plea bargain must do so without seeing any of the prosecution’s evidence. In a system built on the dual principles that defendants are innocent until proven guilty and that guilt must be proven beyond a reasonable doubt, forcing a defendant to choose to go to prison on a blind guess is simply unfair.

Think of it this way: Few if any of us would make an important, life-changing decision completely uninformed. We would not have risky surgery without diagnostic tests; we would not buy a home, send a child to college, or put a loved one in a care facility sight-unseen; we would not invest our life savings on the flip of a coin. And if someone told us that was simply the way it was done 95% of the time, because the alternative was too expensive and time-consuming for most people to endure, we would almost certainly walk away from what felt like a bad deal. But a criminal defendant – who is innocent until *proven* guilty – cannot walk away.

A System of Pleas

The United States Supreme Court has called the modern criminal justice system “a system of pleas, not a system of trials.”¹⁰ Nationally, about 97% of criminal convictions are the product of guilty pleas.¹¹ The rate is similar in New York – about 96%.¹² And almost all plea negotiations take place pre-indictment, long before any discovery has changed hands. This means that every year, hundreds

¹⁰ See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In *Lafler*, and its companion case of *Missouri v. Frye*, the U.S. Supreme Court extended the Sixth Amendment’s guarantee of effective assistance of counsel to all “critical” stages of the criminal justice process, including plea bargaining. The Court reasoned that criminal trials had largely become a thing of the past, noting that “in today’s criminal justice system, [...], the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012), citing Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (“To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”)

¹¹ See U.S. Sentencing Comm’n, *2017 Sourcebook of Federal Sentencing Statistics*, fig.C, available at: https://isb.ussc.gov/api/repos:/USSC:figure_xx.xcdf/generatedContent?&table_num=Figure_C (last visited February 8, 2019).

¹² New York State Division of Criminal Justice Services, *Criminal Justice Processing Report - Criminal Justice Case Processing Arrest through Disposition New York State, January - December 2017*, p.23, Table 11. June 2018. Available at: <http://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf> (last visited February 7, 2019. Reader may have to cut and paste link; PDF on file with NYCLU.).

of New Yorkers choose prison without seeing any evidence against them – or without knowing if the government has evidence they’re innocent.

Who Cares? Only the Guilty Ones Plead Guilty, Right?

Critics may ask, “Why should the state go to the trouble and expense of showing an accused person evidence of their own crime? If someone is guilty, they know they did it, and will plead guilty for their own good.” The answer is a familiar refrain: in our criminal justice system, every accused person is *innocent until proven guilty*, and if the government seeks to imprison somebody, the Sixth Amendment requires it to justify every use of its immense power to incarcerate.

More to the point, however, our “system of pleas” isn’t that simple. *Defendants who are actually innocent plead guilty all the time.*¹³ There are many reasons why, and most of them have nothing to do with guilt or innocence.

First, defending oneself from criminal charges – especially if doing so involves going to trial – is expensive and time-consuming. Many defendants simply cannot afford private attorneys, time away from work, or worse yet, time spent in jail while awaiting trial, or risk the hefty fine or lengthy prison sentence that may follow a conviction. For them, a guilty plea, a smaller fine and perhaps a shorter prison sentence are the only “affordable” choices.

Second, for defendants in pretrial detention who are facing a likely conviction at trial (trials almost always end in conviction¹⁴), a guilty plea to a lesser charge is often the quicker route back to home, family, and work.

Lastly, trials are unpredictable, and defendants often face far greater sentences if convicted at trial.¹⁵ In fact, many criminal laws are written that way –

¹³ See, e.g., Lucian E. Dervan and Vanessa A. Edkins, “*The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*,” 103 J.Crim.L. & Criminology, 1, 34 (2013).

¹⁴ New York State Division of Criminal Justice Services, *Criminal Justice Processing Report - Criminal Justice Case Processing Arrest through Disposition, New York State, January - December 2017*, *supra*, pp.19-21, Tables 9-9A.

¹⁵ *Plea and Charge Bargaining Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice. p.1. 2011. Available at: <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (last visited February 7, 2019; PDF on file with NYCLU). See also Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.”)

written to incorporate disproportionately severe sentences just so prosecutors have room to negotiate downward during the plea bargaining stage.¹⁶ Prosecutors often use the prospect of a stiffer sentence at trial as a bargaining chip to secure a guilty plea early on. When resorting to such gamesmanship, prosecutors should at least be required to put their cards on the table.

Flaw #2: Witness Information and “Trial by Ambush”

Prosecutors in New York do not have to identify any witnesses prior to trial. Police can interview and take statements from observers and sources, picking and choosing which version of the story to believe and which to disregard, all without defense attorneys knowing, until the eve of trial, the names of those people whose testimony could send the defendant to prison.

The American Bar Association¹⁷, the New York State Bar Association’s Task Force on Criminal Discovery,¹⁸ and the New York State Justice Task Force¹⁹ all recommend that witness information be discoverable. The United States Supreme Court has called the cross-examination of witnesses “singularly important” to a defendant,²⁰ and has called the denial of the “right of *effective* cross-examination” – because cross-examination isn’t effective without at least some idea what a witness is about to say – a “constitutional error of the first magnitude.”²¹ And yet every day, defense attorneys and their clients head into New York’s courts having no idea what the prosecution’s witnesses will say – and no idea how to respond to that testimony – until it’s happened.

¹⁶ Barkow, *supra*.

¹⁷ See Standard 11-2.1(a)(ii), *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3d ed., ©1996 American Bar Association. Available at: https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk/#2.1 (last visited February 8, 2019).

¹⁸ See New York State Bar Association, Task Force on Criminal Discovery, Final Report, pp.9-15. December 1, 2014. Available at: <https://www.nysba.org/WorkArea/DownloadAsset.aspx> (last visited February 8, 2019).

¹⁹ See New York State Justice Task Force Report and Recommendations on Criminal Discovery Reform, p.6. July 2014. Available at: <http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf> (last visited February 8, 2019).

²⁰ *Jencks v. United States*, 353 U. S. 657, 667 (1957).

²¹ Such an error requires automatic reversal of any finding of guilt. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974) [*emphasis added*].

Witness Safety Concerns

Prosecutors claim that identifying witnesses ahead of trial will put witnesses at risk of threats, harassment, or violence. The NYCLU is sympathetic to witness safety concerns, but the truth is that all but three other states – Louisiana, Wyoming and South Carolina – require the prosecution to identify witnesses during discovery²², and not a single state that has adopted open discovery laws has ever gone back to a more restrictive scheme.²³ Indeed, recent studies in several states and cities with modern “open file” discovery practices revealed no link between such practices and increased witness tampering or intimidation.²⁴

Moreover, New York’s *current* discovery law already addresses witness safety concerns: prosecutors who can demonstrate, with evidence, that a witness is at risk are allowed to ask the judge for a *protective order* keeping sensitive witness information from certain defendants or limiting info to defense *attorneys* only.²⁵

In fact, some prosecutors’ offices in New York City, such as the Brooklyn District Attorney’s office, have already adopted open and early discovery in most cases. In a recent New York Times article, acting district attorney Eric Gonzalez acknowledged that his office occasionally obtained protective orders out of witness safety concerns, but noted that overall, **“We’ve been able to find the right balance in how to keep our witnesses safe and also make sure the process is as transparent and open as possible.”**²⁶

Both discovery reform bills under consideration this session – A.1431 (Lentol) / S.1716 (Bailey) and the Governor’s FY2020 Budget Bill – adequately address

²² NYSBA *Task Force Report*, p.2.

²³ NYSBA *Task Force Report*, p.2-3, *citing* Milton Lee, “Criminal Discovery: What Truth Do We Seek?” 4 U.D.C. L. Rev. 7, 19 (1998).

²⁴ See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*. 31 Fordham Urb. L.J. 1097, 1150 (2003-2004) (discussing in detail those studies).

²⁵ Specifically, protective orders may be granted for any of the following reasons: “constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the usefulness of the discovery.” See NY CPL §240.50(1) (emphasis added).

²⁶ Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It’s Too Late*, New York Times, Aug. 7, 2017. Available at: <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html> (last visited February 8, 2019).

witness safety concerns by either leaving in place or strengthening the witness protection mechanisms currently enshrined in the New York Criminal Procedure Law.

Flaw #3: Insufficient Disclosure

New York's current discovery law withholds critical items from the defense.

Among them:

- *Police Reports* – A police report is usually the first written impression of the facts of a case, assembled by an investigating officer, often at the scene of a crime. They are valuable sources of information, yet prosecutors need turn over only those police reports they intend to use at trial, and only when trial is about to start.
- *Warrant Information* – Arrest warrants, search warrants, warrant applications, and the evidence or sworn affidavits supporting those warrants help defense attorneys determine whether a defendant's Fourth Amendment rights – the right to be free from unreasonable search or seizure – were violated.
- *Witness Statements and Grand Jury Testimony* – Witness statements and transcripts of witnesses' grand jury testimony are *critical* to investigating the facts of a crime and preparing an adequate defense, yet they need not be turned over until the eve of trial.
- *Electronic Surveillance and Data Collection* – **See Appendix B**
- *Exculpatory Information* – The Constitution requires prosecutors to turn over evidence that a defendant might be innocent. However, New York's criminal discovery law provides zero guidance on adhering to this critical principle, in that it simply instructs prosecutors, without explanation or elaboration, to turn over "Anything required to be disclosed pursuant to the constitution of this state or of the United States." We address this problem in greater detail immediately below.

Flaw #4: Hidden Evidence of Innocence

Exculpatory evidence – or *Brady* evidence,²⁷ as it is commonly known – is any evidence that helps prove a defendant is innocent. It could be DNA evidence

²⁷ The term *Brady* evidence refers to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), in which the United States Supreme Court held that the Due Process Clause of the 14th Amendment requires the

collected from a victim's body that doesn't match the defendant's; it could be the statement of a witness who swears the defendant was elsewhere when the crime was committed; it could be video footage of someone else committing the crime. It doesn't matter: if it suggests the defendant might not be guilty, the prosecution *must* turn it over to the defense.²⁸

A prosecutor's *Brady* obligations, as they've come to be called, arise out of the Due Process clause of the United States Constitution, which means they're independent of state discovery requirements. In other words, no matter what else a state's discovery rules require, *Brady* evidence *must* be disclosed.

Moreover, disclosure of *Brady* evidence is required by attorney ethics rules. Rule 3.8(b) of the New York Rules of Professional Conduct obligates a prosecutor to disclose to the accused "any relevant information known to the prosecutor that tends to negate the defendant's guilt or mitigate the charges or sentence regardless of the extent of its significance."²⁹

Even so, defendants in New York are still at risk of being left in the dark about evidence that could make the difference between freedom and years behind bars.³⁰

Why? There are several reasons.³¹ First, *Brady* evidence is sometimes never transmitted from the police to the prosecutor. Second, prosecutors, due to either

prosecution to disclose evidence "favorable to an accused... where the evidence is material either to guilt or to punishment."

²⁸ The notion that it is not a prosecutor's job to help a defendant "make his case," so to speak, might make for a good sound bite, but where exculpatory evidence is concerned, a prosecutor's *duty* is exactly that. Indeed, the U.S. Supreme Court has said in that context, "the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667, 675 (1985), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

²⁹ See N.Y. Rules of Professional Conduct, Rule 3.8(b), available at: <https://www.nycourts.gov/LegacyPDFS/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf> (last visited February 8, 2019); and *Formal Opinion 2016-3: Prosecutors' Ethical Obligations To Disclose Information Favorable To The Defense*, Association Of The Bar Of The City Of New York Committee On Professional Ethics. August 29, 2016. Available at: https://www.nybar.org/pdf/report/uploads/20073140-2016-3_Prosecutors_Ethical_Obligations_PROFETH_8.22.16.pdf (last visited February 8, 2019).

³⁰ For just a few anecdotal examples, and a list of published judicial opinions detailing *Brady* violations in New York, see New York State Bar Association, "Final Report of the New York State Bar Association's Task Force on Wrongful Convictions" (2009), pp. 19-44.

³¹ One recent study identified the top three causes of *Brady* violations as: (1) information failing to be transmitted from the police to the prosecutor; (2) the prosecutor's failure to identify

misjudgment or lack of training, sometimes fail to recognize the exculpatory nature of evidence. Third, prosecutors sometimes simply don't turn evidence over when they should – usually out of fear of losing, in a culture that often prizes “winning” at all cost.

Amending New York's discovery laws probably won't deter those prosecutors or police officers who intentionally withhold evidence – that sort of corruption will always remain a problem. But workflow provisions (discussed below), tighter evidence controls, and better training probably *can* go a long way toward making sure evidence gets from the police station to the prosecutor's office, and then from the prosecutor to the defendant. But there remains a fundamental problem with the language of *Brady* itself – language that has been incorporated into many states' criminal discovery laws – that must be addressed.

Materiality

The word “exculpatory” means “tending to clear one of guilt.”³² Under *Brady*, evidence is exculpatory only if – and therefore must be disclosed only if – it is “*material* either to guilt or to punishment.”³³ And evidence is only material where, “if disclosed and used effectively, it may make the difference between conviction and acquittal.”³⁴

So who decides whether evidence is material? Individual prosecutors. And they usually do so in the context of an initial review of a case file, with an eye toward confirming a suspect's guilt.³⁵ But because the standard for materiality is

important information as *Brady* material; and (3) the prosecutor's failure to disclose information he or she knows to be *Brady* material out of fear (generally, fear of losing). See Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2236 (2010).

³² *Exculpate*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/exculpate> (last visited February 8, 2019).

³³ *Brady* at 87 (emphasis added).

³⁴ *Bagley*, *supra*, at 676.

³⁵ See *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*, National Association of Criminal Defense Lawyers, 2014. p.22:

“A prosecutor reviewing a case file for the first time is testing the hypothesis that the defendant is guilty and looking for information to confirm that expectation. Because the police or agents have “solved” the case, there will undoubtedly be information in the file to support the guilt hypothesis. Thus, as a result of confirmation bias, the prosecutor that expects to become convinced of guilt then engages in selective information processing, accepting as true information that is consistent with guilt and discounting conflicting

whether the evidence, if disclosed, would have made a difference at trial, it is all but impossible to assess materiality *prior to or during trial* – after all, how can one expect a prosecutor, or a court for that matter, to know if undisclosed evidence would have led to a different outcome if the first outcome hasn’t happened yet?

The U.S. Supreme Court has recognized that materiality determinations vary from jurisdiction to jurisdiction and prosecutor to prosecutor, calling the process “inevitably imprecise.”³⁶ And the lower courts have begun to see the problem as well, acknowledging that materiality assessments are really only possible on appeal or *habeas*³⁷ review.³⁸

The United States Department of Justice has followed suit, advising in its United States Attorneys’ Manual that because it is “sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.”³⁹

Numerous commissions, think tanks and professional organizations have denounced *Brady’s* antiquated materiality requirement. Indeed, the American Legislative Exchange Council (ALEC), a conservative/libertarian-leaning organization of state legislators “dedicated to the principles of limited government, free markets and federalism” recently released a resolution in favor of open file discovery practices, citing as one justification the difficulty prosecutors have in making materiality assessments.⁴⁰

And in November 2017, in response to a report issued by the New York Justice Task Force (a working group of judges, academics, attorneys, and other criminal justice professionals assembled to address the problem of wrongful

information as unreliable or unimportant. [That information] will rarely rise to the level of ‘material’ in the mind of that prosecutor.”

³⁶ *U.S. v. Agurs*, 427 U.S. 97, 108 (1976).

³⁷ A *habeas corpus* – or simply *habeas*, in legalese – action is a lawsuit, filed by a prisoner, challenging his or her confinement.

³⁸ *Material Indifference*, *supra* at n.86 (collecting cases).

³⁹ U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-5.001(C) (2008). <https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings> (last visited February 7, 2019) *citing* *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

⁴⁰ See American Legislative Exchange Council, “Resolution in Support of Establishing Efficient and Fair Criminal Law Discovery Practices” September 18, 2018. *Available at*: <https://www.alec.org/model-policy/resolution-in-support-of-establishing-efficient-and-fair-criminal-law-discovery-practices/> (last visited February 8, 2019).

convictions in New York), the New York Administrative Office of the Courts issued a general order⁴¹ requiring all criminal courts to remind prosecutors at the beginning of every criminal prosecution that they are to disclose “exculpatory” evidence *without regard for materiality*.⁴²

Those steps represent significant progress. However, New York’s criminal discovery law – the primary source of prosecutors’ disclosure obligations in this state – still ambiguously direct prosecutors to disclose exculpatory evidence “pursuant to the constitution of this state or of the United States.” That antiquated language needs to be updated to guarantee that defendants have a right to see all evidence that might set them free, and to give prosecutors clear guidance on how to identify and disclose that evidence.

We’ve identified and discussed the biggest problems with New York’s criminal discovery law. But are things really that bad? **Let’s take a look at how criminal discovery is handled in other states.**

How do you structure a rule requiring prosecutors to turn over evidence of innocence? Read on.

Exemplary language that moves past *Brady*’s troublesome materiality requirement can be found in both discovery reform bills under consideration this session: A-1431 (Lentol / S-1716 (Bailey), and the Governor’s budget bill. From §245.20 of A-1431:

(k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government’s behalf in the case, that tends to: (i) negate the defendant’s guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant’s culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant’s identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment.

Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

⁴¹ A copy of the Administrative Office of the Courts’ Order (“AOC Order”) and the February 17, 2017 Commission Report may be viewed here: https://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf (last visited February 7, 2019). PDF on file with NYCLU.

⁴² AOC Order at p.12-13, Part VII, “Order Regarding Disclosure Obligations for Prosecutors” Available at: https://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf (last visited February 8, 2019).

HOW DO NEW YORK'S DISCOVERY LAWS COMPARE TO THOSE OF OTHER STATES?

We're 46th.

The New York State Bar Association (NYSBA) observed in its 2014 report that, at the time of publication, New York was one of fourteen States with the most restrictive discovery laws in the nation, in the company of Alabama, Georgia, Iowa, Kansas, Kentucky, Louisiana, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Wyoming, and Texas.⁴³

And what's worse, of those states, only four – Louisiana, South Carolina, Wyoming and *New York* – deny criminal defendants access to witness information until the very start of a criminal trial.

Around the time the NYSBA report was being finalized, Texas significantly reformed its criminal discovery rules and became one of the most progressive criminal discovery states in the country, and while *this* report was being produced, Virginia substantially modernized *its* rules,⁴⁴ so neither state is any longer considered one of the worst offenders. Now, New York is no longer in the overall “bottom fourteen” but the “bottom twelve.”

Indeed, most states reformed their criminal discovery laws a long time ago. How have states *similar to New York* in size, population, urban vs. rural population distribution, economy, cultural and ethnic diversity – and indeed, rates and types of crime – formulated their criminal discovery laws? Let's find out.

⁴³ NYSBA *Task Force Report*, p.2.

⁴⁴ Virginia (Va. Sup. Ct. R. 3A:11) – In September 2018, in light of recommendations from the Virginia State Bar, the Supreme Court of Virginia issued an order substantially improving the commonwealth's criminal discovery rules. Defendants in Virginia are now entitled to see (1) police reports, including witness statements; (2) defendants' and codefendants' statements, including the substance of any oral statements made to police; (3) expert reports and other analyses; (4) all documents, objects, recordings, or other items upon a showing by the defense that the items may be material; and (5) names and known addresses of all trial witnesses.

Virginia's new rules are not perfect, as they rely at least in part on prosecutors' materiality and relevance assessments, and they mention exculpatory evidence only in the context of a reminder to prosecutors – without elaboration or guidance – that their constitutional duty to produce such evidence supersedes Virginia's court rules. Nonetheless, the rule change is a significant reform for criminal justice in the Commonwealth. Virginia's new rules take effect July 1, 2019.

Criminal Discovery: A State-by-State Comparison

New York is currently 46th in the nation – ahead of only Louisiana, South Carolina and Wyoming – in the fairness of its criminal discovery laws. Here's how more modern states do it. The two states with “Open File” discovery – Texas and North Carolina – allow the defendant to see everything the prosecutor has. NOTE: This is not an exhaustive list of what each state requires, but rather a list of some items considered critical to protect a defendant's constitutional right to a fair trial.

In the states BELOW, the prosecutor MUST produce the evidence AT RIGHT:	Prior to Plea	Exculpatory Evidence (This is constitutionally required)	Witness Names and Identification Info	Witness Statements	Grand Jury Minutes of Defendants/ Witnesses	Defendant and Witness Criminal History	Police Reports, and Officer Contact Info	Warrant Information and Supporting Materials	Electronic Surveillance Information	Protective Orders Available for Witness Safety
New York (N.Y. C.P.L. §240.20)	No	Yes	Not until trial.	Not until the start of trial	Yes for defendants, and yes for witnesses, but not until trial.	Not for defendant. For witness, not until trial	Only if for use at trial, and then not until trial	No	No	Yes
California (Cal. Pen. Code §1054-1054.10)	Yes	Yes	Yes, but addresses only for defense counsel.	Yes, at the outset of discovery	No	Yes	No	No	No	Yes
Florida (Fl. Crim. P. R. 3.220)	Yes	Yes	Yes	Yes, at the outset of discovery	Yes, as to defendant	Yes	Yes	Yes	Yes	Yes
Illinois (Ill. Crim. Ct. R. 411-429)	Yes	Yes	Yes	Yes, at the outset of discovery	Yes, all	Yes	Yes	Yes	Yes	Yes
Massachusetts (Ma. R. Crim. P. Art. 14)	Yes	Yes	Yes	Yes, at the outset of discovery	Yes, all	Yes	Yes	No	No	Yes
Michigan (Mich. Ct. R. 6.200)	Yes	Yes	Yes	Yes, at the outset of discovery	No	Yes	Yes	Yes	No	Yes
N. Carolina (N.C.G.S.A. §15A-903)	Yes	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes
Texas (Tx. Crim. P. Art. 39.14)	Yes	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes, open file discovery	Yes
Washington (Wa. Cr. R. 4.7)	Yes	Yes	Yes, plus contact info	Yes	Yes	Yes	Yes, if for trial	No	Yes	Yes

Let's Get Some Details: What Do Other States Permit?

Many states have modern criminal discovery laws that allow defendants early and broad access to most, if not all, of the prosecution's files. In most cases, discovery begins automatically, and in nearly every jurisdiction, incorporates both pre-plea production and clear, unambiguous guidance on the disclosure of evidence favorable to the defendant. Here is a look at what several other states do:

North Carolina (N.C.G.S.A. §15A-903) – North Carolina has adopted full open file criminal discovery. Upon defendant's request (or motion if the request is denied), the prosecution must make "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant."⁴⁵

The term "file" includes "the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant."⁴⁶

Remarkably, North Carolina's discovery statute makes it a felony for anybody in the prosecutor's office or the police department to willfully omit or misrepresent evidence subject to disclosure per the above rules.⁴⁷

Texas (Texas C.C.P. Art. 39.14) – the state practically synonymous with "tough on crime" reformed its criminal discovery laws in 2014, and now has open file discovery.

The Ideal Solution: "Open File" Discovery

The best criminal discovery rules offer what's called "open file" discovery: as soon as possible after the start of a criminal case, the prosecution produces everything in its own files and those of law enforcement, except work product and other privileged material. North Carolina – regarded as the first state in the country to adopt open file discovery – has a concise rule that reads:

"(a) Upon motion of the defendant, the court must order: (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." N.C. Gen. Stat. Ann. §15A-903

The statute defines terms like "file" and "government agency," adds provisions to make sure the evidence is available when it's needed, and allows protective orders for witness security, but otherwise, that's the rule.

Under consideration this session, the current version of A-1431 (Lentol) / S-1716 (Bailey) would bring open file discovery to New York.

⁴⁵ N.C.G.S.A. § 15A-903(a)(1).

⁴⁶ N.C.G.S.A. § 15A-903(a)(1)a.

⁴⁷ N.C.G.S.A. § 15A-903(d).

Upon a defendant's request, Texas prosecutors must turn over "as soon as practicable" *all of the state's documents*, including witness statements, police reports, criminal histories, warrant materials, and any other item considered material to the case.⁴⁸

Texas also allows either party to take depositions.⁴⁹ A deposition is a pretrial, sworn interview in which defense counsel may ask the same questions they might later ask at trial of any witness identified by the prosecution, including police officers involved in the case. Depositions are commonplace in civil discovery, and would be a useful feature of any pretrial criminal discovery system.

Prosecutors in Texas also must name their trial witnesses at least 30 days prior to jury selection.⁵⁰

Texas also provides clear evidentiary rules that move past *Brady's* antiquated "materiality" standard, requiring the prosecution to produce any "exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."⁵¹ Lastly, defendants in Texas are entitled to full discovery *prior to any guilty plea*, and indeed are not permitted to accept a guilty plea without informing the court they have seen the state's evidence.⁵²

California (Cal. Penal Code §1054-1054.10) – California, home to America's second largest metropolitan area, requires prosecutors to turn over, among other things: (1) trial witness names and contact info, (2) defendants' statements, (3) physical evidence, (4) trial witness criminal histories, (4) *Brady*-type evidence, which the rule simply and concisely describes as "any exculpatory evidence."⁵³ Evidence must be turned over so long as it is "in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies."⁵⁴

Florida (Fl. Crim. P. R. 3.220) – Any time after the filing of a "charging document" – usually an information, indictment or complaint – a criminal defendant in Florida may request discovery from the prosecution, and within fifteen days is entitled to see, among other things, (1) all witness names and statements, (2) all other statements, including police reports and statements of codefendants, (3)

⁴⁸ Texas C.C.P. Art. 39.14(a).

⁴⁹ Texas C.C.P. Art. 39.02.

⁵⁰ Texas C.C.P. Art. 39.14(a).

⁵¹ Texas C.C.P. Art. 39.14(h).

⁵² Texas C.C.P. Art. 39.14(j).

⁵³ Cal. Penal Code §1054.1(e).

⁵⁴ Cal. Penal Code §1054.1.

any grand jury minutes containing the defendant's testimony, (4) electronic surveillance information, (5) search warrant supporting documents, (6) *Brady* evidence, defined, albeit somewhat narrowly, as "material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged."⁵⁵ Florida also allows defense attorneys to take depositions of witnesses.

Illinois (Ill. Crim. Ct. R. 411-429) – In Illinois, the following items are due after indictment or information, upon defendant's motion: (1) names, addresses, and statements of all intended trial witnesses, (2) all defendant statements; (3) grand jury transcripts of defendants and trial witnesses; (4) expert reports; (5) books, papers, photos and physical evidence; and (6) trial witnesses' criminal history.

Illinois' exculpatory evidence provision is particularly broad, directing the prosecution to turn over "any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor."⁵⁶

Illinois also requires disclosure of electronic surveillance of defendant's communications: "The State shall inform defense counsel if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party, or of his premises."⁵⁷

Lastly, Illinois's rules also includes provisions to optimize preservation of evidence by law enforcement, increase communication between law enforcement and prosecutors, and improve the flow of evidence from police departments and other government agencies to the prosecutor's office for eventual disclosure to the defense.⁵⁸

Massachusetts (Ma. R. Crim. P. Art. 14) – Massachusetts has one of the most open criminal discovery statutes in the country. Discovery is automatic, must take place prior to any plea bargain, and occurs fairly early in the process: usually at or before the pretrial conference, which takes place shortly after arraignment. The defendant gets a comprehensive view⁵⁹ of the state's evidence, including, among other things, (1) witness names, addresses, dates of birth, and statements, (2) defendant's and codefendants' statements, (3) police statements and reports, as well as names and addresses of all law enforcement witnesses, (4) all grand jury

⁵⁵ As discussed, this is not the best description of exculpatory evidence, as it limits production solely to items related to *charged* offenses and leaves the determination of materiality to the prosecution.

⁵⁶ IL R S CT Rule 412(c).

⁵⁷ IL R S CT Rule 412(b).

⁵⁸ IL R S CT Rule 412(f).

⁵⁹ Complete list set forth at Ma. R. Crim. P. Art. 14(a)(1)(A).

minutes, (5) all party and witness criminal histories,⁶⁰ and (6) all *Brady* evidence, which is concisely defined as “any facts of an exculpatory nature.”

Michigan (Mich. Ct. R. 6.201) – Defendants in Michigan are entitled to, among other things: (1) names and recorded statements of potential trial witnesses, (2) all police reports and interrogation records concerning the case; (3) all written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, *even if that person is not a prospective witness at trial*; (4) all warrant materials pertaining to any search or seizure in the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case; (6) the criminal records of all trial witnesses, including records to be used to impeach a witness; (7) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, plus copies of any documents or photographs; (8) all *Brady*-type evidence, described as “any exculpatory information or evidence known to the prosecuting attorney.”

New Jersey (N.J. Ct. R. 3:13) – New Jersey’s criminal discovery rules are particularly broad. Full discovery *must precede any pre-indictment plea offer* and all discovery, no matter when it occurs, must include where relevant (1) all “exculpatory materials;” (2) access to all physical objects, photos, data, and documents; (3) all recorded statements of the defendant, plus summaries of unrecorded statements against interest; (4) “names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;” (5) witness and co-defendant statements; (6) police reports; (7) expert witness information; and (8) information about identification procedures. New Jersey defendants are also entitled to take depositions of witnesses who for reason of impending death or incapacity are unlikely to appear at trial.

Washington (Wash. Super. Ct. CrR 4.7) – Washington’s discovery requirements are comprehensive. They require disclosure of: (1) witness names, statements and contact information, (2) defendants’ statements, (3) grand jury testimony of the defendant and any trial witnesses, (4) all documents, reports, photos or other objects, including expert reports, to be used at trial, (5) criminal histories of defendant and any trial witnesses, (6) electronic surveillance records, (7) any information indicating entrapment of the defendant, and (8) in a more liberal formulation of *Brady*, all evidence – not just evidence subject to a prosecutor’s materiality assessment – tending to “negate a defendant’s guilt as to the offense charged.”⁶¹

The federal criminal system – Discovery in the federal criminal justice system, while not as open as most states, is still better than in New York. In federal

⁶⁰ Ma. R. Crim. P. Art. 14(a)(1)(D).

⁶¹ Wash. Rev. Code Ann. § SUPER CT CR CrR 4.7(a)(3).

court, criminal discovery is governed not by one set of rules, but by several different sources: (1) Federal Rules of Criminal Procedure 16 and 26.2, (2) *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring government production of exculpatory evidence) and *Giglio v. United States*, 405 U.S. 150 (1972) (requiring government production of impeachment evidence – that is, evidence calling into question a witness’ credibility), and (3) 18 U.S.C. §3500 (the “Jencks Act”) (requiring the production of trial witness statements).⁶²

So what must the federal government disclose? Upon defense counsel’s request, usually made at arraignment, federal prosecutors must turn over, among other things: (1) all documents material to the case, (2) all recorded statements of the defendant, including grand jury testimony, (3) summaries of defendant’s oral statements to federal law enforcement, (4) summaries of expert reports, and, as noted above, trial witness statements, but only after those witnesses have already testified at trial. Per constitutional requirements, *Brady* evidence must be turned over even if the defense does not request it.⁶³

Moreover, §9-5.000 of the United States Attorney’s Manual currently mandates – or at least strongly recommends – prosecutorial disclosures of exculpatory and impeachment evidence beyond the requirements of *Brady* and *Giglio*.^{64 65}

⁶² However, under 18 U.S.C. §3500, federal prosecutors do not have to produce statements of government witnesses until after those witnesses have testified at trial.

⁶³ See *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

⁶⁴ Quoting from the Manual: “Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. **As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt** as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court[.]” U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-5.001(C) (2008). Available at: <https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings> (last visited February 5, 2019).

“A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.” *Id.* at (C)(1).

⁶⁵ Indeed, Congress attempted to fix *Brady* problems in the federal system with the Fairness in Disclosure of Evidence Act of 2012, S.2197, 112th Cong. (2012) (“FDEA”), which would have eliminated the materiality assessment altogether and required the production of all information that “may reasonably appear favorable to the defendant.” The FDEA never became law.

It is clear that other states have figured this out. So how does New York fix it?

HOW TO REFORM NEW YORK'S DISCOVERY LAWS?

Criminal discovery laws primarily must require *early* and *open* disclosure of evidence. Those two criteria, when met, satisfy most Constitutional requirements and solve most defendants' discovery problems.

Early

Early means discovery must begin automatically, without a request from the defense, and as soon as practicable after the defendant is arrested – ideally upon initial appearance or assignment of counsel, and no later than a few days after arraignment or indictment upon information. If full disclosure at initial appearance is not possible, key items – such as police reports, existing witness statements, warrant information, and exculpatory evidence in the prosecutor's possession at that time – should be disclosed, with all remaining evidence to follow as soon as practicable.

Early also means the defendant must be permitted to see most, if not all, discoverable evidence prior to the expiration of any plea offer, and *all* evidence must be turned over early enough for the defendant to prepare for trial.

Open

Open means the defendant may see as much of the government's evidence as possible – ideally the prosecution's entire file, subject to limitations only on attorney work product and concerns about witness safety. There should be a presumption of disclosure – meaning that any questions about whether a particular item of evidence must be turned over should be resolved in favor of disclosure. Production of exculpatory evidence should be expressly and unambiguously mandated, and such evidence should be defined *without regard for materiality, relevance or other subjective assessments*. Even in an open file system, categories of discoverable items should be enumerated so there is little doubt about the scope of the parties' obligations. Specifically, although this is not an exhaustive list:

- Names and contact information of all witnesses known to the prosecution – not just witnesses the prosecution intends to call at trial – should be discoverable.
- Statements of all witnesses known to the prosecution – not just the witnesses the prosecution intends to call at trial – should be discoverable.

- Witness inducements – money or other benefits provided to witnesses in exchange for testimony – should be discoverable.
- All grand jury transcripts should be discoverable.
- Criminal histories, if any, of all the prosecution’s trial witnesses should be discoverable.
- Names, contact information, and written reports of every law enforcement officer involved in the case should be discoverable.
- Information provided by confidential informants should be discoverable.
- All information, data, or recordings obtained by electronic surveillance, as well as a description of the surveillance method used, must be discoverable.
- All information related to search or arrest warrants in the matter, including warrant applications, supporting documents and affidavits, and catalogs of seized items, should be discoverable.
- All information about a defendant’s past criminal activities should be discoverable.
- All expert data, including CVs, reports, contact information, qualifications and licensing information, and Laboratory Information Management System data should be discoverable.

Other Features

Modern, efficient, constitutionally robust criminal discovery systems usually include other defining virtues, such as:

- *Workflow and Evidence Custody Requirements*

Police departments and other government agencies should be required to turn over all evidence in *their* possession to the prosecutor’s office. Given the scope of modern police investigations, it often takes time for law enforcement to gather its evidence and send it to the prosecutor. Workflow provisions help with that process, by making sure the prosecutor *and* the defendant have all the relevant evidence controlled or possessed by *all* the various government agencies and departments, including law enforcement – not just the evidence sitting on the prosecutor’s desk. Workflow provisions also help limit *Brady* violations by the police department and, by making it the police department’s job to supply evidence to the prosecutor, help make the prosecutor’s job easier.

- *Carefully Balanced Protection for Witnesses, Set by the Court*

Defendants must have broad access to the government’s evidence. But where the prosecutor can demonstrate with evidence that a defendant poses a particularized threat of witness intimidation or harassment, the court may limit the

defendant's access to that witness, but even then, only to the extent necessary to ensure the witness' safety. However, that power should not be vested unilaterally with the prosecution.

- *Accountability*

Before trial is allowed to start, prosecutors should be required to certify in writing that they have disclosed all known discoverable materials, and that they have exercised due diligence in searching for discoverable materials in the possession of law enforcement and other agencies. They should be required to identify and keep a log of all materials disclosed, and issue additional certificates of compliance if they make supplemental disclosures.

- *Enforceability*

For reforms to have any real effect, failures to turn over evidence required by discovery rules must come with meaningful consequences. Courts should have discretion to correct deficiencies by requiring the production of additional evidence, adjusting deadlines to compensate for late disclosures, suppressing or precluding improperly obtained evidence, dismissing charges, and where appropriate, sanctioning counsel for particularly egregious or repeated infractions.

CONCLUSION

For too long, New York's opaque, oppressive and out-of-date criminal discovery rules have cost defendants their right to a fair trial and, as a result, their freedom. This needs to end. The time has come for New York to catch up with the rest of the country by enacting fair and open criminal discovery laws.

Appendix A – WHAT’S CURRENTLY ON THE TABLE?

There are currently two discovery bills this session: A.1431 (Lentol, J.) / S.1716 (Bailey, J.), and Governor Cuomo’s FY2020 Budget Bill. The “Lentol-Bailey” bill is a true open file discovery bill that would provide all of the reforms covered by this paper. The NYCLU endorses the Lentol-Bailey bill. That said, the Governor’s bill, while technically not an open file bill, is also comprehensive in its enumerated disclosure requirements and would provide most of the key reforms discussed in this report. A quick review of those bills:

A.1431 (Lentol) / S.1716 (Bailey)

As noted, the Lentol/Bailey bill is a true “open file” discovery bill that would guarantee production of all the prosecutor’s evidence. It would require disclosure of a few critical items at initial appearance without overly burdening prosecutors in the early stages of a case; it would allow for robust pre-plea discovery; it would incorporate critical workflow provisions to ensure prosecutors receive evidence from law enforcement and other government agencies; and it would allow prosecutors, where necessary to protect witnesses, to petition the court for protective orders.

The Lentol/Bailey bill adheres to all of the NYCLU’s discovery reform principles discussed above, and if enacted would make New York one of the most open and fair jurisdictions in the country for criminal discovery.

FY2020 Budget Bill

Governor Cuomo’s bill would also represent great step toward meaningful discovery reform. It includes an exhaustive list of items to be disclosed – including all of the items recommended by this report, and a clear, unambiguous description of *Brady* evidence that makes no reference to a materiality standard. While it does not provide discovery as early as the Lentol/Bailey bill, it requires the prosecution to produce *all* discovery “as soon as practicable,” and no later than 15 days after indictment or information, and, like the Lentol/Bailey bill, would require the prosecution to disclose all evidence prior to the expiration of any plea offer. It also includes workflow provisions similar to those in the Lentol/Bailey bill, and it incorporates adequate protective order mechanisms while leaving ultimately leaving witness protection to the discretion of the court.

The NYCLU does object to the bill’s provision that would criminalize the intimidation of witnesses on social media, as such a proposal likely suffers serious First Amendment problems (for the sake of brevity this report does not discuss this aspect of the bill at length). Those concerns aside, the NYCLU supports the discovery reform aspects of the Governor’s bill, which would make New York one of the best jurisdictions in the country on this issue.

Appendix B – ELECTRONIC SURVEILLANCE AND DATA COLLECTION

The ever-growing sophistication of electronic surveillance and data collection technology makes it essential that prosecutors disclose electronic search and surveillance information, **including information about any surveillance methods used to obtain evidence in a criminal case**. This is especially so in light of *Carpenter v. United States*, No. 16-402, 585 U.S. ____ (2018).

In *Carpenter*, the United States Supreme Court held that cell site location data – information your cellphone regularly shares with your service provider about which local cell tower it is connected to, and which therefore can be used to determine the phone’s location – is protected by the Fourth Amendment and cannot be obtained by police without a warrant, even though the data is stored not by you, but by your service provider.

Carpenter is the latest in a line of cases suggesting that while the Supreme Court is at least somewhat willing to protect Americans from government surveillance, the Court also is inclined to do it on a piecemeal, surveillance device-by-device basis, assessing the constitutionality of individual spying technologies as they come before the Court.

This sort of review almost always arises in the context of criminal defense cases, either as a standard investigatory practice, or as part of a more illicit practice known as parallel construction. Parallel construction is when the government improperly obtains evidence via secret surveillance or some other questionable method, and, in an effort to avoid Fourth Amendment problems, offers the court and the defendant a different, “parallel” chain of investigative events suggesting the government obtained the evidence by other, more traditional means. Neither the court nor the defendant are ever told about the actual way the evidence was obtained.

Parallel construction is a common practice, especially in the area of electronic surveillance. Indeed, a recent lawsuit by the NYCLU uncovered an agreement between the FBI and the Erie County (NY) Sheriff’s Office concerning the use of Stingray technology (a Stingray is a surveillance device that mimics a cell phone tower, “tricking” all the cell phones in its vicinity into connecting to it), in which the FBI, in exchange for providing the devices to Erie County, went so far as to demand that local prosecutors *dismiss charges against defendants surveilled by Stingrays* rather than disclose to the court that the device had been used. See, “Erie County Sheriff Records Reveal Invasive Use of “Stingray” Technology” April 7, 2015. Available at: <https://www.nyclu.org/en/press-releases/erie-county-sheriff-records-reveal-invasive-use-stingray-technology>.

In light of such widespread practices, Defense attorneys must know exactly how and with what technology electronic surveillance is being conducted.

Unfortunately, **neither bill** under consideration this session adequately addresses electronic surveillance. The NYCLU will continue to fight for greater disclosure of government snooping methods in the future.

For more on parallel construction, *see* “Report Shows US Law Enforcement Routinely Engages In Parallel Construction,” *Techdirt.com*. Jan 22, 2018. Available at: <https://www.techdirt.com/articles/20180110/14482038982/report-shows-us-law-enforcement-routinely-engages-parallel-construction.shtml>.

For another comprehensive report on parallel construction, *see* “Dark Side: Secret Origins of Evidence in US Criminal Cases” Human Rights Watch. January 9, 2018. Available at: <https://www.hrw.org/report/2018/01/09/dark-side/secret-origins-evidence-us-criminal-cases#>.

For a truly astonishing yet accessible survey of the various electronic surveillance methods in use by law enforcement today, *see* the Electronic Frontier Foundation’s “Street Level Surveillance” series, *viewable here*: <https://www.eff.org/issues/street-level-surveillance>.

Lastly, for a look at how facial recognition software – notoriously unreliable and subject to crippling racial biases – is quickly becoming a popular parallel construction tool: <https://www.justsecurity.org/57275/police-rekognition-telling-defendants/>.