THE JUSTICE PROJECT

Expanded Discovery in Criminal Cases

A Policy Review

Wrongfully convicted for the rape and murder of a young girl, Clarence Brandley spent nearly ten years on death row before being exonerated. Prosecutors failed to disclose exculpatory evidence that placed other suspects at the scene of the crime.

Expanded discovery laws could have prevented this injustice.

INTRODUCTION

In criminal cases, discovery is the formal process by which the defense and prosecution exchange information relevant to a criminal investigation. The exchange of relevant evidence is a critical component of investigation and trial preparation. Discovery provides pertinent information allowing each side to adequately prepare for the prospect of a trial and it gives the defendant information on how to plead. Through the process, discovery helps the criminal justice system reach reliable outcomes efficiently in criminal cases. The necessity of adequate discovery flows from the principle upon which the criminal justice system is founded — the presumption of innocence.

By requiring the timely exchange of all information collected by the police and prosecution in criminal cases, expanded discovery laws can provide for a more fair and accurate criminal justice system. American criminal jurisprudence is predicated upon the presumption of innocence. Because an individual is presumed innocent until convicted by a court of law, the prosecution alone bears the burden of proof. The state must present evidence that the accused is guilty beyond a reasonable doubt. The presumption of innocence is seriously damaged when the defense is given insufficient opportunity to cast doubt upon the prosecution's case. Only through adequate discovery can counsel subject evidence to appropriate scrutiny and give the accused a meaningful opportunity to challenge and test evidence in a fair hearing before a court of law. Similarly, through a process of reciprocal discovery, the defense may also be required to turn over information to the prosecution. Such information may regard, *inter alia*, witnesses the defense intends to call at trial. It is vital, however, that reciprocal disclosure violate neither attorney-client privilege nor the Fifth Amendment right not to give self-incriminating testimony.

Rules identifying what qualifies as "discoverable" material in criminal trials, and when it must be exchanged, are determined in large part by state statutes, with some guidance from the United States Supreme Court. Most states have formal rules establishing what information the prosecution must disclose to the defense and, if a state provides for reciprocal discovery, vice versa. Variation in what type of information and materials the defense is entitled to receive under law depends not only on the charge itself, but also, in large part, simply upon the location of the trial. Not only does the timing of disclosures vary from jurisdiction to jurisdiction, but it often remains dependent upon the individual policies of the prosecutor or the competence of an individual's defense counsel.

The rules that codify civil and criminal procedure are different in state and federal courts, but in both instances civil procedure actually provides more expansive rights to discovery. For example, in civil trials parties may depose the other party and the other party's witnesses. This rule simply does not exist in most states for criminal trials. Moreover, civil procedure often mandates discovery timelines adequate for counsel to evaluate and scrutinize evidence. The fact that discovery laws are so broad in civil cases and are often so restrictive in criminal cases — where the freedom and, sometimes, the life of the defendant are at stake — is as nonsensical as it is unjust.

Discovery is a crucial procedural safeguard that protects against wrongful imprisonment, helps to make the legal system more transparent by increasing pretrial disclosure, and ensures a fair procedure by allowing each side in a trial to adequately prepare their case. Alternatively, inadequate discovery laws threaten the reliability of outcomes in criminal cases and significantly undermine a defendant's right to due process. Adequate discovery laws also mitigate other common reasons for wrongful convictions, such as eyewitness misidentification and false confessions. Expanded discovery allows the defense to adequately and vigorously challenge evidence and increases the likelihood that misleading or exculpatory evidence will be caught and handled appropriately when considering pleas and at trial. Additionally, while expanded criminal discovery laws help ensure a more fair and accurate legal system, legal practitioners in jurisdictions with more open discovery rules also report a more efficient process, with fewer reversals and retrials, and more cases resolved earlier in the process. In short, expanded discovery practices also enhance judicial efficiency.

This policy review seeks to inspire communication among criminal justice stakeholders, policymakers, and others regarding the best practices and methods for improving access to evidence through expanded discovery. By employing the reforms highlighted in this review, policymakers can build a fairer, more robust, and more accurate criminal justice system.

RECOMMENDATIONS & SOLUTIONS

Discovery is the formal process by which evidence is exchanged between the defense and prosecution prior to trial. In a civil suit, a defendant has broad discovery rights including access to witness statements, prior claims filed against either party, police reports, and the right to depose third parties.[1] In criminal cases in most states, however, discovery is much narrower. Access to evidence held by the police and the prosecution may often be significantly restricted. Discovery in criminal cases often does not include information on witnesses, police reports, or mitigating and aggravating evidence, all of which could affect the outcome of a trial, as well as lessen or increase the sentence imposed after a conviction. Where this evidence is discoverable, it is often too late in the process to be of any practical use to the defense. Mandatory and open-file discovery, in which prosecutors make their entire case file available to the defense and disclose particular items at required times, leads to a more efficient criminal justice system that better protects against wrongful imprisonment and renders more reliable convictions.

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To prevent wrongful convictions, and improve efficiency in the criminal justice system, it is necessary that discovery laws be as expansive as possible at the pretrial phase and that they be uniform, mandatory, and enforced. The following recommendations represent best practices for discovery in criminal cases. By implementing these standards, states would considerably enhance the reliability of outcomes in criminal cases.

OPEN-FILE DISCOVERY POLICY

To best protect a defendant's right to due process and improve the system's ability to efficiently resolve cases, states should enact more expansive discovery laws comparable to the laws governing discovery in civil cases. Open-file discovery grants the defense access to all unprivileged information that (with due diligence) is known or should be known to the prosecution, law enforcement agencies acting on behalf of the prosecution, or other agencies such as forensics testing laboratories working for the prosecution. An open-file policy reduces discretionary decisions in determining what evidence is "material" (meaning that it will affect the outcome of trial) and "exculpatory" (meaning that it will tend to negate guilt or mitigate a sentence) and should thus be disclosed to the defense. By allowing the defense access to the state's entire file, open-file discovery reduces the potential for error and the inefficiencies inherent in making the decisions on an item-by-item basis.

AUTOMATIC AND MANDATORY DISCLOSURES

In addition to full, open-file discovery, states should adopt rules requiring mandatory and automatic disclosure of certain specified information in criminal cases. In 1994, the American Bar Association (ABA) issued new standards related to criminal discovery, which were promulgated in recognition of a growing state and federal trend toward expanding pretrial discovery in criminal cases. For example, the ABA recommends disclosure of tangible objects; information related to witnesses, including names, addresses, and statements; expert witness information, including qualifications, reports, and results of physical or mental examinations; and materials related to sentencing (meaning evidence related to aggravating or mitigating factors that could increase or reduce the possible punishment).

States should adopt rules that closely mirror the ABA standards in terms of mandatory disclosures, making clear the duty of the state to obtain all materials and information in the hands of agencies under its control or acting on its behalf, and ensuring proper discovery at the sentencing phase of capital cases. These elements constitute meaningful discovery and allow both sides to adequately prepare for trial.

TIMING

Discovery rules should provide for early access to information. The ABA criminal discovery standards recommend that states establish timelines early in the process to allow each party to make adequate use of the evidence before trial. In addition to the prosecution's initial disclosures, discovery rules should affirm the continuing obligation of police, prosecutors, and other agents working for or on behalf of the prosecution to turn over discoverable material as it becomes available.

CERTIFICATION

Discovery rules should require proper documentation that both parties have exchanged the necessary materials, as well as when, and in what manner, and that they have exercised due diligence in obtaining materials from police agencies and other agents acting for or on behalf of the prosecution. Discovery certificates filed with the court create a record that the parties have fulfilled discovery responsibilities, inserting a measure of accountability into a process plagued by delays and uncertain obligations.

REMEDIES

Remedies for non-disclosure are essential to the success of discovery laws. Discovery rules should provide for appropriate remedies in cases where discoverable material is willfully suppressed or when discoverable obligations are only partially met. The ABA recommends a range of remedies, including orders to produce discoverable evidence, trial continuances, exclusion of the withheld evidence, or personal sanctions, among others.

GROUNDS FOR REFORM

The record of wrongful convictions in the United States has repeatedly shown that exculpatory evidence can be withheld for long periods of time, forcing innocent individuals to spend years or decades in prison. Extensive investigations during the appeals process have contributed to overturned verdicts by bringing to light suppressed exculpatory evidence. As is often the case, prosecutors have sole discretion in determining whether evidence is exculpatory and thus, whether to disclose it. Better discovery laws, such as open-file discovery, would require prosecutors to disclose any and all evidence. By allowing the defense to examine and challenge all information — and not just information that prosecutors might deem materially exculpable — creates a more just system.

Even the requirement that all "material" information must be disclosed limits disclosure because it requires a subjective analysis by prosecutors as to whether something will affect the outcome of a trial. What may appear exculpatory to a defense attorney — or lead to the discovery of exculpatory evidence through additional investigation — may appear to be only tangentially relevant to police or prosecutors. Providing a standard for the exchange of all evidence removes subjectivity and promotes fairness and accuracy in the criminal justice system.

Because discovery rules vary greatly from jurisdiction to jurisdiction, a defendant's geography, rather than the nature of the evidence itself, can have more of an impact on the types of evidence to which he or she will have access.

It is no small testament to the importance of discovery reform that groups such as the American Bar Association, the National Conference of Commissioners for Uniform Law, and state criminal justice commissions have addressed the need for clearer and more transparent discovery regulations. In an age where DNA evidence has exonerated over 200 persons, the need for improved discovery procedures is more urgent than ever. The following best practices, outlined above and discussed in greater detail below, provide a much-needed framework for reform.

OPEN-FILE DISCOVERY

The adoption of open-file discovery rules for criminal trials would allow the full and open exchange of all evidence in the possession, custody, or control of the state. An open-file discovery process creates a more level playing field on which the quality of evi-

dence can be challenged and tested. Such a reform lessens the arbitrary nature of disparate discovery policies between jurisdictions. Were the prosecution and agents of the prosecution to open their file to the defense, "it would remove much of the uncertainty inherent in the discretionary disclosure decisions prosecutors now have to make."[2]

Though an open-file policy grants access to all material contained in the prosecution's file, information must actually be in the file for the policy to have value. As such, additional best practices should accompany an open-file policy, including but not limited to: explicitly requiring police officers to provide all investigative materials to prosecutors; requiring certain mandatory disclosures of particular items of central importance; and clearly defining the obligations of both parties in the discovery process.

The burden of implementing an open-file system should be minimal considering most states have a pre-existing system in place for comparable exchange during civil trials. Open-file policies would avoid pretrial debates and hearings on whether particular evidence should be disclosed. As a result, open-file discovery has the potential to improve efficiency. Open-file policies may also save states money in the long-term by reducing the number of convictions overturned on appeal, thereby reducing the necessity and expense of retrials. In addition, open-file policies enhance efficiency by allowing defendants to make better-informed plea decisions.

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Some prosecutors have already recognized the benefits of open-file discovery and have voluntarily adopted the policy. Although the federal rules for discovery in criminal cases are among the narrowest and most restrictive, many federal prosecutors have adopted an open-file policy; state and county prosecutors in some jurisdictions also have some type of informal open-file policy in place.[3] States should make this a mandatory practice for all jurisdictions to avoid disparities from jurisdiction to jurisdiction within a state.

AUTOMATIC AND MANDATORY DISCLOSURES

Automatic, mandatory discovery of particular items of central importance is a key reform that would standardize disclosure of information among defendants and reduce inefficient practices. Mandatory and automatic discovery reduces the need for time-consuming discovery motions which must be answered by the opposing party and oftentimes addressed by the already overburdened court. Mandatory and automatic discovery of crucial items, in addition to open-file discovery, brings all centrally important information about the case to counsel at an early time before a trial moves forward. This reform limits the possibility of suppression of material evidence and enhances the reliability of the original criminal resolution (be it a trial or a plea). In so doing, mandatory and automatic discovery creates a fairer, more accurate, and more efficient criminal justice system.

The American Bar Association has long supported expanded criminal discovery which, in the words of the ABA standards, helps to "promote a fair and expeditious disposition of the charges; provide the defendant with sufficient information to make an informed plea; permit thorough preparation for trial and minimize surprise at trial; and, reduce interruptions and complications during trial and avoid unnecessary and repetitious trials."[4] According to the ABA, "full and free exchange" of appropriate materials helps achieve these goals and creates simpler and more efficient procedures thereby expediting the processing of cases.

The ABA standards for criminal discovery clearly define the types of evidence the prosecution must share with the defense. The standards include written and oral statements made by the defendant and codefendants and witness lists, police reports, tangible objects, expert opinions, and information (such as eyewitness identification) collected by third-party investigatory agencies such as law enforcement or forensics laboratories. Additionally, the standards call for prosecutors to disclose any agreements between the state and key witnesses, as well as reports from experts regarding mental or physical examinations,

scientific tests, and expert qualifications. The ABA standards also address requirements for reciprocal discovery, in which the defense provides the prosecution with certain non-privileged information. In addition, the state must provide information on the criminal record of the defendant and co-defendants and generally provide any information that casts doubt on the defendant's guilt or would lessen the sentence imposed upon conviction.[5]

Robust discovery should also include forensic testing results. Reports should include explanations of the testing involved and the underlying data, and not just the results of the forensic procedure. The prosecution should disclose to the defense all potentially exculpatory inferences drawn from forensic testing. In some cases, innocent defendants have been wrongfully convicted based on faulty forensic testing procedures or inaccurate scientific testimony. Providing defense counsel with notes on the testing procedures and credentials of the testing personnel would give counsel a more meaningful opportunity to expose erroneous test results or rebut inaccurate testimony from scientific experts.

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TIMING

Adequate discovery allows defense attorneys to conduct critical pretrial investigations and allows for greater scrutiny of evidence before trial. Early disclosure of information, especially police reports and witness statements, is essential to locating and memorializing potentially relevant evidence. Therefore, improving the requirements for timely disclosure levels the playing field and provides for a more fair and accurate analysis of disclosed information.

Discovery should be initiated as early as practicable in the process to allow each party to have sufficient time to analyze the disclosed information and adequately prepare for trial.[6] Unfortunately, many states lack timelines and in many cases timelines are tied to the start of trial rather than arraignment. In Colorado, by contrast, discovery procedures require that the prosecution provide written or recorded statements of the accused and codefendants as soon as possible (but no later than twenty calendar days after the filing of charges) and that grand jury transcripts should be provided no longer than thirty days after indictment. All other discoverable materials should be provided no later than thirty days before trial.[7]

Because ninety-five percent of criminal cases are resolved by plea or settlement and will never make it to trial, discovery is critical to ensuring that a defendant is aware of all available evidence in order to make an informed decision about whether to enter a plea.[8] Open-file policies should not only include police reports containing arrest and charging details, but should also be readily available to defense counsel early in the process. Early disclosure of police reports allows for immediate investigation by both parties, which is critical to locating and memorializing key evidence, including statements of potential witnesses.

The ABA also recommends that disclosure be initiated by the prosecution, with the defense following. Investigation into the crime is initiated by law enforcement under the umbrella of prosecutors, and it is necessary for the defendant to review the prosecution's evidence in order to formulate a defense. This is especially true in cases of innocent defendants, who may know nothing at all about the crime and have no starting place from which to build a defense. Defendants need adequate time to prepare their case, and "the assumption the defendant has enough information about the case to allow for investigation flies in the face of the constitutional right to a presumption of innocence."[9]

The ABA recommends that parties be under a continuing duty to disclose discoverable material as it emerges, including material that is discovered during or after trial.[10] This is an essential component of any effective discovery policy such that due diligence continues to be conducted throughout the course of the trial should any information bearing on the reliability of the defendant's conviction become available to law enforcement, district attorneys, or appellate prosecutors during the course of appeals and post-conviction proceedings.

CERTIFICATION

Certification creates a record of what information has actually been exchanged between parties. A discovery certificate should be filed by the District Attorney's office with the court during pretrial procedures, and should specify when evidence was exchanged and by what method of delivery. While the ABA standards on discovery present a strong model policy, they lack a requirement that parties certify that they have complied with discovery requirements. Discovery laws mandating certification should also be enacted.

Careful documentation is necessary to preserve a record of what materials were exchanged between parties, further reducing the chance that discoverable material will be willfully or inadvertently suppressed. Materials listed on the discovery certificate should include evidence that may be in the possession of third party investigatory agencies (including the police and expert witnesses) to ensure due diligence in providing this information to the defense.[11] It is important to include third-party evidence to enable the defense to have access to all relevant information, such as testing procedures and chain of custody information for forensic evidence. Finally, while pretrial discovery satisfies a critical need, discovery should not end when trial begins. As investigations continue, any newly yielded evidence must be turned over to the defense. Prosecutors should explicitly acknowledge their "continuing duty to disclose" relevant information as it arises, so that the defense has access to evidence even after the discovery period has ended.[12]

REMEDIES FOR NONCOMPLIANCE

Legal remedies for nondisclosure are critical to ensuring compliance. As some scholars argue, "prosecutors are almost never disciplined for *Brady* violations, even in the most blatant and easily provable cases."[13] Imposing sanctions limits indiscreet prosecutions and willful withholding of evidence through legal accountability. In addition, it provides incentives for the prosecution and defense to fully disclose required materials.

The ABA standards recommend that judges choose from a range of remedies when evidence is withheld. The standards permit a judge to exclude evidence not disclosed in a timely fashion, issue a continuance to allow evidence to be disclosed, or even hold counsel in contempt for rule violations.[14]

THE LEGAL LANDSCAPE

In a criminal case, the prosecution carries the dual responsibilities of ensuring that justice is served and of securing convictions. These two roles are important but, at times, conflicting. Scores of cases in which individuals were wrongfully convicted and later exonerated have demonstrated that exculpatory evidence can be withheld for years, even decades, after individuals have spent large portions of their lives in prison, before the evidence comes to light. Prosecutors may fail to disclose exculpatory evidence not out of malicious intent, but simply because few jurisdictions provide a clear definition to guide a prosecutor's decisions on what can be considered exculpatory. Prosecutors' workloads also may inhibit appropriate discovery because of the time required to evaluate every item in the file to determine its materiality or exculpatory nature. Despite due process protections, discovery violations persist, and individuals continue to be wrongfully convicted. Moreover, while *Brady v. Maryland* provides a basic framework for disclosing exculpatory material, it has evolved into a post-trial corrective tool more than a practical pre-trial tool useful for preventing wrongful convictions.[15]

BRADY EVIDENCE

In 1963, the United States Supreme Court issued a landmark decision in *Brady v. Maryland*, a case in which the prosecution withheld important exculpatory evidence from the defense. The Court found the failure to disclose relevant exculpatory information, or information that would tend to negate guilt, to be a violation of the defendant's due process rights, ruling that the prosecution must provide the defense with any evidence in its possession that is material to the defendant's guilt or punishment.[16] In short, the prosecution must turn over all material evidence to the

defense prior to trial. In addition, *Brady* holds that prosecutors can be held in violation regardless of whether the suppression of evidence was malicious in its intent.

Subsequent cases have narrowed *Brady*, including *Kyles v. Whitley*, in which the defendant was convicted of capital murder and sentenced to death. In *Kyles*, the Supreme Court found that "constitutional error" occurs only in cases where there is a "reasonable probability" that the outcome would have been different if the evidence had been disclosed prior to trial.[17] In the *Kyles* case, it took multiple state and federal habeas proceedings before all of the exculpatory evidence was discovered by the defense. Unfortunately, the *Kyles* case did not provide prosecutors with any additional *practical* guidance about their pre-trial obligations to disclose exculpatory material. Instead it set a standard for appellate courts to use in deciding whether or not a failure to disclose was bad enough to warrant overturning a conviction.

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FEDERAL CIVIL DISCOVERY — A BETTER MODEL

While federal criminal discovery rules are restrictive and inadequate, rules for civil cases are expansive and serve as a model for effective justice. In federal civil cases, plaintiffs and defendants are under a mandatory obligation to exchange information. That information includes the name, phone numbers, and address of every person likely to have discoverable material and a copy of all documents and tangible evidence in their possession, custody, or control which may be used at trial. A mandatory obligation means that no motion for discovery needs to be filed in court prior to discoverable materials being exchanged. In addition to mandatory discovery, civil statutes also stipulate that counsel must exchange information about expert witnesses, including a copy of all opinions and their basis, their qualifications, and any financial compensation they receive in exchange for their opinions or testimony. The sequence for this discovery is determined by the judge, but must be at least ninety days prior to the start of trial. Other discoverable information in civil cases includes a list of witnesses, including their phone numbers and address; the designation of witnesses whose testimony is expected to be given by deposition; and the identification and summary of other evidence that the party expects to offer. Materials in these categories must be exchanged at least thirty days prior to trial. Federal civil rules also provide for opportunities to depose witnesses.[18]

LIMITED DISCOVERY SUBVERTS THE EFFECTIVENESS OF THE ADVERSARIAL SYSTEM

Our adversarial system of justice is based on the notion that the state's case must be subject to vigorous scrutiny and challenge in order to test the validity of the evidence and to enable the fact-finder — whether judge or jury — to ascertain the truth of the matters in question and reach a just outcome in a fully informed manner. Restrictive discovery inhibits that process by undermining the ability of lawyers to prepare adequately for the case at hand. Expanded discovery alone, however, cannot realize these benefits without well-trained and adequately funded attorneys on both sides to implement the policies and use the information appropriately.

Brady v. Maryland represented a landmark improvement for the criminal justice system, but more steps are needed. *Brady* alone does not ensure a safer and more effective criminal justice system if it is not accompanied by timely, mandatory, traceable, and open-file discovery. But like many reforms, expanded discovery requires remedies for non-compliance as well as adequate counsel who can implement the policies and use the information to effectively challenge the evidence.

The goal of expanded discovery laws is to improve procedural transparency and to ensure both the fairness of a trial and of the outcome. The right to effective counsel is an essential safeguard against wrongful imprisonment and plays a vital role in ensuring that the benefits of discovery procedures are realized.

FEDERAL CRIMINAL DISCOVERY — A STEP BACK

Unlike the civil side, the federal rules for criminal discovery are much more restrictive. Discoverable material includes any relevant written or recorded statements made by the defendant in the possession or control of the state; statements made during interrogation; and the defendant's recorded statement made during a grand jury hearing. The substance of oral statements made by the defendant, and a copy of the defendant's record, are also discoverable. Evidence including books, papers, data, tangible objects, and places are subject to inspection and may be copied or photographed so long as they are material to the defense's case and were obtained from or belonged to the defense, and are being used by the prosecution in its case-in-chief at trial. The defense must also be allowed to inspect and copy the results of mental and physical examinations, tests, or experiments; and the defense must receive a summary of any expert witness testimony the state expects to use at trial.[19]

In contrast with civil discovery, criminal discovery is not mandatory and thus is produced only at the request of the defense, and there are no preset timelines specifying how far in advance of the trial material must be exchanged. In addition, the govenment is not required to provide the defense with witness lists or the statements of any co-defendants. Even the treatment of expert witnesses is dramatically different.[20] According to Federal Rules of Civil Procedure, expert witnesses must provide opposing counsel with their qualifications, all published materials from the past ten years, and a report of all opinions and their basis; whereas the Federal Rules of Criminal Procedure only requires expert witnesses to provide a summary of their testimony.[21]

STATE PRACTICES VARY WIDELY

Pretrial discovery can be mandated by any of five different authorities: statute, court rule, the judiciary's "inherent right to grant discovery when necessary to achieve justice," common law, and the Constitution.[22] In most jurisdictions, court rules or state statutes govern criminal discovery. These rules establish timelines for discovery and define what evidence is subject to discovery.

States vary widely in their approach to criminal discovery, including rulings on procedure, timing, and what evidence qualifies for discovery. As of 2004, approximately one-third of the states (including California, Florida, New Jersey, Illinois, Michigan, and Pennsylvania) have implemented discovery rules modeled on the ABA standards. About a dozen states have discovery rules similar to the more restrictive federal criminal case rules. The remaining states fall between these two standards.[23]

Providing witness statements prior to cross examination, sometimes only after a witness has testified, means that the defense has only minutes to prepare for cross-examination, creating an environment of "trial by ambush."

For example, a key difference between the Federal criminal rules and ABA standards is in the treatment of discovery pertaining to witness lists and pretrial investigations: under Federal rules, this information is only provided prior to cross-examination, assuming a case goes to trial.[24] Providing witness statements prior to cross examination, sometimes only after a witness has testified, means that the defense has only minutes to prepare for cross-examination, creating an environment of "trial by ambush."

Some states have enacted broad or open-file discovery for criminal cases, but have limited it to the appeals process and not during the pre-trial proceedings. North Carolina, for example, enacted open-file legislation for death row inmates in 1996, which provided death row inmates with significantly better access to the prosecution's files. Between 1996 and 2004, five death row inmates were exonerated in North Carolina, including Alan Gell, who was acquitted in a second trial in 2004 after spending nine years in prison. In response, the North Carolina General Assembly further reformed its discovery laws for criminal cases expanding them to more closely mirror the state's laws regulating civil cases and requiring an open-file policy at the trial level.[25]

BENEFITS & COSTS

BENEFITS TO EXPANDED DISCOVERY

It is in the best interest of all parties — the defense, the prosecution, and the public — that strong safeguards exist to protect against wrongful imprisonment and reduce the number of convictions overturned on appeal. Broad and open discovery, by allowing greater access to the facts of the case, dramatically increases the reliability of outcomes in criminal cases, resulting in greater public confidence in the criminal justice system and enhanced public safety.

Early discovery, especially in cases with early plea bargaining, will likely result in fewer trials and save states potentially millions of dollars. Automatic, mandatory discovery also leads to greater efficiency in the criminal justice system by reducing the need for pretrial discovery motions, thereby saving attorneys, judges, and court personnel time and expense.

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According to a 2003 survey by the Kansas Legislative Audit Post, the costs of trying a case for which the death penalty is sought are seventy percent higher than comparable cases where the state is seeking life in prison. The majority of these costs are incurred prior to and during the trial as a result of the state's investigations and in establishing a jury. In cases where convictions are overturned or cases are returned for resentencing, the state also incurs the costs of a new trial, including new investigations, tests, expert witnesses, and jury selections. By increasing plea bargains, shortening trials, and ensuring the best use of the state's investigative and administrative costs, expanded discovery ensures that available resources will be used to capture the actual perpetrator before more people are victimized.

The advent of DNA technology has uncovered a variety of systemic vulnerabilities within the criminal justice system, including the lack of adequate discovery, that can lead to wrongful convictions. Full and open discovery allows exculpatory evidence to come to light and can prevent further injustices. While inadequate discovery is detrimental to all defendants, innocent defendants are particularly vulnerable. Expanded discovery is necessary to protect against wrongful convictions by ensuring that defendants are able to ascertain all of the evidence against them and mount a proper defense, especially when they know nothing of the crime at hand.

COSTS OF EXPANDED CRIMINAL DISCOVERY

Most states have statutes allowing for limited discovery in criminal cases during pre-trial procedures, and some states also grant inmates expanded discovery or open-file discovery during the appeals process. Initial expenses to implement expanded discovery would be minimal. Initial expenses would primarily derive from additional training concerning the types of evidence subject to discovery and the manner in which it must be disclosed. Initial expenses are offset by overall cost savings of improved efficiency of the courts, including fewer reversals on appeal, fewer court motions for disclosure, and more efficient plea negotiations resulting in earlier case resolutions.

For example, Florida has adopted rules similar to the ABA standards — including the opportunity to conduct depositions in criminal cases, a rule in place in Florida for forty years. A 1989 report by the Florida Supreme Court's Criminal Discovery Commission found that taking of depositions was not cost prohibitive, and it made a "unique and significant contribution to a fair and economically efficient … criminal process."[26]

Inadequate discovery is costly even when a person is rightfully convicted, and wrongful convictions are costlier still on many levels. Sufficient discovery laws can help avoid a lengthy appeals process and allow more expedited discovery. Meanwhile, lawsuits based on civil rights violations resulting from exonerations cost states millions of dollars. Worse still, each wrongful conviction jeopardizes public confidence in the criminal justice system. This says nothing of the cost to society when an innocent person is imprisoned and the true perpetrator remains at large. The safeguard of expanded discovery in criminal cases emerges as a low cost, high benefit public policy.

PROFILES OF INJUSTICE

Earl Charles's Story

Earl Charles spent nearly four years in prison after being wrongfully convicted of double murder. During his trial, evidence of the suggestive nature of the identification procedures and vital information on the informant's incentive to lie was not disclosed to the defense. Independent evidence showing he was in another state at the time of the crime eventually helped exonerate Charles, and during civil litigation, the suppressed evidence finally came to light.

In May of 1975, a jury convicted Earl Charles of murdering Max and Fred Rosenstein in a furniture store in Savannah, Georgia on October 3, 1974.[27] Charles was sentenced to die by electrocution. Despite the conviction, Charles maintained his innocence until his exoneration in 1978. Critical exculpatory information was never given to the defense until years after his conviction.

THE EYEWITNESSES

The only eyewitnesses to the crime were the surviving victims: Myra Rosenstein, who was unable to offer any description to the police; and Bessie Corcelius, who could provide only a general description of the assailants. The slugs recovered from the victims, some fingerprints, and Corcelius's description comprised the only available leads.

The police initially focused on Earl Charles because of his prior record and their mistaken belief that he left town shortly after the murders. In reality, he had moved from Savannah to Tampa, Florida a month before the murders, along with his neighbor Michael Williams and Williams' girlfriend. While in Tampa, the men briefly worked at a Kwik Pep gas station managed by Robert Zachery.

Several weeks later, police in Florida took Charles, Williams, and two others into custody for the Savannah murders. One of the other men, James Nixon, would eventually provide testimony implicating Charles. Though neither witness had been able to make a positive identification, Savannah detective F.W. Wade took both Myra Rosenstein and Corcelius to Florida to provide the identification needed to extradite Earl Charles and Michael Williams to Georgia. Despite their repeated failure to identify Charles when presented with his photograph, both witnesses pointed him out of a lineup as the shooter during extradition proceedings. In fact, Myra Rosenstein acknowledged that, "I could have made a mistake."[28] Although the identification testimony was dangerously problematic, it went unchallenged during the trial.

Despite their repeated failure to identify Charles when presented with his photograph, both witnesses pointed him out of a lineup as the shooter during extradition proceedings.

UNDISCLOSED EVIDENCE

The witnesses' repeated failure to identify Earl Charles from the mug books and the overall suggestive nature of the identification process was not disclosed to the defense before trial.[29] In addition, when police later showed the witnesses another more recent photo of Charles, they again failed to identify him as the assailant, another fact that went undisclosed to the defense.

Although both witnesses eventually testified with confidence at trial, their initial hesitations were not disclosed. The defense was thus unaware that the witnesses had repeatedly failed to identify Charles in the days following the crime and therefore did not have the information available to challenge the identifications or present evidence to the jury of the suggestive nature of the identification procedures.

Most importantly, the defense did not receive complete and accurate information regarding a jailhouse snitch whose testimony proved to be pivotal in Charles's wrongful conviction. The testimony of James Nixon, who claimed Charles had bragged about shooting "a man and a little boy" in a furniture store in Savannah, constituted a strong piece of the prosecution's case.

THE TRIAL

At trial, Nixon would insist that he had no deal with authorities in which he would benefit in exchange for his testimony. In fact, it was not discov-

ered until the civil trial that Detective Wade had, in fact, written the Governor of Florida recommending Nixon be released from prison because of his help in convicting Earl Charles. Letter correspondence between Detective Wade and James Nixon also illustrated that Nixon expected help towards his release in exchange for his testimony.

Because this evidence was excluded during pretrial discovery procedures, Charles' defense attorneys were unable to offer this compelling evidence of Nixon's incentive to lie to the jury.

At trial, the prosecution relied on Nixon's testimony and the testimony of the eyewitnesses. Charles' defense rested on his strong alibi. He had been at work at the Kwik Pep gas station in Florida on the day of the crime, a fact supported by both his boss Robert Zachery and by Zachery's boss, who provided time cards and paycheck records.

Detective Wade contradicted Zachery's testimony, claiming Zachery told him the young men were not at work on the day in question. The jury believed the police officer and the eyewitnesses, and Charles was convicted and sentenced to death.[30]

EXONERATION

Charles' mother was a tireless advocate for her son and continued to call upon Zachery for assistance. Zachery mentioned the communications to his friend, Deputy Sheriff Harvey, who had been patrolling the Kwik Pep station in Florida. Harvey consulted the journal he kept of his daily rounds and discovered notes confirming that both men — Williams and Charles — were at work in Tampa at the time of the murders.

The Savannah District Attorney ordered a reinvestigation of the case in 1978. After confirming Deputy Harvey's information, prosecutors did not oppose Charles' motion for a new trial. His conviction was vacated, and all charges against him were dropped.[31] Charles was freed on July 5, 1978, nearly four years after his arrest and incarceration. By the time of the exoneration, the few leads available to authorities had gone cold, and the Rosensteins' true killers were never caught.

After the trial, Nixon recanted his testimony and admitted that Detective Wade had offered him leniency in exchange for testifying against Charles. Nixon's recantation was corroborated when Detective Wade's letter to the Governor and correspondence with Nixon surfaced during discovery in Charles' civil lawsuit.[32]

Additionally, Nixon revealed to Charles' lawyers that Detective Wade had supplied him with details of the murder. During the course of the civil trial, Charles' legal team discovered Detective Wade's report on his interview with Zachery. In it, he failed to make note of any assertion by Zachery against Charles' alibi, contradicting his own testimony.

Earl Charles struggled to put his life together in the years following his release, until he walked into the path of an oncoming car and was killed on February 3, 1991.[33]

Clarence Brandley's Story

Clarence Brandley, the superintendent janitor at a Texas high school, was wrongly convicted of the rape and murder of a young girl in 1980. During the investigation and subsequent trial, authorities did not disclose key evidence to the defense that placed other suspects at the scene of the crime. Instead, they focused their entire investigation and prosecution on Brandley. Brandley spent almost ten years on death row until finally being exonerated in 1990.

On the morning of August 23, 1980, Cheryl Dee Ferguson went missing during a volleyball tournament at Conroe High School. When it was discovered that she was missing, janitors searched the school. Two of the janitors, Henry "Icky" Peace and Clarence Brandley, discovered her body in the auditorium loft.[34] Brandley was the only African-American janitor, the others were white. Police interrogated Peace and Brandley together when, according to Peace, an investigator said, "One of you is going to have to hang for this," and then, turning to Brandley, added, "Since you're the nigger, you're elected."[35]

THE INVESTIGATION

In the face of public pressure to solve the crime, investigators publicly announced that they would arrest a suspect by the first day of classes, August 31, just eight days after the murder had occurred.[36] After an investigation that lasted less than three days,

Clarence Brandley was taken into custody and charged with the crime. The only evidence linking Brandley to the crime were the statements of the janitors who worked with him. They claimed they saw Brandley follow the victim into the bathroom shortly before her disappearance and that he was the only janitor with a key to the loft where the body was found.[37] Their statements were given after a "walk-through" of the crime scene with investigators, and there was evidence that they were intimidated into corroborating their stories. Peace reported abusive treatment from the lead investigator to the District Attorney's office, but they did nothing to stop his testimony from being heard at trial, or to correct the behavior of investigators.[38]

As late as 2002, prosecutors still maintained that Brandley was guilty. They have not apologized for his wrongful imprisonment, nor have they filed charges against any other suspects. In fact, no investigation into Acreman or Robinson was ever performed despite the strong evidence against them.

THE TRIAL

Brandley was convicted of capital murder, and sentenced to death in February of 1981, after a hung jury had not been able to return a verdict in a trial in December of 1980. Eleven months after Brandley was convicted and sentenced to death, his appellate lawyers discovered that exculpatory evidence was not only withheld during the trial, but had since disappeared while in the custody of the prosecution. This included a Caucasian pubic hair (Brandley is African American) and other hairs recovered from Ferguson's body that were neither hers nor Brandley's. Also missing were photographs taken of Brandley on the day of the crime showing that he was not wearing the belt the prosecution claimed had been the murder weapon.

The withheld and missing evidence was all the more troubling in light of the pretrial destruction of the spermatozoa. During the autopsy, the medical examiner discovered the existence of semen on the victim, but the state failed to run an analysis on the sample. Even in 1980, it was police procedure to preserve vaginal swabs taken in sexual assault investigations in order to exclude suspects based on blood type, Rh factor, and other genetic characteristics. However, by the time of the trial, the vaginal swabs taken from the victim had been lost or destroyed.[39]

Brandley's attorneys effectively articulated the willful destruction and disappearance of the potentially exculpatory evidence in Brandley's appellate briefs, but the Texas Court of Criminal Appeals affirmed the conviction and death sentence in 1985 without mentioning the issue.

Another janitor, John Sessum, testified at the first trial, corroborating the story of the other custodians, but in a subsequent evidentiary hearing he recanted what he had said at trial. At the hearing he claimed to have seen Acreman, another janitor, follow the victim up a staircase towards the auditorium, hearing her scream "No" and "Don't."[40] He testified that Acreman warned him not to tell anyone what he had seen on the night of the murder. Despite Acreman's threats, Sessum told Wesley Styles, the lead investigator. Styles threatened to arrest him if he did not corroborate Acreman's story.[41]

The suppression of evidence continued in 1986. Brenda Medina told her attorney that on the day of the crime James Dexter Robinson, one of the other janitors, confessed to her that he had murdered a girl. Medina's attorney informed the district attorney's office of this development, but the district attorney did not pass this important information on to Brandley's defense attorneys. When Medina's attorney realized this, he took it upon himself to notify Brandley's attorneys of the confession.[42]

Cheryl Bradford, a student at the school, contacted authorities shortly after the incident, and again after seeing a televised program questioning the validity of Brandley's conviction and airing a picture of Robinson. She told authorities that she saw two men who fit descriptions of Acreman and Robinson, rushing through the gymnasium around the time of the murder. Investigators neither followed this lead nor shared this information with Brandley's defense lawyers. The other janitor who found Ferguson's body

with Brandley gave similar testimony placing Acreman near the scene of the crime, but this lead was ignored by investigators and hidden from the defense.[43]

THE EXONERATION & CIVIL SUIT

In a 1987 evidentiary hearing, State District Judge Perry Picket recommended that the Court of Criminal Appeals grant Brandley a new trial, declaring: "The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion the pervasive shadow of darkness has obscured the light of fundamental decency and human rights." He continued to say, "In the thirty years this court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, [and] witness intimidation. . . .The continued incarceration of Clarence Lee Brandley under these circumstances is an affront to the basic notion of fairness and justice."[44]

The Court of Criminal Appeals, after sitting on the case for fourteen months, finally accepted Picket's recommendation with a sharply split *en banc* decision on December 13, 1989. In the majority opinion, Judge Berchelmann wrote: "The state's investigative procedure produced a trial lacking the rudiments of fairness. The principles of due process, embodied within the United States Constitution, must not, indeed cannot, countenance such blatant unfairness. The violent end of Cheryl Ferguson's young life is both senseless and tragic… Our outrage over her murder, however, cannot justify the subversion of justice that took place during the investigation."[45] Brandley was released on January 23, 1990.[46]

The prosecution appealed, delaying disposition of the case another ten months. But within hours of the U.S. Supreme Court's denial of *certiorari* on October 1, 1990, the prosecution dropped all charges.[47]

As late as 2002, prosecutors still maintained that Brandley was guilty. They have not apologized for his wrongful imprisonment, nor have they filed charges against any other suspects. In fact, no investigation into Acreman or Robinson was ever performed despite the strong evidence against them.[48] Brandley filed a $120 million lawsuit against several state agencies, but the case was dismissed because of state sovereign immunity.[49]

Michael Evans & Paul Terry

Michael Evans and Paul Terry each spent 27 years in prison after being wrongfully convicted of the rape and murder of a young girl in 1976. The convictions of Evans and Terry followed trials in which material evidence concerning the sole eyewitness had been withheld from their attorneys. In 2003, Evans and Terry were released after DNA testing exonerated both men, and in January 2005, they were granted a full pardon by Illinois governor Rod Blagojevich.

In 1976, Michael Evans and Paul Terry were arrested for a murder they did not commit based on eyewitness identification. Both men were convicted because defense lawyers were not given exculpatory information which would have cast down on the testimony of the sole eyewitness.

IDENTIFICATION PROCEDURE

On January 19, 1976, five days after the rape and murder of nine-year-old Lisa Cabassa, Judith Januszewski came forward as a witness to the crime. The police asked Januszewski to come to the police station, where she was questioned about what she had witnessed, and her statements were recorded in a police report. During the interview, Januszewski stated that she left work "at approximately 6:37 pm" and began walking home. Although it was dark, and Januszewski was not wearing her glasses,[50] she stated to the police that she had seen two black men pulling a young girl towards an alley on the day Lisa Cabassa was murdered.[51]

On February 6, 1976, police wrote a supplemental report concerning the substance of Januszewski's interview on January 19. This report contained several significant changes from the previous police report. Most notably, in the February 6 report, Januszewski is said to have told police that she had left work a little after 8:00 pm, not 6:37 pm.[52] The February 6 report also stated that she had seen a third black man on the night of the murder. Additionally, according to the February 6 report, Januszewski stated that she was not able to see the girl's face well and did not name the girl she saw as Lisa Cabassa, despite the fact that she knew Lisa. Moreover, the February 6 report also stat-

ed that Januszewski had told the police that she was not sure whether what she witnessed was Lisa Cabassa's abduction or instead "an older brother bringing his sister home."[53]

After insisting for weeks to the police that she could not identify the men she had seen with the victim, on February 26, 1976 the police locked her in a "roach-infested" interrogation room for ten hours with no bathroom where they repeatedly asked her to give names for the men she had seen on the night of the crime.[54] The police officers offered the name "Michael Evans" to her as a possible suspect. These vital facts were not disclosed to Evans's attorneys.

Januszewski knew Evans because he would occasionally stop by the real estate office where Januszewski worked to visit a co-worker. On February 26, police officers were at Januszewski's workplace when Evans walked by. Januszewski pointed Evans out to the officers and he was arrested immediately and taken to the police station. Januszewski was also taken to the station and placed in an interrogation room next to Evans. Although Januszewski had initially insisted that she did not recognize the men she saw on the night of the crime, she identified Michael Evans as one of the men she had seen that night.

> Both men were convicted because defense lawyers were not given exculpatory information which would have cast down on the testimony of the sole eyewitness.

THE TRIALS

In June 1976, Evans was prosecuted on rape and murder charges. Evans' attorney moved to suppress the identification and arrest, but both motions were denied. In a bench trial before Judge Earl Strayhorn, Evans was found guilty, despite the limited evidence against him. In fact, in a response brief, police officers later stated, "The prosecution's case rested entirely on the testimony of Ms. Januszewski."[55] On September 27, 1976, Judge Strayhorn granted Evans' motion for a new trial, finding that the prosecution had failed to disclose material information prior to trial thereby violating Evans' right to a fair trial. Most significantly, Evans' attorney was not told that Januszewski had contacted the reward hotline instead of the police, and that Januszewski had been paid $1,250 by the Illinois Law Enforcement Commission, after identifying Evans.[56] This important information concerning Januszewski's possible incentive to lie was not shared with the defense before trial.

Police continued to search for other suspects in the case, and more than nine months after Evans' conviction, showed a teenager from Lisa Cabassa's neighborhood a composite sketch, prepared from the information Januszewski had provided police. The teenager identified the suspect as Paul Terry. Terry was then placed in a line-up, and Januszewski identified him as the second man she had seen with Lisa Cabassa. On November 17, 1976, Paul Terry was arrested and charged with the rape and murder of Lisa Cabassa. Evans and Terry were tried together (Evans for a second time) before a jury, and on April 27, 1977 they were convicted of murder, aggravated kidnapping, rape and sexual assault. They were each sentenced to 400 years in prison.

Evans and Terry appealed the convictions. On December 4, 1979, the First District Illinois Appellate Court affirmed the convictions and sentences. Evans and Terry requested a rehearing, which was also denied on February 14, 1980.

THE EXONERATIONS

With the help of the staff at the Center on Wrongful Convictions at Northwestern University School of Law, Evans filed a motion for DNA testing in October 2001. The DNA results excluded Evans and Terry as the source of the DNA found on the rectal swab taken from the victim. On May 23, 2003, both Evans' and Terry's convictions were vacated. On August 22, 2003, their charges were dropped and both men were released from prison. On January 6, 2005, Governor Rod Blagojevich granted both men pardons based on innocence, saying, "Serving time in prison — years in some cases — for a crime you didn't commit is one of the worst things that could happen to someone… Thanks to DNA technology, these [two] men were exonerated. A pardon will help each of them rebuild their lives, and that's why I granted them."[57]

On May 24, 2004, Evans and Terry filed lawsuits against the City of Chicago and individual police offi-

cers. At depositions taken of Januszewski and her former husband, Harry Januszewski, new information concerning the criminal case came to light, further indicating that exculpatory evidence was withheld prior to their trial. Harry Januszewski stated that he had been suspicious about his wife's involvement with the police. He claimed that his attempts to inform the police that his wife had a history of lying and petty fraud were ignored. Additionally, when he accompanied his wife to court in order to raise his concerns with the prosecutors, he was detained in a holding room, away from the proceedings, until court was adjourned for the day. None of these facts were discovered by the defense until their civil suit. Expanded discovery laws would have obligated prosecutors to disclose these facts to Evans's attorneys during the criminal trial.

Both Evans and Terry filed lawsuits for wrongful imprisonment. In August 2006, the jury in Evans' case denied his claims. Evans has received $160,000 from the state as compensation for twenty-seven years of false imprisonment, and he has an appeal pending in the Seventh Circuit. Terry's case is also pending in the Circuit Court of Cook County. In the end, both men failed to receive fair and just trials because prosecutors did not give the defense access to exculpatory information that would have cast doubt on the testimony of the single eyewitness.

SNAPSHOTS OF SUCCESS

The need for expanded discovery in criminal cases is essential to having a more fair and accurate criminal justice system. In addition, expanded discovery in criminal cases protects a defendant's right to due process. States like North Carolina, Florida, Colorado, New Jersey, and Arizona are great examples of reform in this area. As detailed below, these states have enacted legislation that expands discovery in criminal cases.

NORTH CAROLINA

Prior to 1963, prosecutors in North Carolina weren't required to provide the defense with any evidence favorable to the defendant. In the 1970's, the General Assembly enacted minimum discovery standards during the trial phase; although an improvement, these standards did not go far enough to protect a defendant's right to due process. For example, under the minimum standards, the prosecution was required to turn over prior statements by witnesses — but not until after they had testified, leaving the defense only minutes to prepare for cross-examination, and creating an air of "trial by ambush."

In 1996, North Carolina passed legislation granting death row inmates full access to police and prosecution files during the appeals process. In the five years following the enactment of the legislation, the convictions of five death row inmates were overturned, and the inmates were granted new trials and eventually exonerated. In all five cases, the prosecution in the original trials had suppressed material evidence including witness statements and deals with jailhouse informants.

Following the 1996 legislation, a number of prosecutors began voluntarily sharing their files with the defense at the trial stage, including Robenson Country District Attorney Johnson Britt, who told the *Raleigh News & Observer*; "if it's in my file, the defense attorneys get it. If it's in the law enforcement file, they get it."[58] In 2004, the General Assembly passed open-file discovery legislation, granting the defense pre-trial access to the prosecution's files including police reports and witness statements.

FLORIDA

Florida has adopted broad rules regulating discovery in criminal cases similar to the ABA model. Florida is one of the few states to have adopted the practice of deposing witnesses in criminal cases — similar to the civil practice — a rule the state has had for more than forty years. Under current law, only depositions taken to perpetuate testimony may be submitted as substantive evidence. A defendant has the right to be present during a deposition performed by the state to be submitted as evidence against the defense.

The state places all witnesses in one of three categories, which determine whether the defense has the

right to a) an unlimited option to depose, b) deposition upon court approval, or c) no opportunity for deposition. Under Florida law, the defense may freely depose eyewitnesses, alibi witnesses, witnesses present during the making of defendants' statements, investigating officers, witnesses known to the prosecution to have evidence negating the guilt of the defendant, and (under certain circumstances) expert witnesses. Similarly the prosecution may depose any defense witness to be called during a trial or hearing. Criminal discovery laws passed in 1996 made it no longer necessary to subpoena investigating officers for deposition. Florida also requires a "Richardson hearing" be held in cases of discovery violations, to assess which sanction should be imposed. The court must determine whether and to what extent the violation has prejudiced the opposing party and make a formal inquiry into all the circumstances surrounding the violation.[59]

COLORADO

Colorado has enacted broad discovery laws based on the ABA standards, including the use of depositions and clearly defined rules outlining what evidence qualifies as discoverable. Colorado's statutes also establish a procedure for the exchange of discoverable information that includes filing with the court compliance certificates itemizing evidence produced for opposing counsel.[60]

Colorado's statutes also make clear that the state is under a continuing mandatory obligation to disclose evidence it secures, including witness lists, police reports, expert statements, any electronic surveillance of conversations involving the accused, written statements of the defendant and co-defendant, and the substance of any oral statements, as well as any and all mitigating or exculpatory evidence. Mandatory discovery laws mean the state must produce qualifying materials without the need for the defense to file discovery motions.[61]

Finally, state statutes allow the court to establish timelines for discovery, so long as evidence is produced at least thirty days prior to the beginning of a trial. The regulations also allow the court to grant discretionary disclosure of evidence not specifically outlined as mandatory. According to the law, the prosecution is not under an obligation to share any work product or to provide the defense with the names of informants where their identification is a prosecution secret, and the failure to disclose does not result in a violation of the defendant's constitutional rights.[62]

NEW JERSEY

Ninety-five percent of cases never go to trial, and in many cases the defense may have limited access to evidence against their client. In cases where the prosecution has made pre-indictment plea offers in New Jersey, however, state law allows the defense to request to inspect and copy or photograph relevant evidence that would otherwise have been discoverable had the case gone to trial. Because the court often plays no role in negotiating the terms of plea agreements, fair and appropriate deals are more likely when the defense can view material evidence.

Additionally, prosecutors are required to disclose the names of all people with relevant information relating to the crime, not only the witnesses they plan to call.[63]

New Jersey has additional rules regulating discovery in capital cases. In addition to the discovery already required by the state, a prosecutor in a capital case must provide the defense with the indictment containing the aggravating factors that the state intends to prove during the penalty phase, along with all discovery relevant to proving these factors. The prosecutor must also provide the defense with any discovery in the possession of the prosecution relevant to the existence of mitigating factors. Such exchange is reciprocal, and the defense must likewise provide the state with an itemization of the mitigating factors the defendant intends to present at sentencing, along with any relevant discovery to support those factors. The statute also makes clear that in capital cases, the disclosure of discovery relevant to the existence of either aggravating or mitigating factors is the ongoing responsibility of both parties.[64]

ARIZONA

Through amendments to the criminal procedure rules in 2003, Arizona has recognized the defense's early need for certain items relating to discovery in order to mount an adequate defense. The amended rules provide automatic discovery of all reports from law enforcement related to the defendant's crime and names and addresses of experts used by the prosecution. This discovery must take place at arraignment, which provides defense with a greater amount of time to prepare their case and strategies. In addition to this

early automatic discovery, Arizona's statute requires automatic disclosure of an expansive list of material. The list includes but is not limited to names and statements of prosecution witnesses, statements of the defendant and any accomplices, and aggravating and mitigating evidence. Additionally, the 2003 amendment states that a defendant can file a motion for discovery of additional items if needed.

The statute also specifies more clearly the prosecutor's obligation to obtain and provide materials for discovery to the defense. As a result, the prosecution must automatically disclose all prior felony convictions of any witnesses they intend to call during the trial. This particular reform illustrates the duty of the prosecution to provide information to the defense that is not readily available.[65]

VOICES OF SUPPORT

"The truth is more likely to come out at trial if there has been an opportunity for the defense to investigate the evidence."[66]

William J. Brennan
former U.S. Supreme Court Justice
Tyrell Williams Memorial Lecture

"In fairness to the defendant. . . the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty."[67]

Supreme Court of Virginia
Peterson v. Commonwealth, 1983

"The underlying assumption of public comments objecting to changes in discovery procedures seems to be that the benefits of new discovery procedures do not justify the burdens imposed on prosecutors and the potential for delay in capital trials. The committee submits that taking the extra step to insure a fair trial the first time is justified by moral and practical considerations. One capital case in which a retrial is avoided by better discovery procedures will offset the marginal increase in effort needed to comply with the new Rules in many others."[68]

Illinois Supreme Court's
Special Committee on Capital Cases
Commission on Capital Punishment

"The stakes are high. . . . [T]he injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered."[69]

Byron White
U.S. Supreme Court Justice
Imbler v. Pachtman

"A rule of open-file discovery would have the great benefit of avoiding an unworkable system of case-by-case inquiry into individual restrictive discovery claims, a method that is likely to lead to underenforcement of the right to effective assistance. In addition, the costs of open-file discovery are very low. . . . While there may be administrative costs to open-file discovery, since such a rule will lead to more discovery generally and to discovery in cases with early plea bargains in which it may not have otherwise occurred, there will be a corresponding savings in the probability that pleas will happen earlier if the defendant has an opportunity to view the government's evidence. In short, the high benefits and low costs to the prophylactic rule of open-file discovery make such a remedy particularly appropriate to cure Sixth Amendment violations resulting from restrictive discovery."[70]

Jenny Roberts
Syracuse University
Fordham Urban Law Journal, May 2004

"One attribute of military justice is 'open-file' discovery. Military jurists pride themselves that the counsel in courts martial do not 'hide the ball' from their opponents. . . . Pretrial preparation and adherence to rules of court are essential to an orderly presentation of evidence at trial. An orderly presentation of evidence allows the court to focus on relevant issues."[71]

Lt. Col. Gary J. Holland
Circuit Judge
United States Army Trial Judiciary Army Lawyer, 1993

"The prosecutor in a criminal case shall. . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[72]

American Bar Association
Model Rules of Professional Conduct

"The state has all the cards and they're holding all the cards. The district attorney is the arbiter of what is favorable [evidence]. If he doesn't think it's favorable, then you don't get it. In some cases, you're limited from seeing anything."[73]

Phillip Wischkaemper
Texas Criminal Defense Lawyers Association
Kvue.com, Austin state news

"I found that, as a prosecutor in the McVeigh and Nichols case, what really saved our conviction at the very end was that we did have open-file discovery and that the defense had access to all the information and that, honestly, we couldn't have known at some points whether it was Brady or not. And only by sharing all of it with the other side were we able to know that they could pursue whatever they thought was appropriate during the pre-trial phase."[74]

Elizabeth Wilkinson
Former Chief of the Terrorism and Violent Crime Section of the US Department of Justice
Senate Judiciary Committee, June 27, 2001

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[75]

George Sutherland
U.S. Supreme Court Justice
Berger v. United States, 1935

"Regardless of whether a particular jurisdiction provides open-file discovery in ordinary criminal litigation, discovery should be full and open in capital cases. If necessary, separate discovery statutes should be enacted to cover death penalty cases. In all jurisdictions, the rule in capital cases should be full, open-file discovery under which, at an early state, all documents, information, and materials available to the prosecution are automatically and routinely made available to the defense."[76]

Mandatory Justice: The Death Penalty Revisited
The Constitution Project, 2006

"On the whole, more open and earlier disclosure of discoverable material without formal demand or motion is the preferred practice among all sectors of the Criminal Courts' practice. The burden on the defense, prosecution, and judiciary — in terms of time and resources devoted to drafting, responding and deciding formal demands — appears to prolong the process and delay informed decision-making toward ultimate case disposition until later in the process. It also decreases overall satisfaction with the efficient performance of our high-volume system and may in fact hinder the expeditious disposition of cases."[77]

New York County Lawyers' Association
Press Release, March 2006

"If there is evidence sufficient to convict someone beyond a reasonable doubt, there is nothing to fear about opening the file to the defense."[78]

James Coleman
Duke Law
Raleigh News & Observer, November 16, 2003

"There is a greater chance of upholding the conviction on appeal if all prosecutors handled this [discovery] in the same way. If you have to provide open-file discovery post-conviction you might as well do it at trial in order to reduce the chance of a conviction being overturned."[79]

Roy Cooper
North Carolina Attorney General
Raleigh News & Observer, November 16, 2003

"And 'open-file' discovery policies — where the police and prosecutors share all the evidence they have collected with the defense — would ensure that any evidence, including evidence helpful to the defense, is disclosed. Many prosecutors who already have adopted 'open-file' policies support them, in part, because they encourage defendants to plead guilty once they are aware of the strength of the government's evidence."[80]

John Gould
Professor of Law, George Mason University
The Richmond Times Dispatch, April 12, 2005

QUESTIONS & ANSWERS

Why are open-file discovery laws needed? Aren't limited discovery laws sufficient?

The defense needs to have access to all material evidence in the possession of the prosecution or any third party investigatory agencies, both to ensure a fair outcome and to protect the defendant's right to due process. Limited discovery during the trial phase creates the risk that some material evidence will be provided without adequate time for appropriate use, or even missed entirely. For example, if defense attorneys aren't provided with witness statements until after the witness has testified, they have only moments to prepare for cross-examination.

Unlike criminal cases, discovery laws regulating civil suits allow for open-file access to the opposing counsel's files including witness statements, police reports, and insurance information; this open-file access is even more critical in cases where a defendant's liberty — or even life — is at risk.

In addition to an open-file policy, the ABA standards provide a model for discovery statutes, because they present a clear enumeration of what evidence must be exchanged, including written statements made by the defendant or co-defendant, witness lists, expert witnesses, and the inspection of physical evidence.

Many states grant defendants open-file access to the prosecution's files during the appeals process. Why should open-file access be extended to the trial phase?

Innocent suspects should not have to wait for the appeals process for the court to determine that they are not guilty. By making discovery available to the defense at the outset of the criminal process, defendants are able to argue their innocence effectively and the court can avoid wrongfully convicting them in the first place. North Carolina's experience highlights this problem. In 1996, North Carolina passed legislation granting death row inmates open-file access to police reports and prosecutors' files during the appeals process; then in 2004, after five capital cases were overturned due to suppressed evidence, the state General Assembly enacted legislation granting open-file access to all felony cases. In the interim between 1996 and 2004, many prosecutors had begun to share information with the defense voluntarily, believing it made the trial process more efficient and that convictions were more likely to be upheld during an appeal. In the words of North Carolina Attorney General Roy Cooper, "If you have to provide open-file discovery post-conviction, you might as well do it at trial in order to reduce the chance of a conviction being overturned."[81]

Why are the current standards requiring the prosecution to turn over material evidence insufficient?

In the 1963 case, *Brady v. Maryland*, the Supreme Court established that the prosecution must submit all exculpatory evidence to the defense prior to trial. While the Court specified that the material must be turned over in a timely manner, it did not define what amounts to "timely." Subsequent cases *(i.e., Kyles v. Whitley)* narrowed this standard, stating that only material which would have changed the outcome of a trial constitutes material evidence. Taken together, these rulings require a predictive determination of what evidence meets the materiality requirement, and prosecutors may inadvertently suppress evidence due to unfamiliarity with the defense's case and inability to forecast what evidence may prove material in the context of the defense strategy. This creates competing roles for the prosecutor, who must both try the defendant and anticipate what evidence may later prove to have changed case outcome.

In addition, the *Brady* ruling only applies to cases that go to trial; in ninety-five percent of cases, however, the defendant pleads guilty in a plea bargain. Because *Brady* standards don't apply to the plea bargaining process, even innocent defendants may decide to plead because they are unaware of material evidence.[82]

Does open-file discovery place an undue burden on the prosecution?

Open-file discovery helps to require the strongest case possible for the prosecution. This makes the process more efficient and increases confidence in convictions, therefore reducing the likelihood of a conviction being overturned during appeals. C. Colon Willoughby, District Attorney in North Carolina's Wake County, believes that by sharing evidence, prosecutors can move cases faster and avoid the expense of trials — important considerations in areas with long court dockets. He says, "[Open-file discovery] is more likely to generate guilty pleas. If you have good evidence, the lawyer tells the client to plead guilty."[83]

Does open-file discovery require the prosecution to disclose privileged information?

Open-file discovery applies to evidence possessed by the prosecution, including witness statements, information relating to lineups, personal belongings of the defendant to be submitted as evidence, evidence negating guilt, and expert and police reports. It does not apply to notes, theories, opinions, conclusions, or legal research conducted by the prosecution. Disclosure of witnesses can also be denied by judges on a case by case basis in instances where there is a substantial risk of physical harm or intimidation.

Does open-file require the defense to turn over their evidence as well?

The burden to prove the defendant guilty beyond a reasonable doubt falls upon the state alone, and the information the defense may be required to disclose under reciprocal discovery is limited to notice of evidence and witnesses the defense intends to offer at trial. Moreover, the reciprocal discovery requirements made of defense counsel must be consistent both with a defender's constitutional role to advocate for a person who is presumed innocent until proven guilty and with a defendant's 5th amendment right against self-incrimination.

Some jurisdictions do require that both sides turn over information before trial. Reciprocal discovery is important in that both sides should have time to develop a response to the evidence presented by the other. Several states have requirements for reciprocal discovery under part of expansive discovery systems. The ABA standards require the defense to disclose certain information to the prosecution, including the names and addresses of all witnesses whom the defense intends to call at trial, and reports and statements made by experts as a result of physical or mental examinations which the defense intends to introduce at trial, as well as the qualifications of those experts, among other requirements.

Is it difficult to implement expanded discovery laws?

Expanded pre-trial discovery is not difficult to implement, especially since most states already have some form of discovery procedures in place. In fact, automatic discovery will cut down on court time and expense in that motions will not need to be filed for the appropriate pre-trial discovery to occur.

A MODEL POLICY

MODEL BILL FOR EXPANDED DISCOVERY IN CRIMINAL CASES[84]

Section I. Purpose.
Pretrial discovery procedures should, consistent with the constitutional rights of the defendant, promote the ascertainment of the truth in trials and resolutions by facilitating the full and free exchange of information such that prosecution and defense can be fully prepared for trial, provide the defendant with sufficient information to make an informed plea decision, and promote efficient resolution of the charges by reducing interruptions and complications during trial and avoiding unnecessary and repetitious trials.

Section II. Scope.
These standards should be applied in all criminal cases. Discovery procedures may be more limited than those described in these standards in cases involving minor offenses, provided the procedures are sufficient to permit the party to adequately investigate and prepare the case.

Section III. Definitions.

A. When used in this act, a "written statement"" of a person shall include:
   1. Any statement in writing that is made, signed, or adopted by that person; and
   2. The substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

B. When used in this act, an "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

Section IV. Discovery Obligations of the Prosecution.

A. Independent of motion or request, the prosecution must disclose any material or information within the prosecutor's possession or control that *could be*, *should be*, *or is known to negate the guilt of the defendant* as to the offense charged or that would tend to reduce the punishment of the defendant.

B. Independent of motion or request, and regardless of whether the prosecution determines material to be relevant, irrelevant, inculpatory, or exculpatory, the prosecution shall disclose the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes, but is not limited to:
   1. All written and all oral statements made by the defendant or any co-defendant, and the names and addresses of any witnesses to such statements. This shall be disclosed regardless of when the statement was made, and any oral statement must be memorialized in writing.
   2. The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person. The prosecution shall also identify the persons it intends to call as witnesses at trial, even if the prosecution intends to call the witness as a rebuttal or character witness.
   3. All written and all oral statements made by witnesses;
   4. The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding, or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness. In addition, the prosecution should disclose the identity of any jailhouse informants, and any background information concerning such informants.
   5. The investigating officer's or officer notes;

6. Results of tests and examinations, or any other matter of evidence obtained during the investigation of the offense alleged to have been committed by the defendant, including, but not limited to:
    a. Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and without regard to whether the prosecution intends to call parties conducting the reports, tests, examinations, experiments, comparisons, or statements to testify. Tests, reports, and case notes prepared by state agencies or laboratories qualify as reports or written statements of experts under this section. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
    b. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that pertain to the case or that were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.
    c. Any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the offense charged or relating to any material discoverable under this act.
    d. Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial. While the prosecution is under no duty to conduct background checks of all witnesses, if the prosecution runs a general criminal records search for defense witnesses, the prosecution must make the same search with respect to prosecution witnesses and must disclose the results to the defense.
    e. Any materials, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case, and the identity of any witnesses to such lineup, showup, and picture or voice identifications.

C. If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

D. If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

E. The prosecution shall disclose any and all contents of the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant file not specifically listed or named above.

F. The prosecution must certify, in writing, that it has fully complied with the disclosure obligations contained in this act and acknowledging the prosecution's continuing obligation to disclose any discoverable information to the defense. This written certification must also contain a written statement from a designated lead investigator from each law enforcement agency involved in the investigation of the offense charged that confirms that the agency has given to the prosecution all information that, if known to the prosecution, would be discoverable.
    1. Certification must be completed as early as possible, but no fewer than five standard business days, prior to the start of trial or other resolution; and
    2. Certification must be completed earlier if the court rules, upon motion by the defense, that the defense requires additional time to incorporate complex, voluminous, or time-sensitive discovery material into the defense's case.

Section V. Disclosure Obligations of the Defense.

A. The defense should, within a specified and reasonable time prior to trial or other resolution, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:
    1. The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness.
    2. Any reports made in connection with the case by experts whom the defense intends to call at trial. For each such expert witness, the defense should also furnish to the prosecution curriculum vitae.
    3. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that the defense intends to introduce as evidence at trial.

B. If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names, home addresses, and if already required, statements of the witnesses who may be called in support of that defense.

Section VI. The Person of the Defendant.

A. After the initiation of judicial proceedings, the defendant should be required, upon the prosecution's request, to appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecuting attorney to the defendant and the defendant's counsel.

B. Upon motion by the prosecution, with reasonable notice to the defendant and defendant's counsel, the court should, upon an appropriate showing, order the defendant to appear for the following purposes:
    1. To permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;
    2. To permit the taking of samples of other materials of the body;
    3. To submit to a reasonable physical or medical inspection of the body; or
    4. To participate in other reasonable and appropriate procedures.

C. The motion and order pursuant to paragraph (2) above should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

D. The court should issue the order sought pursuant to paragraph (2) above if it finds that:
    1. The appearance of the defendant for the procedure specified may be material to the determination of the issues in the case; and
    2. The procedure is reasonable and will be conducted in a manner that does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and
    3. The request is reasonable.

E. Defense counsel may be present at any of the foregoing procedures unless, with respect to a psychiatric examination, it is otherwise ordered by the court.

Section VII. Timing and Manner of Disclosure.

A. Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable following the date of arraignment and is concluded and certified as early as practicable prior to resolution. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

B. The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.
C. Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information that is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.
D. Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:
    1. Notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and
    2. Make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

Section VIII. Obligation to Obtain Discoverable Material.

A. The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office and of any others who have worked on the case for the prosecution or for the defense.
B. The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office.
C. If the prosecution is aware that information that would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the fact of the existence of such information to the defense.
D. Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.
E. Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court must order disclosure of the specified material or information.

Section IX. Restrictions and Limitations on Disclosure.

A. Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or the defense attorney, or members of the attorney's legal staff.
B. Disclosure of an informant's identity should not be required where the court determines that reasonable fear exists that disclosureure would lead to the informant being harmed and where a failure to disclose will not infringe the constitutional rights of the defendant. The court should not deny disclosure of the identities of witnesses testifying at trial.
C. Disclosure should not be required from the defense of any communications of the defendant, or of any other materials that are protected from disclosure by the state or federal constitutions, statutes or other law.
D. The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds upon motion from the prosecution that there is substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure that outweighs any usefulness of the disclosure.

E. Upon a showing of cause, the court may at upon motion by the prosecution order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

F. When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscoverable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

G. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made in camera. A record should be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Section X. Interference With Investigation.

Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

Section XI. Custody of Materials.

Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

Section XII. Sanctions.

A. If an applicable discovery rule or an order issued pursuant thereto is not promptly implemented, the court should do one or more of the following:

1. Order the non-complying party to permit the discovery of the material and information not previously disclosed;
2. Grant a continuance;
3. Prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or
4. Enter such other order as it deems just under the circumstances;

B. The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order or upon a finding that counsel has acted in bad faith in connection with these rules.

C. Consistent with the requirements of due process, where the prosecution fails to provide the defense with discoverable evidence either in bad faith or in such a manner as to prejudice the defendant's ability to prepare for trial and then seeks to introduce evidence at trial, the normal remedy should be exclusion of such evidence.

Section XIII. Admissibility of Discovery.

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

LITERATURE

SUGGESTED READINGS

The following materials are essential reading for individuals interested in enhancing the reliability of outcomes in criminal cases through expanded discovery.

ABA Standards for Criminal Justice: Discovery and Trial by Jury, 3d ed., *available at* http://www.abanet.org/crimjust/standards/discovery.pdf.

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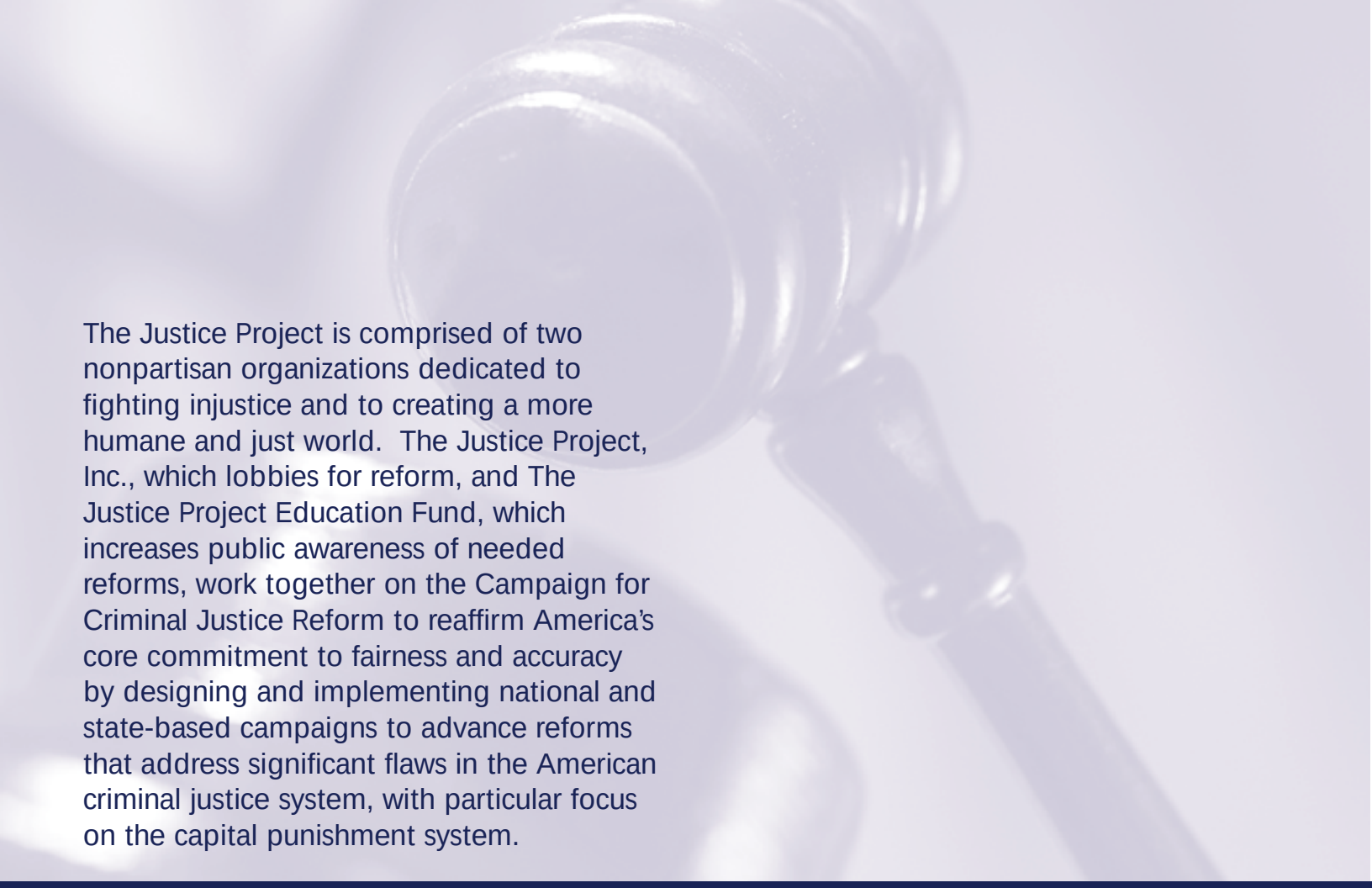

The Justice Project is comprised of two nonpartisan organizations dedicated to fighting injustice and to creating a more humane and just world. The Justice Project, Inc., which lobbies for reform, and The Justice Project Education Fund, which increases public awareness of needed reforms, work together on the Campaign for Criminal Justice Reform to reaffirm America's core commitment to fairness and accuracy by designing and implementing national and state-based campaigns to advance reforms that address significant flaws in the American criminal justice system, with particular focus on the capital punishment system.

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