

25,000 New Yorkers are jailed statewide. 70% have not been convicted and are being detained pretrial. Across New York, jail populations are rising -- largely driven by increased pretrial detention. Through grassroots power-building and strategic legislative advocacy, the #FREEnewyork campaign advocates to achieve overhaul of New York's pretrial justice system. Comprehensive discovery law reform is essential to this effort.

This policy brief describes the imperative for comprehensive discovery law reform in New York State. It provides an overview of how discovery law currently operates in New York State, and identifies key considerations for reform. This document lays out a 'gold standard' discovery reform proposal for New York State, which was developed in consultation with JustLeadershipUSA's directly impacted membership; statewide grassroots organizations; and numerous legal and issue experts working at the local, state & national level. Core components of 'gold standard' discovery reform include: open, early, automatic and mandatory turnover of discovery material that is statutorily enforceable.

DISCOVERY LAW: THE IMPERATIVE FOR REFORM

- Our criminal justice system resolves the vast majority of its cases through plea bargains, which are negotiated before a case goes to trial. 97% of criminal cases in New York¹ are resolved through plea deals, and similar rates are seen in other states and at the federal level.²
- Discovery material is evidence that each side of a court case plans to use at trial, including police interviews, witness statements, video footage, etc.
- Access to this information, or lack of access, plays a critical role in the plea-bargain assessment process. Discovery material contains the information that prosecution could use in a trial, and is vital in helping defendants understand the exact nature of the case being made against them.
- The Brady Rule (established in *Brady v. Maryland*, 1963) establishes the constitutional obligation of prosecutors to disclose information that is favorable to the accused including exculpatory information, information that might reduce the defendant's sentence, and information that impeaches prosecution witnesses.³
 - In practice, the Brady Rule is inconsistently followed and relies upon individual prosecutors' assessments of material. Defense attorneys frequently communicate concern that the Brady Rule is not always followed.

¹ http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro

² <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/>

³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963)

- If all discovery materials and information, favorable and non-favorable to the defense, are required to be turned over at the early stages of a case, most Brady materials would automatically be disclosed.
- The U.S. Supreme Court does not concretely require that any evidence, even exculpatory or impeachment evidence, be provided to the defense before a guilty plea. As a result, state law on pre-plea discovery differs significantly.
- Many states utilize an “open-file” model, which require relatively broad discovery obligations on prosecutors early in the criminal process.
- Other States (including New York) follow a much more restrictive, “closed-file” model and allow prosecution to avoid turning over critical evidence either entirely or until very near the time of trial.
- A fair trial requires that the defense attorney is able to conduct independent investigations and test evidence, and they are unable to do this when prosecutors do not turn over essential evidence until a late stage.
- This imbalance in ability to prepare for a trial is unjust, and contributes to case-delays, increased pre-trial detention, and uninformed plea decisions.
- In civil cases in New York, attorneys get complete discovery and ability to interview the opposing party’s witnesses.
- However, in criminal cases, prosecutors do not have to turn over witness statements or police reports until right before the trial begins, so cases cannot be investigated and convictions made through plea deals are unreliable.
- The consequences of justice system involvement irreparably alter a person's life – yet New Yorkers across the state are being left in the dark regarding critical case evidence. Overhaul of New York’s criminal discovery law is urgently needed and long overdue.

DISCOVERY LAW IN NEW YORK: THE HISTORY

- New York’s Discovery Law is enshrined in CPL 240 and follows a ‘closed file’ model. CPL 240 does not require prosecutorial turnover of discovery until just after the jury has been sworn in.
 - This ‘closed-file’ discovery model includes no requirement for disclosure of witness statements. Often, police reports and video footage come too late in the process and not all police reports are considered discoverable material.
- Under the current statute, defendants are denied vital information about their case, information that is essential for making rational decisions about their pending cases.⁴
- New York’s antiquated criminal discovery law inhibits, at great taxpayer cost, prompt guilty pleas from people who would be willing to resolve their cases if shown the evidence against them.
- Current discovery law causes trial delays and has a significant impact on pretrial detainees who must choose between their freedom and acceptance of a plea deal.

⁴ <http://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx>

- New York’s law is widely considered to be weak and problematic.^{5,6}
- New York is currently one of the four states with the most restrictive criminal discovery rules, alongside Louisiana, South Carolina, and Wyoming.⁷
- 35 other states require open and early discovery which results in earlier, more informed case resolution.⁸
- All states comparable to New York – such as New Jersey, Massachusetts, and 35 others⁹ – have long used broad and early discovery.
- In some New York counties, District Attorneys have abandoned CPL 240 and implemented an “open file” or “discovery by stipulation” protocol under which they voluntarily offer defendants forms of “open file” discovery material early in the case, on an ongoing basis, and consent to certain hearings without a formal defense motion.
- A survey conducted by the New York County Lawyers’ Association found that “those boroughs [of New York City] with more liberal disclosure report the most universal satisfaction with the process *regardless of position within the system.*”¹⁰
- In Kings County, NY – where the Brooklyn District Attorney’s office has implemented a practice of open-file discovery – case resolution times are quicker than in other counties.
 - In a 2015 survey, defense attorneys cited delays resulting from a lack of open-file discovery (outside of Brooklyn), stating that early plea offers cannot be properly assessed without seeing the prosecutor’s evidence.¹¹

DISCOVERY LAW IN NEW YORK: THE IMPACTS

- Defense is unable to conduct independent investigation, accurately assess plea offers, access exculpatory evidence, or prepare for trial. Ultimately, without access to evidence, defense attorneys cannot make well-informed decisions while the defendant’s future is at stake.
- Discovery procedures differ county to county. This results in an imbalanced system of justice in which case outcomes are directly tied to where a crime was allegedly committed.
- When defendants receive inconsistent discovery material county to county, it creates mistrust in the system.
- Opponents of discovery law reform express concerns that open discovery will result in witness harassment and endangerment (i.e. releasing witness names may put them in danger or may hinder reporting of crime)
 - Independent research has found *little evidence that open-file discovery endangers the safety of witnesses, a common (and unfounded) argument against the practice.*¹²

⁵ <http://cityandstateny.com/articles/opinion/new-york-imbalanced-discovery-law-day.html>

⁶ <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?mcubz=3>

⁷ <http://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx>

⁸ <http://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx>

⁹ <http://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx>

¹⁰ New York County Lawyers’ Association, “Discovery in New York Criminal Courts: Survey Report and Recommendations” (2006), p. 2 (emphasis added); see also The Spangenberg Group, “Status of Indigent Defense In New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services” (2006), pp. 77- 83, 146-48.

¹¹ <http://www.morejustnyc.org/the-reports/#the-commissions-report>

¹² <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4488&context=wlulr>

- A recent study of North Carolina prosecutors' perceptions of open-file discovery showed broad acceptance of the fairness and efficiency of the practice, and very few had concerns about its logistical burdens or effects on witness safety.¹³
- A majority of states have reformed their discovery laws to make them more open. If witness endangerment had resulted, states would have repealed their open discovery laws. No state that has passed open discovery statutes has reverted to more restrictive versions.
- The consequences of justice involvement irreparably alter the course of a person's life. Our current discovery laws result in innumerable miscarriages of justice.

GOLD STANDARD DISCOVERY REFORM IN NEW YORK

Discovery must be open:

- Open-file discovery gives the defense access to all unprivileged information that is known or should be known to the prosecution, law enforcement agencies, or any other agencies working on behalf of the prosecution.
- Formalized procedure for request of discovery material that may be in the possession of law enforcement or prosecution, but are not within the prosecutor's file, is vital, but the procedure must be accompanied by sanctions when conditions are not adhered to.
- An open-file policy reduces subjective decisions from prosecution in determining what evidence is material and exculpatory and should thus be disclosed to the defense.

Discovery must be turned over early:

- Discovery materials must be handed over at arraignment.
- Time should be counted moving forward from the first court appearance.
- A prosecutor's initial discovery obligation is as soon as practicable but not later than 15 calendar days after arraignment.
- Discovery material should be handed over in one initial phase then turned over automatically as prosecution gathers additional discovery material throughout the case.

Disclosure must be Automatic and Mandatory Disclosures:

- Rules requiring mandatory and automatic disclosure of specified information must be adopted.
- Examples include: 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 (see Appendix A for full list).
 - Note: The above standards are taken from ABA recommendations and standards on discovery and language could be adapted accordingly.

Inclusion of Certification and Remedies:

¹³ <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4488&context=wlulr>

- Discovery certificates should be filed with the court to ensure both parties have fulfilled their obligations with regards to discovery.
- Reform must include language for remedies and/or penalties for instances of information suppression and/or non-fulfillment of discovery obligations. ABA recommendations for remedies include orders to produce evidence, trial continuances, exclusion of withheld evidence, etc.

DISCOVERY LAW REFORM: WHAT IT MEANS FOR NEW YORKERS

Passage of gold standard discovery law reform, along with comprehensive speedy trial and bail law reform, will put New York at the forefront of pretrial justice reform. Systemic reform is urgently needed, and has benefits that extend across our criminal justice system.

Gold standard discovery law reform will:

- Result in a fairer, more transparent system that aligns with a majority of national discovery models.
- Decrease the number of uniformed/forced guilty pleas and wrongful convictions.
- Result in guilty pleas being entered earlier in the case process.
- Meaningfully decrease the number of New Yorkers being held in county jails as cases are resolved more quickly and transparently.
- Reduce case disputes and delays and speed up case resolutions (time to disposition).
- Save taxpayer dollars currently being spent on inhumane and unnecessary pretrial detention.

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Prosecution will disclose to the defendant, and permit the defendant to copy or photograph each of the following items when under the custody of prosecution:

- All written and recorded statements, as well as oral statements made by the defendant or co-defendant
- All transcripts of the testimony of a person who has testified before any grand jury (when relevant to case)
- The names, known aliases, addresses and birth dates of all persons whom the prosecutor knows to have evidence, as well as which ones the prosecution plans to call as witnesses
- The name, rank, shield number and business address of all law enforcement personnel who has evidence
- All statements written or recorded which relate to the matter of the case or were made by those who have evidence on the case
- Intended expert opinion evidence, including identifying information, CV, and statement of facts and opinions which the expert is expected to testify (and the grounds for those claims). If these materials are not disclosed within the time constraints of initial discovery, then disclosure must be made as soon as practicable and not later than 60 calendar days before trial
- All police reports, law enforcement agency reports, police logs, exhibits, tapes, other electronic recording and any tangible objects which relate to the case
- All reports concerning scientific tests and physical and mental examinations of any person related to the case
- All tangible objects obtained from or allegedly belonging to the defendant including notes on which tangible objects were physically possessed by the defendant and recovered during a search by a police officer
- All evidence that may negate the defendant's guilt or reduce the punishment. Disclosure is required even if the prosecution doubts the believability of usefulness to the defendant.
- Summary of all corporeal or non-corporeal or voice identification procedures; both when an eyewitness identified the defendant and when they did not.
- Summary of all promises, rewards made to persons who may be called as witnesses
- Whether the prosecution has any evidence or information provided by a confidential informant
- Whether a search warrant has been exercised and supporting materials from the search
- Whether there has been electronic surveillance of a residence or telephone etc. of the defendant and all recordings related to it
- The date, time and place of the offense charged and of the defendant's arrest
- Whether a charged offense was seen by police and if so, whether visual magnification or enhancement equipment was used.
- Any information related to the case that was collected by prosecution (i.e. cellphone and email records)