



State of Connecticut
DIVISION OF PUBLIC DEFENDER SERVICES

Office of Chief Public Defender
30 Trinity Street, 4th Floor
Hartford, Connecticut
(860) 509-6405 Telephone
(860) 509-6495 Fax

Christine Perra Rapillo
Chief Public Defender
Christine.Rapillo@jud.ct.gov

Testimony of Office of the Chief Public Defender
Tejas Bhatt, Senior Assistant Public Defender
Jennifer Bourn, Assistant Public Defender

Judiciary Committee
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Office of the Chief Public Defender **supports S.B. 519** (raised): An Act Concerning Open File Disclosure.

Codifying and clarifying existing rules relating to discovery is important because it promotes four important objectives:

- (1) It creates uniformity in discovery practice in the state and works to eliminate disparity in the practice from courthouse to courthouse;
- (2) It properly places the responsibility for disclosure on the prosecutorial official instead of requiring a request from the defense;
- (3) It works to ensure that disclosure happens in a timely manner; and
- (4) It offers protection against wrongful conviction.

Robust and full discovery promotes transparency and the appearance of fairness of the system, promotes expeditious and appropriate disposition of cases, and avoids unnecessary litigation – both trying a case because the defendant made an ill-informed decision to reject a plea bargain and litigation having to do with the discovery itself.

To better promote these interests, we suggest some changes and modification to the proposal. We have attached to this testimony an annotated bill showing all of our proposed changes in green. In sum, those changes:

1. Alter the language of **Section 1(a)** to better reflect the constitutional, practice book and ethical obligations of the prosecutor and to ensure that appropriate materials are turned over in an expedient fashion.
2. Alter the language of **Section 1(b)** to avoid a reading that permits later disclosure of these materials than is currently permitted.
3. Add language to **Section 1(f)** to ensure that the statutory language complies with the language of the Practice Book and doesn't unduly restrict the defense from using the information supplied in conducting a defense investigation of the case.
4. Modify the language in **Section 1(g)** to provide that an ongoing record of the information disclosed can be made in writing by the prosecutor. As currently written, we are concerned that the requirement is impractical.
5. Limits the language in **Section 1(h)** to serious felonies so that the parties have the flexibility to quickly resolve all misdemeanors and Class D felonies and provides that for Class A, B and C felonies, the court shall ensure that before accepting a plea the defense is satisfied with compliance with this section.
6. Add to the language in **Section 3** to require that the prosecutorial official ensures that the police officers have complied with their obligation and that all such exculpatory information has been disclosed to the defense.
7. Modify language in **Section 4**, which pertains to the special category of "jailhouse informants" to ensure that the defense and the jury are provided sufficient information to make accurate credibility determinations about these "inherently suspect"¹ witnesses:
 - a. Expand the definition of "any grant, promise or offer of immunity" in **Section 4(2)** to accurately reflect that the prosecution must disclose any incentive or benefit promised to a jailhouse informant, no matter the type.
 - b. Add **subsection (3)** to ensure that the defense can investigate the veracity of the circumstances surrounding the purported confession and ensure that any Constitutional bars to such testimony can be pursued.
 - c. Add **subsections (5) and (6)** to better reflect the prosecutorial official's ethical, constitutional and practice book obligations to disclose all exculpatory and impeachment information.

This office strongly supports and applauds the effort to improve and streamline the discovery practice in this state because the practice varies widely depending on the jurisdiction, and discovery failures have led to numerous wrongful convictions in this state. In many of those cases, where the disclosure violation was discovered decades after conviction, the prosecution was unable to re-try the defendants or build and prove a case against the real perpetrator. These discovery failures harm the integrity of and confidence we have in our system, as well as the interests of all interested parties in a case.

We thank you for your consideration and are happy to provide additional information and input on this important issue and bill.

¹ State v. Diaz, 302 Conn. 93, 109 (2011).

AN ACT CONCERNING OPEN-FILE DISCLOSURE.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 54-86a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

[(a) Upon motion of a defendant at any time after the filing of the indictment or information, and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court shall order the attorney for the state to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements, admissions or confessions made by the defendant; (2) books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process; (3) copies of records of any physical or mental examinations of the defendant; and (4) records of prior convictions of the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known to the attorney for the state or to the defendant.

(b) An order of the court granting relief under subsection (a) of this section shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.]

(a) As soon as practicable, but not later than thirty days after a defendant enters a plea of not guilty after arraignment in a criminal case, the prosecuting official shall, unless otherwise ordered by the judicial authority, make available to the defense the following material and information that is within the possession, custody or control of the prosecuting official, the state or any agent of the state, including a person under contract with the state: (1) Police or uniform arrest reports, including all oral, written, or recorded statements of all witnesses, including any co-defendant, percipient witness, accomplice, or co-conspirator; (2) books, papers, documents, photographs or other tangible objects held as evidence and material to the case; (3) relevant written or recorded statements, admissions or confessions made by the defendant or by any codefendant, if the defendant and codefendant are to be tried jointly; (4) relevant records or copies of any such records of prior convictions of the

defendant and any witness, including any co-defendant, percipient witness, accomplice, or co-conspirator; and (5) exculpatory information, including but not limited to impeachment evidence or information which tends to negate the guilt of the accused or mitigate the offense charged, or which would tend to reduce the punishment. with respect to the defendant. Upon request from a defendant, the prosecutorial official shall provide such information in the same electronic format and file type, if any, in which the state maintains such information. If prior to or during trial, the prosecutorial official discovers additional information or material that must be disclosed to the defendant under this subsection, the prosecutorial official shall immediately disclose such material or information to the defendant.

(b) As soon as practicable the prosecutorial official is aware of the existence of, but not later than thirty-five days before the start of trial, except for good cause shown or as otherwise ordered by the judicial authority, the prosecutorial official shall obtain and make available to the defense without delay the following material and information that is within the possession, custody or control of the prosecutorial official, the state or any agent of the state, including a person under contract with the state: (1) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons; (2) tapes and transcripts of any electronic surveillance of conversations involving the defendant, any codefendant or witness in the case; (3) summary of any unwritten or unrecorded admissions or confessions made by the defendant or by any codefendant, if the defendant and codefendant are to be tried jointly; and (4) relevant copies of records of any physical or mental examinations of the defendant. and (5) relevant records or copies of any such records of prior convictions of the defendant and any codefendant. Upon request from the defendant, the prosecutorial official shall provide any such material or information in the same electronic format and file type, if any, in which the state maintains such information. If prior or during trial, the prosecutorial official discovers additional material or information that must be disclosed to the defendant under this subsection, the prosecutorial official shall do so promptly.

(c) Upon motion of a defendant and upon a showing that the request is reasonable, the court may order the prosecutorial official to disclose to the defense relevant material and information not covered by subsections (a) and

(b) of this section. An order of the court granting relief under this subsection shall specify the time, place and manner of making the disclosure permitted and may prescribe such terms and conditions as are just.

(d) The prosecutorial official may request an ex parte in camera hearing before a judge, who shall not be the same judge who presides at the hearing of the criminal case if the case is tried to the court, to determine whether any material or information subject to disclosure under subsection (c) of this section is relevant and material to the defendant's case. If the judge determines such material or information is not relevant and material to the defendant's case, the prosecutorial official may withhold such material or information from disclosure.

(e) Any information subject to disclosure under this section shall be made available for such disclosure, but the prosecutorial official may redact or withhold any portion of material or information, that the prosecutorial official is not required to produce. Upon motion of the defendant, the court may order any such redacted or withheld information subject to disclosure and inspection.

(f) Any materials furnished to the defendant or defense counsel in discovery shall be used only for the purposes of conducting such counsel's side of the case and for the performance of his or her official duties. No defendant, defense counsel or agent of the defendant or defense counsel shall further disclose such evidence disclosed by the state, except to persons employed by defense counsel in connection with the investigation or defense of the case or any successor counsel, without the prior approval of the prosecuting official or the court finding good cause to so disclose or that such information is already available to the public.

(g) The prosecutorial official shall make part of the record or court file a ~~record~~ an itemized list of all any information provided to the defendant pursuant to this section.

(h) Before the court accepts a plea of guilty or nolo contendere for any Class A, B or C felony, before the court requires a defendant to accept or reject a plea bargain, the rejection of which will result in a trial, and before trial, the court shall inquire and ensure that the defendant is satisfied with the disclosures made and with the prosecutorial official's compliance with the

provisions of this section. the defendant and the prosecutorial official shall acknowledge, in writing or on the record in open court, the disclosure of all information provided to the defendant under this section.

(i) A court may order the defendant to pay costs for tangible materials related to discovery under this section.

[(c)] (j) A motion under subsection [(a)] (c) of this section may be made only in a criminal case and shall include all relief sought under said subsection [(a) of this section] (c). A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

[(d)] (k) Prior to the arraignment of any arrested person before the court to determine the existence of probable cause to believe such person committed the offense charged or to determine the conditions of such person's release pursuant to section 54-64a, the [attorney for the state] prosecutorial official shall provide the arrested person or his or her counsel with a copy of any affidavit or report submitted to the court for the purpose of making such determination; except that the court may, upon motion of the [attorney for the state] prosecutorial official and for good cause shown, limit the disclosure of any such affidavit or report, or portion thereof.

Sec. 2. Section 54-86b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

(a) In any criminal prosecution, after a witness called by the prosecution has testified on direct examination, the court shall on motion of the defendant order the prosecution to produce any statement oral or written of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified, and the court shall order said statement to be delivered directly to the defendant for his or her examination and use.

(b) Except as provided in sections 54-86d and 54-86e, upon the request of a defendant or prosecutorial official, not later than the thirtieth day before the date that jury selection is scheduled to begin or in the case of a trial without a jury, or not later than the thirtieth day before the date that presentation of evidence is scheduled to begin, a party may request that the other party shall disclose the name and address of each person the party receiving such request may use at trial to present evidence. Such disclosure shall be made in writing

in hard copy form or electronically not later than the tenth day after receiving such request. On motion of a party and after notice to the other parties, the court may order an earlier time at which one or more of the other parties must disclose such requested information.

[(b)] (c) If the prosecution fails to comply with the order of the court, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

Sec. 3. Section 54-86c of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

[(a)] Not later than thirty days after any defendant enters a plea of not guilty in a criminal case, the state's attorney, assistant state's attorney or deputy assistant state's attorney in charge of the case shall disclose any exculpatory information or material which he may have with respect to the defendant whether or not a request has been made therefor. If prior to or during the trial of the case, the prosecutorial official discovers additional information or material which is exculpatory, he shall promptly disclose the information or material to the defendant.

(b) Any state's attorney, assistant state's attorney or deputy assistant state's attorney may request an ex parte in camera hearing before a judge, who shall not be the same judge who presides at the hearing of the criminal case if the case is tried to the court, to determine whether any material or information is exculpatory.]

[(c)] Each peace officer, as defined in subdivision (9) of section 53a-3, shall disclose in writing any exculpatory information or material which [he] such peace officer may have with respect to any criminal investigation to the prosecutorial official in charge of [such case] any criminal case for which such investigation is relevant. The prosecutorial official shall, no later than 35 days prior to the start of trial, represent to the defense and the court that such official has inquired of each peace officer in the case, has obtained all information pursuant to this section, and has disclosed that information to the defense.

Sec. 4. (NEW) (*Effective October 1, 2018*) (a) Notwithstanding any provision of chapter 961 of the general statutes, if the state intends to use at a defendant's trial testimony of a witness to whom the defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody or control of the state that is relevant to the witness's credibility, including, but not limited to:

(1) The witness's complete criminal history, including any charges that were dismissed or reduced as part of a plea bargain;

~~(2) Any grant, promise or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment given by the state in exchange for the witness's testimony; Any grant, benefit or incentive, including, but not limited to, any plea bargain, bail consideration, recommendation of a sentence or statement of a position that is beneficial to the witness, reduction or modification of sentence, any agreement pursuant to §53a-39(b), or any other leniency, immunity, financial payment, reward, placement in a witness protection program, or assistance with immigration status, or amelioration of current or future conditions of incarceration; and~~

(3) The substance, time, and place of any statement allegedly given by the suspect or defendant to the in-custody informant, and the substance, time, and place of any statement given by the in-custody informant to law enforcement implicating the suspect or defendant in the crime charged;

~~(3)~~ (4) Any information concerning other criminal cases in which the witness has testified or offered to testify give information against any defendant with whom the witness was imprisoned or confined, including any grant, promise or offer, as described in subdivision (2) of this subsection, given by the state in exchange for the testimony;

(5) Whether the informant modified or recanted his or her testimony at any time;

(6) Any other information that is exculpatory or that constitutes impeachment or that is otherwise required by the prosecuting official's ethical and constitutional obligations.

(b) If at any time before, during or after trial the prosecutorial official discovers any additional document, item or information required to be disclosed under subsection (a) of this section, the prosecutorial official shall promptly disclose the existence of the document, item or information to the defendant.

Sec. 5. (NEW) (*Effective October 1, 2018*) (a) The court shall allow discovery under sections 54-86a to 54-86c, inclusive, of the general statutes, as amended by this act, by the defendant in a criminal case of property or material:

(1) That constitutes child pornography, as defined in section 53a-193 of the general statutes; or

(2) The promotion or possession of which is prohibited under sections 53a-196 to 53a-196i, inclusive, of the general statutes.

(b) Property or material described in subsection (a) of this section shall remain in the care, custody or control of the state during all periods of disclosure;

(c) A court shall deny any request by a defendant to copy, photograph, duplicate or otherwise reproduce any property or material described by subsection (a) of this section, provided the prosecutorial official makes the property or material reasonably available to the defendant.

(d) For purposes of subsection (c) of this section, property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing and examination of the property or material by the defendant, the defendant's attorney and any individual the defendant seeks to qualify to provide expert testimony at trial.

Sec. 6. Subsection (b) of section 54-86k of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

(b) If the results of the DNA analysis tend to exculpate the accused, the prosecuting authority shall disclose such exculpatory information or material to the accused in accordance with section [54-86c] 54-86a, as amended by this act.