



Legislative Affairs
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2019-2020 Legislative Memorandum

Subject: Discovery Reform

Positions: S.1716 (Bailey) / A.1431 (Lentol) – SUPPORT

**Executive Budget Proposal, P.P.G.G. Article VII Legislation,
A.2005-A / S1505-A, Part AA, Subpart B – QUALIFIED SUPPORT**

Every person accused of a crime is innocent until proven guilty. But New York’s current discovery law denies people a fair chance to fight the case against them. Lawmakers and the Governor must take action to reform New York’s criminal discovery laws this session.

The NYCLU strongly supports S.1716/A.1431, also known as the “Discovery for Justice Reform Act.” The NYCLU also approves the discovery reform aspects of Governor Cuomo’s FY2020 budget bill, but wholeheartedly objects to its provisions that would enhance criminal penalties for witness intimidation and criminalize witness intimidation on social media.

New York’s Discovery Rules are Critically Flawed

In criminal court, discovery is the process by which the prosecution provides its evidence to a person accused of a crime. In most states, the process is expansive: defendants are permitted to see most of the government’s evidence, which allows them to make informed decisions about their defense strategy. New York’s criminal discovery laws, however, deny defendants access to critical evidence, creating unjust outcomes that undermine the public trust and devastate the lives of thousands of New Yorkers every year.

The most significant flaws in the state’s criminal discovery law are:

(1) No Pre-Plea Discovery – Almost all New York defendants plead guilty instead of going to trial, but as a rule, they are not entitled to see any evidence before accepting a plea. Under the current system, defendants are too often pressured into pleading guilty because they have no sense of the case against them – even defendants who are factually innocent.

(2) Lack of Witness Information – New York prosecutors are not required to identify witnesses who will testify against the defendant until the start of trial, leaving defense attorneys with little or no time to investigate witnesses' claims or prepare for cross-examination.

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

(4) Nondisclosure of Evidence Favorable to the Defense – Despite recent court-ordered changes to discovery practice, New York's criminal discovery law does not explicitly require prosecutors to produce *all* exculpatory evidence – that is, evidence that a defendant might be innocent – only that evidence they deem *material* – or important – to the case.

Discovery Reforms Are Needed to Ensure Fairness in Our Justice System

True criminal discovery reform must require *early* and *open* access to evidence. *Early* means discovery must begin automatically, without a request from the defense, and as soon as practicable after the defendant is arrested. *Early* also means the defendant must be permitted to see the prosecution's evidence prior to the expiration of any plea offer.

Open means the defendant must be allowed to see as much of the government's evidence as possible – ideally the prosecution's entire file. This is called “open file” discovery. Production of exculpatory evidence should be expressly mandated *without regard for materiality or other subjective criteria*. And even in an open file system, categories of discoverable items should be enumerated so there is little doubt about the parties' obligations.

A modern, efficient, constitutionally robust criminal discovery program should also include *workflow and evidence custody requirements*, which help police departments and other government agencies turn over evidence in *their* possession to the prosecutor's office, in turn making sure the prosecutor *and* the defendant have all the government's evidence; *accountability provisions* that require prosecutors to certify before trial that they have disclosed all known discoverable materials, and *enforceability* measures that allow courts to remedy discovery violations and, where necessary, sanction attorneys who break discovery rules.

Any discovery reform should also provide for the protection of witnesses in cases where the prosecutor can demonstrate that a defendant poses a threat of witness intimidation or harassment. In such instances, the court should be able to

limit the defendant's access to witness' personal contact information, but even then, only to the extent necessary to ensure the witness' safety.

S.1716/A.1431: True Discovery Reform, with Protection for Witnesses

S.1716/A.1431 is a true "open file" discovery bill that would guarantee production of all of a prosecutor's evidence in a reasonable, timely manner. The bill:

- Requires disclosure of a few critical items at a defendant's first appearance in court, without overly burdening prosecutors in the early stages of a case.
- Allows for robust pre-plea discovery that would permit defendants to properly assess the relative merits of a plea agreement, and to adequately prepare for trial in cases that are not pled out.
- Incorporates critical workflow provisions to ensure that prosecutors receive evidence from law enforcement and other government agencies.

Importantly, it would provide for witness safety by allowing courts discretion to limit discovery of witness information where a prosecutor can demonstrate, with evidence, that a defendant poses a threat to that witness.

The NYCLU urges lawmakers to support and pass S.1716/A.1431. If enacted, it would make New York one of the most open and fair jurisdictions in the country for criminal discovery.

Executive Budget Proposal: Meaningful Reform, with Troubling Additions

While the Executive budget proposal on discovery does not go as far, it would also enact meaningful reform. It would not create an "open file" system, but it does propose an exhaustive list of items to be disclosed – including all of the items listed in this paper, and a clear, unambiguous description of *Brady* evidence that makes no reference to a materiality standard. Although it does not provide discovery as early as S.1716/A.1431 would, it requires the prosecution to produce *all* discovery "as soon as practicable," and no later than 15 days after indictment or information; and, like S.1716/A.1431, the Executive budget proposal would require the prosecution to disclose all evidence prior to the expiration of any plea offer. It also includes workflow provisions similar to those in S.1716/A.1431, and it incorporates adequate witness protection mechanisms while leaving ultimately leaving that protection to the discretion of the court.

Unfortunately, the NYCLU cannot support the budget measure's additional proposals to enhance criminal penalties for witness intimidation and criminalize the intimidation of witnesses on social media. In particular, the social media provision gives rise to serious First Amendment concerns. With those provisions omitted, however, the Executive budget proposal on discovery reform would also stand to transform New York's justice system into one of the nation's fairest.