DREW FINDLING
President

March 29, 2019

VIA EMAIL: JUDtestimony@cga.ct.gov

The Honorable Gary Winfield
Co-Chair, Joint Committee on Judiciary
Connecticut General Assembly

The Honorable Steven Stafstrom
Co-Chair, Joint Committee on Judiciary
Connecticut General Assembly

The Honorable John Kissel
Ranking Member, Joint Committee on Judiciary
Connecticut General Assembly

The Honorable Rosa Rebimbas
Ranking Member, Joint Committee on Judiciary Connecticut General Assembly

**Re: Comments on S.B. No. 653, an act concerning open-file disclosure in criminal cases**

Dear Senator Winfield, Representative Stafstrom, Senator Kissel, and Representative Rebimbas:

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to express NACDL's support for S.B. No. 653, an act concerning open-file disclosure in criminal cases.

NACDL has worked extensively on criminal discovery reform initiatives at both the state and federal level. It is with this experience and perspective that we support S.B. No. 653 and urge the adoption of the changes outlined in the committee bill. These changes will provide much needed access to the basic information necessary for a meaningful defense without compromising public safety or imposing an undue fiscal burden on the state.

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crimes or other misconduct and to promote the proper and fair administration of justice. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and

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judges committed to preserving fairness and promoting a rational and humane criminal justice system. Representing thousands of criminal defense attorneys who are intimately aware of the inadequacies of the current criminal justice system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

NACDL's representation of the defense perspective in the courts is unparalleled. NACDL files 60-70 amicus briefs every year, in courts ranging from the U.S. Supreme Court to federal circuit courts of appeals and state high courts and appellate courts. In the U.S. Supreme Court, NACDL is the most cited and, according to the leading Supreme Court blog, most effective amicus.

NACDL has long been active in the area of criminal discovery reform, including the development of a model open-file discovery law. Designed to promote fairness and informed decision-making, the legislation calls for production immediately after arraignment and prior to entry of any guilty plea or trial of all information generated during the investigation of a charged offense. This model law is the product of NACDL's extensive research and draws from best practices around the country.

NACDL's efforts to bring about criminal discovery reform are not academic. The organization's members have experienced firsthand the damage done when the government fails to timely meet its discovery obligations. As defense attorneys, our members carry a heavy responsibility to see that the accused in every criminal case has meaningful representation so that he or she can put the government to its burden, consistent with the rights guaranteed by the United States Constitution. That job is made more difficult, if not impossible, when the defense does not have access to the basic relevant information in the government's files.

Those who stand accused must have access to the basic tools for their defense, this includes access to information such as police reports, witness statements, and the results of scientific examinations. When these items are missing, defendants are left in the dark, facing trial by ambush. Their attorneys are unable to fully and fairly challenge government actions, to conduct meaningful investigations, and to assure all relevant information is considered when an accused is called upon to make the life-altering decision of whether or not to go to trial.

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S.B. No. 653 helps correct this, directing substantive and timely disclosures of information and assuring an accused has any police or arrest reports, witness statements, witness lists, prior conviction records of witnesses, reports of experts, the results of physical, mental, and scientific examinations, and recordings from electronic surveillance of conversations of the defendant, co-defendants or witnesses. It further assures that as an investigation continues, the accused will continue to be provided information.

Importantly, by requiring disclosure occur not only prior to trial, but prior to the entry of a guilty plea, S.B. No. 653 helps assure that decisions to plead guilty are undertaken with a full understanding of the state's evidence. This is vital as more than 90% of criminal cases currently conclude in pleas. Fairness should not be limited to the small fraction of our criminal justice system that ends in trial.

Further, it is important to note that these reforms do not come at the price of victim and witness safety. Section 5(b) of the proposed legislation includes substantive protections that can allow for disclosure to be denied, restricted, deferred, or that reasonable conditions be imposed in any instances in which there are concerns for victims and witnesses.

Access to information about the nature of the charges and the evidence against the accused is crucial to the defense attorney's ability to fulfill their ethical and constitutional obligations to zealously represent an accused. Access to police reports and witness statements, for example, informs the attorney about the nature and strength of the government's case and enables them to intelligently advise their client regarding the advisability of trial. This information also allows the attorney to understand where they might find additional information that can aid their client's defense, better enables the defense attorney to recognize and challenge government oversight, mistake, or misconduct, and assures adequate preparation for trial. Improved discovery not only increases the fairness on questions of guilt, but also enhances fairness on questions surrounding punishment, helping insure important mitigating information is investigated and considered.

The benefits of these reforms are not limited to the accused. The prosecution and the entire judicial system benefit, as well. For example, when the defense has an informed understanding of the charges and the evidence, plea discussions are more efficient and meaningful. A recent study comparing North Carolina's open-file practices with the restrictive practices in Virginia revealed that *ninety percent* of the

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prosecutors in North Carolina were satisfied with the new open-file system. They noted open-file benefits include increased efficiency, more protection against inadvertent violations of the prosecutor's obligation to produce exculpatory information, lowered risks of wrongful convictions, and increased fairness and trust in the criminal justice process.[1]

In 2014 Texas overhauled its discovery practices converting to an open file practice. The change came in the wake of the exoneration of Michael Morton, who spent 25 years in prison for the murder of his wife before DNA exonerated him. A review of the case revealed vital, exculpatory evidence had been withheld from the defense decades earlier. After five years of working under the state's new, broad open-file discovery law, Texas prosecutors applaud the decision to change discovery practices. In an op-ed penned by Texas prosecutors earlier this year, they noted "[o]pen and transparent discovery is in the interest of the entire criminal justice community, from the prosecutors and police to the accused."[2]

Adoption of S.B. No. 653 can do the same for Connecticut; improving case outcomes and enhancing the sense of fairness and confidence in the state's criminal justice system all without compromising public funds or public safety.

Respectfully Submitted,

Drew Findling, President
National Association of Criminal Defense Lawyers

[1] Jenia Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285 (2016).
[2] Rubio, Julia and Garza, Linda. (Feb. 11, 2019). Texas Prosecutor Calls for Discovery Reform in NY State. New York Law Journal. Available at: https://www.law.com/newyorklawjournal/2019/02/11/open-discovery-benefits-police-and-prosecutors-too/.