State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

IN OPPOSITION TO:

S.B. No. 653 (COMM) AAC OPEN FILE DISCLOSURE IN CRIMINAL CASES.

JOINT COMMITTEE ON JUDICIARY
March 29, 2019

The Division of Criminal Justice opposes S.B. No. 653, An Act Concerning Open File Disclosure in Criminal Cases, and respectfully requests the Committee take NO ACTION on this legislation.

Historically, the rules of discovery have been crafted by the Judicial Branch through its Rules Committee. The disclosure requirements on both the prosecution and defense are reflected in the Practice Book and enforced by the Judges of the Superior Court to ensure fairness to all parties in a criminal proceeding. The bill places untenable burdens on law enforcement and the prosecution to obtain information outside their control, assumes notice requirements prosecutors do not receive, and requires prosecutors to compile chronological lists of discovery at multiple points in a prosecution, which will bog down our trial courts while providing scant additional protection to the accused.

Section 1 of the bill requires the prosecutor, upon written request from the defense, disclose within 45 days any of the following items that are 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) relevant police or uniform arrest reports, including all recorded statements, whether oral or written, of all witnesses;
(2) relevant books, papers, documents, photographs or other tangible materials;
(3) relevant recorded statements, whether oral or written, admissions or confessions made by the defendant;
(4) relevant records or copies of such records of any prior conviction of the defendant or any witness;
(5) any warrant executed for the arrest of the defendant for the offense charged, and any search and seizure warrants issued in connection with the investigation of the offense charged; and
(6) exculpatory information and material with respect to the defendant.

Current law requires the prosecutor to turn over all materials in the prosecutor's possession. The bill will require the prosecutor to additionally obtain and turn over material from "agents of the state including a person with a contract with the state." This material is not in the prosecutor's possession and DCJ has no legal avenue to demand its production short of an investigative subpoena, which Connecticut law precludes. In addition, the Division has concerns that this contractor language will be used in an attempt to obtain the records of advocates for domestic violence and sexual assault victims and family relations officers, none of whom are law enforcement officers but who assist victims through the judicial process. Requests of this nature will have a significant negative impact on the ability of these victim representatives to candidly speak with victims. Victims may rightly fear the advocate who seeks to help them may unwittingly become a witness for the defense based on the advocate's recollections of their interaction.

Furthermore, Section 1 requires additional disclosure of certain additional materials "not later than thirty-five days before the start of trial." Timetables for disclosure based on the anticipated start of trial are unreasonable, if not impossible given the Superior Court process for calling in cases for trial. Currently, trial judges work on a 24-hour notice call-in system, i.e., we frequently get only a day's notice before a trial is to begin. All matters on the firm jury list are presumed ready for trial. If a matter that was scheduled for trial gets called in and resolves with a plea, another is immediately called in to take its place. The large volume of cases in most Part A (Judicial District) locations makes the advance scheduling of trial impractical. If this rule were changed, far fewer cases would be reached for trial in a given year, which would require additional judicial and prosecutorial resources to staff additional trial courts. Similarly, Section 2 of the bill requires both sides to file witness lists thirty days prior to trial. This requirement will also be unreasonable given the current trial call-in procedure.

Section 3 of the bill hinders the ability of prosecutors to disclose exculpatory information. Under current law, a prosecutor has the right to seek guidance from a judge concerning his or her duty to disclose potentially exculpatory information. The judge has the right to review the documentation and turn over to the defense any material deemed exculpatory. The bill as drafted takes this discretion away from a neutral judge and leaves it solely in the hands of the prosecutor. Section 3 of the bill also places unreasonable demands on peace officers to disclose exculpatory information on all cases they know of or should know of to which the information pertains. The officer may have no actual knowledge of other investigations but, under the new law, they will be held responsible for knowing about other matters that may help some other defendant. It is simply unfair to impute this level of global understanding of all cases in a particular police department or across police departments. The law should remain that the officer is required to disclose exculpatory material with respect to the case at hand in which he or she is involved.

Lastly, Section 3 will require the prosecutor thirty-five days prior to trial to ask every peace officer in a case whether such officer has made the prosecutorial official aware of such exculpatory information or material. This will require another investigation by the prosecutor, which may take significant time, manpower and expense. It will require, sometimes years after the crime, for the prosecution to track down every peace officer, however tangentially involved in the case, and obtain in writing verification that they have turned over all material in the case. Many of these officers are often retired or have moved to other departments. This will require

additional Inspectors for DCJ in order to comply with our affirmative obligations under this section. Clearly, this bill, as was the case with similar legislation proposed last year, could not be fully and properly implemented as it is written without significant additional resources.

Finally, there is no demonstrated need for this legislation. The Division is not aware of systemic problems with discovery or trial court opinions ruling prosecutors have violated the rules of court in this area. We have on more than one occasion invited the defense bar to report to us any specific problems or concerns so that we may address them but to this day no one has come forward.

In conclusion, the Division respectfully recommends the Committee take NO ACTION on S.B. No. 653. We thank the Committee for affording this opportunity to provide input on this matter and would be happy to provide any additional information to the Committee or to answer any questions that you may have.