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**Michelle Feldman, Innocence Project**  
**State Habeas Task Force Hearing Testimony**  
**November 20<sup>th</sup>, 2019**

My name is Michelle Feldman and I am the State Campaigns Director for the Innocence Project, a national organization based in New York that exonerates innocent people who have been wrongfully convicted and enacts policies to prevent and address wrongful conviction. We work closely with the Connecticut Innocence Project on cases and policy reforms.

State habeas is an important avenue for overturning wrongful convictions in Connecticut. Enacting pre-trial open-file discovery would prevent wrongful convictions and reduce the volume of state habeas petitions. In addition, providing discovery in state habeas would streamline the process, helping to overturn wrongful convictions more quickly and reducing unmeritorious claims.

*Wrongful Convictions based on the State Withholding Evidence*

In Connecticut, 15 of 23 wrongful convictions—**65 percent**—involved the state withholding exculpatory evidence from the defense, according to the National Registry of Exonerations, which tracks every wrongful conviction overturned in the United States since 1989.<sup>1</sup> In each of these cases, the innocent person lost years of their lives in prison while the actual perpetrators went undetected to potentially harm others. **Connecticut taxpayers paid over \$54 million** in state compensation and federal civil rights claims for these wrongful conviction cases.<sup>2</sup>

In addition, providing post-conviction discovery would help streamline state habeas filings.

*Improving Pre-Trial Discovery*

Statewide pre-trial open-file discovery could prevent future wrongful convictions by ensuring early and complete evidence disclosures to the defense. The volume of state habeas petitions based on claims of *Brady* violations or Ineffective Assistance of Counsel would also be reduced with open-file discovery. The U.S. Supreme Court ruled in *Brady v. Maryland* (1963) that the state must disclose all evidence in its possession that is material and exculpatory to the defense.

Open-file discovery would require the disclosure of all non-privileged evidence in the state's file, thus preventing *Brady* violations. In addition, prompt pre-trial disclosures would reduce claims based on Ineffective Assistance of Counsel for defense attorneys failing to present or move for the exclusion of certain evidence, since late disclosures make it difficult for defense counsel to investigate and integrate new information.

Currently, pre-trial discovery is governed by the Connecticut Practice Book rules and statute. However, the rules are not followed consistently, and State's Attorneys administer "local justice" that varies based on who runs the office. In addition, enforcement of the rules by the courts varies by jurisdiction. Connecticut should follow the lead of neighboring states like New Jersey and New York and pass an open-file discovery law that includes:

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<sup>1</sup> National Registry of Exonerations. <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=CT>

<sup>2</sup> Jeffrey S. Gutman, An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted, 82 MO. L. REV. (2017).



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- 1) Pre-plea discovery requirements;
- 2) Clearer disclosure deadlines;
- 3) Better information-sharing between police and prosecutors;
- 4) Stronger enforcement through parties certifying compliance and court sanctions for noncompliance.

## 1. Pre-plea discovery

Although 95 percent of criminal cases are resolved through guilty pleas, currently the State's Attorneys are not required to provide discovery before a defendant enters a plea agreement. Pleas are supposed to be negotiations, but without knowing the evidence against their clients, defense attorneys cannot effectively negotiate with prosecutors to dismiss or reduce charges. Defense lawyers cannot advise their clients beyond a mathematical calculation of risk, along the lines of, "You're facing 10 years in prison if you go to trial, I can't tell you about more about the evidence, do you want to take the plea deal that expires in a week?"

Without knowing what evidence will be used against them, the accused are being forced to make life-altering decisions that can carry prison time, criminal records, and collateral consequences. That leads to innocent people pleading guilty, which occurred in 1 in 10 DNA exonerations nationally.<sup>3</sup>

In Connecticut, a teenager named Bobby Johnson pled guilty to a New Haven murder in 2007. Years later, his state habeas attorney discovered police reports that pointed to a different perpetrator who had been linked to similar killings. Based on this and other evidence, the New Haven District Attorney agreed to vacate Johnson's conviction in 2015.<sup>4</sup>

The police reports had not been disclosed before Johnson pled guilty. If his defense attorney had gotten this information, he may have advised Johnson differently, or may have gotten the prosecutor to drop the charges because there was such powerful evidence of a different perpetrator. Johnson might have been spared 9 years in prison, and taxpayers might have saved almost \$3 million in state compensation.<sup>5</sup>

## 2. Clearer disclosure deadlines

The timing of criminal discovery should also be improved. The current rules require State's Attorneys to turn over materials within 45 days of the defense filing a request.<sup>6</sup> However, prosecutors often obtain critical evidence after that point, and there is no cutoff date for disclosing previously unavailable materials. The defense is forced to continuously check if the prosecutor has additional evidence, and the prosecutor can potentially wait until the day before trial begins to disclose it.

There should be an additional deadline before trial for the state to disclose any items that weren't available during the initial deadline. A second time limit would create more efficiency and ensure that the defense has enough time to review evidence and prepare for trial.

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<sup>3</sup> [www.innocenceproject.org](http://www.innocenceproject.org)

<sup>4</sup> National Registry of Exonerations. Case Profile: Bobby Johnson.

<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4751>

<sup>5</sup> Id.

<sup>6</sup> Conn. Practice Book Sec. 40-11



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### 3. **Stronger information sharing between police and prosecutors.**

There should also be stronger information sharing between prosecutors and the police. Connecticut statute requires police to disclose in writing to the prosecution all “exculpatory” materials in its possession.<sup>7</sup> However, the term “exculpatory” is subjective and forces police to make judgment calls about which evidence would tend to negate a defendant’s guilt.

With open-file discovery, police wouldn’t have to make those judgement calls. Law enforcement would be required to turn over their entire file of evidence to the prosecution. In addition, prosecutors should be required to ask officers involved in the investigation whether they have turned over all materials in their possession.

### 4. **Better enforcement.**

Finally, the problem of inconsistent practices throughout the state can be addressed with stronger enforcement by the courts. First, both parties should be required to file a certificate of compliance with the court to create a record of the attorneys attesting to following discovery statute and rules. Second, judges should sanction states attorneys who do not follow discovery requirements. Courts should be required to grant continuances, upon the defense’s request, if the prosecution fails to provide required evidence within prescribed time period. The delay should not count against the defendant for calculation of speedy trial purposes.

#### *New Jersey & New York Discovery Laws*

These reforms would be in line with open-file discovery laws that have been in place in New Jersey for decades and were enacted in New York last year.<sup>8</sup> Both laws require the state to disclose all evidence before a defendant enters a guilty plea. In terms of timing, in New Jersey materials must be disclosed when the indictment is unsealed and in NY within 15 days of arraignment. Both laws apply discovery requirements to law enforcement agencies and officers, in addition to prosecutors, and require parties to provide an itemized list of the evidence that was disclosed. New York’s law requires both parties to certify compliance, and judge must allow the defense extra time to review evidence that was not disclosed by the required deadline.

#### *Post-Conviction Discovery*

In addition to strengthening pre-trial discovery, providing post-conviction discovery would reduce meritless state habeas claims and help overturn wrongful convictions more quickly. Right now, the state does not have to disclose any evidence to the defendant in state habeas proceedings. Without access to police reports, forensic analysis and other critical information, post-conviction litigators cannot effectively evaluate whether a petitioner’s claim is legitimate and deserving of further investigation.

Instead, the litigators err on the side of caution and file every claim that the petitioner alleges to avoid procedural defaults. In addition, post-conviction litigators spend an enormous amount of time and resources tracking down evidence that the state already has in its possession.

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<sup>7</sup> Conn. Gen. Stat. Ann. § 54-86c (West)

<sup>8</sup> **New York Discovery Law: C.P.L 245; New Jersey Discovery Law: Rule 3:13**



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Post-conviction discovery would allow post-conviction litigators to screen out meritless state habeas claims and identify wrongful conviction cases. The litigators could focus on investigating innocence cases and file claims with stronger evidence that could lead to quicker resolutions in wrongful convictions.

### Conclusion

Connecticut can prevent wrongful convictions of the innocent and reduce the volume of state habeas petitions with statewide pre-trial, open-file discovery. The state could also ensure that wrongful convictions are overturned quicker and reduce frivolous state habeas claims by provide post-conviction discovery to the defense.