# Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison

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*Abstract*

*Our criminal justice system resolves most of its cases through plea bargains. Yet the U.S. Supreme Court has not required that any evidence, even exculpatory or impeachment evidence, be provided to the defense before a guilty plea. As a result, state rules on pre-plea discovery differ widely. While some jurisdictions follow an "open-file" model, imposing relatively broad discovery obligations on prosecutors early in the criminal process, others follow a more restrictive, "closed-file" model and allow the prosecution to avoid production of critical evidence either entirely or until very near the time of trial. Though the advantages and disadvantages of both models are debated, surprisingly little is known about the models' real-world operation.*

*In this Article, we report the results of an original empirical study in which we surveyed practicing prosecutors and criminal*

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*defense attorneys about their pre-plea discovery practices. We surveyed attorneys from Virginia and North Carolina, two adjacent states, which are demographically and geographically similar, but have notably different discovery rules. North Carolina mandates open-file discovery early in the criminal process. By contrast, Virginia protects certain critical documents, such as witness statements and police reports, from discovery.*

*Our findings indicate that, as expected, open-file discovery can promote more informed guilty pleas. It leads to improved pre-plea disclosure of most categories of evidence. The practice is also viewed as more efficient in that it reduces discovery disputes and speeds up case dispositions. We also found little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice. Open-file discovery does not, however, appear to enhance the disclosure of certain impeachment evidence, such as the prior convictions of prosecution witnesses. Further, practitioners reported that even when the entire case file is turned over to the defense pre-plea, the file is frequently missing some information relevant to the case. The Article interprets these findings and concludes with a general endorsement of the North Carolina open-file system over the Virginia closed-file system as a better guarantor of informed decisions and efficient process in criminal cases.*

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## *I. Introduction*

It is commonplace to observe that most criminal cases in the United States today are resolved by a plea bargain, rather than a trial.[1] Yet the Supreme Court has never held that the prosecution's evidence must be disclosed to the defendant before a guilty plea.[2]

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1. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (noting that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system" (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))). In some jurisdictions, criminal trials are so rare that many prosecutors practice for years without appearing before a jury. Don Stemen et al., Plea Bargaining in Wisconsin: Prosecutor Effects on Charge Reductions and Sentencing Outcomes 9 (unpublished manuscript) (on file with author).

2. United States v. Ruiz, 536 U.S. 622, 628–32 (2002). *Ruiz* concluded that the government is not constitutionally required to disclose impeachment evidence before a guilty plea, but it did not squarely resolve whether the government must disclose factually exculpatory evidence. *Id.* at 628. Circuit courts have split on this question. *Compare, e.g.*, Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) (holding that a prosecutor need not disclose exculpatory evidence when a defendant waives a trial and pleads guilty), *with, e.g.*, McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (suggesting that, if a prosecutor fails to disclose factually exculpatory evidence before a defendant

Instead, it has held only that exculpatory evidence must be disclosed sometime before trial.[3]

As a result, state legislatures and judicial systems have adopted their own unique regimes and practices regarding pre-plea discovery.[4] Some jurisdictions follow an "open-file" model and impose relatively broad discovery obligations on prosecutors early in the criminal process.[5] Others follow a more restrictive, "closed-file" model and allow the prosecution to avoid production of critical information either entirely or until very near the time of trial.[6] Advocates of each of these approaches have marshaled theoretical arguments and anecdotal evidence on their behalf, but no one has tested empirically how the two models operate in practice.[7] We have taken up this task by surveying prosecutors and defense attorneys from two states with opposing approaches to pre-plea discovery.[8] This Article describes the findings of our

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enters a guilty plea, this would likely violate the Due Process Clause); *see also* Buffey v. Ballard, 782 S.E.2d 204, 216 (W. Va. 2015) (reviewing federal and state decisions on this question and concluding "that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage").

3. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

4. *See infra* Part II.B (discussing the criminal discovery rules used by different jurisdictions).

5. *See, e.g.*, ARIZ. R. CRIM. P. 15.1 (requiring the prosecutor to make available to the defendant all reports regarding relevant information within the prosecutor's control); COLO. CRIM. P. 16 (same); N.J. CT. R. 3:13-3 (requiring the prosecutor to put together a discovery packet or allow defendant to inspect, copy, and photograph relevant information); N.C. GEN. STAT. ANN. § 15A-903 (West 2015) (allowing a defendant to make a motion entitling her to receive "the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation"); OHIO CRIM. R. 16 (allowing a defendant access to relevant case materials subject to few limitations); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015) (allowing defendants upon request access to all relevant information).

6. *See, e.g.*, GA. CODE ANN. § 17-16-4 (2010) (calling for disclosure "no later than ten days before trial, or at such time as court orders"); VA. SUP. CT. R. 3A:11 (disclosure motion must be made "at least 10 days before the day fixed for trial").

7. *See infra* notes 15–20 and accompanying text (discussing various arguments for and against open-file models with accompanying scholarship depending primarily on anecdotal and hypothetical arguments).

8. The survey examines North Carolina, which uses an "open-file" model,

study and discusses their implications for discovery debates and reform.

While discovery rules continue to vary significantly from state to state, a recent trend has been in the direction of earlier and broader discovery.[9] Several states have reformed their rules and now require that the prosecutor disclose to the defense—either soon after indictment or arraignment, or in any event, before a guilty plea—virtually all evidence relevant to the case.[10] This move toward open-file discovery has been motivated by several concerns.

One concern prompting states to adopt liberal pre-plea discovery policies is the troubling number of eventual exonerations of defendants who originally pleaded guilty.[11] Several researchers have found that a key factor contributing to such wrongful convictions is the withholding of exculpatory evidence.[12] Constitutional rules mandating the disclosure of

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and Virginia, which follows the "closed-file" model. *See infra* Part III.B (explaining the method used for the survey of North Carolina and Virginia).

9. *See* Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 22 (2015) (describing this trend); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1622–23 (2005) (same).

10. *See supra* note 5 and accompanying text (listing rules requiring disclosure).

11. According to the National Registry of Exoneration, 210 of the 1575 wrongful convictions involved a guilty plea. Of the 210 plea-based wrongful conviction cases, at least twenty-one involved failure to disclose exculpatory evidence. The failure to disclose exculpatory evidence was a contributing factor in a much larger number of trial-based convictions. *See Basic Patterns*, NAT'L REGISTRY OF EXONERATIONS https://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx (last visited Apr. 2, 2016) (detailing exonerated individuals including the alleged crimes, reasons for conviction, and means of exoneration) (on file with the Washington and Lee Law Review). For a recent example, see Naheed Rajwani, *DNA Helps Clear Man's Name from Rape Charge After 24 Years*, DALLAS MORNING NEWS (July 25, 2014), http://www.dallasnews.com/news/metro/20140725-dna-helps-clear-mans-name-from-rape-charge-after-24-years.ece (last visited Apr. 2, 2016) (describing the case of a man who pleaded guilty to rape and was later exonerated by DNA evidence) (on file with the Washington and Lee Law Review).

12. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 (2008) (examining claims brought by exonerated individuals, including claims of *Brady* violations); JON B. GOULD ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE 19 (2012) ("In research on erroneous convictions, the most commonly established

exculpatory evidence before trial have proven too weak and ineffective, and these rules have not even been applied to the period before a guilty plea.[13] Yet, without the benefit of seeing the weaknesses in the prosecutor's case, defendants (and their counsel) may be more readily persuaded that the risk of a harsher sentence after trial and conviction outweighs the hope of acquittal, and thus, may be induced to plead guilty despite actual innocence.[14] Even in cases where guilt is not in question, many argue that a fully informed guilty plea is essential to fair and accurate verdicts and sentences.[15]

Another justification offered for liberal pre-plea discovery is greater efficiency. Open-file discovery is said to be more economical than restrictive discovery because defense attorneys no longer have to request specific items of evidence, and disputes over what evidence is discoverable are reduced.[16] As the defense

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transgression is the prosecution's failure to turn over exculpatory evidence."); EMILY M. WEST, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010) ("More than one-third (38%) of misconduct allegations involved *Brady* violations by the prosecutors—withholding potentially exculpatory evidence such as knowledge of alternative suspects and forensic science evidence that may have weakened the prosecution's case.").

13. *Infra* Section II.A.

14. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004) ("The result of inadequate discovery is that the parties bargain blindfolded. . . . Prosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.").

15. *See, e.g.*, Brown, *supra* note 9, at 1624 ("[B]road discovery partially compensates for restricted defense counsel; it helps make up for the deficiency in adversary process of constrained defense advocacy."); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1427, 1466 (2011) (arguing that pre-plea disclosures enhance accurate and voluntary plea bargaining that "more closely mirrors trial outcomes"); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 106 J. CRIM. L. & CRIMINOLOGY (forthcoming 2016) (manuscript at 13) ("[D]efendants need expansive information to intelligently plead guilty and agree to a sentence, or at least the contours of a sentence."); Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1372 (2012) ("Providing defendants with information obtained through the government's superior investigative resources levels the playing field."); Eleanor Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1583 (1981) ("[D]isclosure of evidence is critical to the fairness of the guilty-plea process.").

16. *See* Rodney J. Uphoff, *Criminal Discovery in Oklahoma: A Call for*

gains a better understanding of the prosecution's case earlier in the process, the case is also likely to be resolved more speedily.[17] Advocates of open-file rules also maintain that such rules make discovery more predictable and consistent across counties and among individual prosecutors.[18] Under this reasoning, a clear-cut requirement to disclose all evidence reduces the chances that prosecutors will use their discretion in illegitimate or unfair ways.[19]

Not everyone, however, is convinced that broad pre-plea discovery is necessary or is a net benefit to criminal justice systems. Mandatory disclosure of evidence at an early stage presents several potential difficulties. Among these is the concern that early disclosure of certain types of information—chiefly police reports and witness names, addresses, and statements—could, in some cases, endanger witness safety and privacy, discourage witnesses from testifying, or jeopardize the integrity of ongoing investigations.[20] A second concern is that broad pre-

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*Legislative Action*, 46 OKLA. L. REV. 381, 405 (1993) ("Not only would a mandatory open file policy increase the adequacy of defense counsel's representation, such a policy would substantially limit litigation in the trial and appellate courts over discovery issues.").

17. *See* Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009) ("Defendants confronted with the evidence against them may be quicker to plead guilty if the evidence is strong, or to argue persuasively for dismissal if the evidence is weak, leading to earlier resolution of cases and the elimination of unnecessary trials." (citation omitted)); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010) ("Defendants who are fully aware of the strength of the case against them might express greater willingness to accept plea bargains than those who lack such insight.").

18. *See* TEX. DEF. SER. & TEX. APPLESEED, IMPROVING DISCOVERY IN CRIMINAL CASES IN TEXAS: HOW BEST PRACTICES CONTRIBUTE TO GREATER JUSTICE 5 (2013) [hereinafter TEXAS DEFENDER SERVICE STUDY] (finding that before Texas adopted open-file rules, discovery practices varied "between Texas counties and sometimes within a single district attorney's office").

19. *See* WILLIAM F. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 51 (1985) (reporting study finding that "prosecutors will make the discovery procedures more cumbersome for certain defense attorneys whom they disliked or distrusted"); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 600 & n.241 (2006) (explaining that removing prosecutorial discretion will "equalize the disclosure of information among all defendants").

20. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 631–32 (2002) (discussing concerns about witness tampering and disruption of investigations if defendants have access to too much information); Baer, *supra* note 9, at 55 ("Information that convinces a defendant to admit his guilt is valuable to society; information

plea disclosure can be burdensome for prosecutors, who would have to review evidence earlier in the process and possibly undertake more time-consuming tasks, such as redacting sensitive information and applying for protective orders.[21] Prosecutors would also have to ensure that evidence in the custody of investigative agencies is included in the file in a timely fashion, even though they generally have no direct supervisory authority over such agencies.[22]

Moreover, many argue that mandatory open-file discovery simply isn't necessary. Proponents of this view believe that the phenomenon of innocent defendants pleading guilty is quite rare and, in any event, has little to do with what evidence the prosecutor has disclosed.[23] Opponents of broader discovery rules generally believe that the constitutional framework established by *Brady v. Maryland*[24]—under which prosecutors must disclose

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that enables him to establish his innocence falsely by lying and threatening others is not."); Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141, 145 (2012) ("[T]here are considerable costs involved in broadening preplea disclosure of impeachment evidence—costs that drain the efficient use of prosecutorial and judicial resources as well as threaten the privacy and safety of witnesses."); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1127–28 (2014) (discussing the concern that witnesses and their families will be intimidated through "threats, pressures, and physical harm" by defendants through pretrial disclosure (citation omitted)); Steven M. Goldstein et al., *Response to the Majority's Report*, NYSBA TASK FORCE ON CRIMINAL DISCOVERY FINAL REPORT 81 (Dec. 1, 2014) [hereinafter NYSBA REPORT, *Response to Majority*] (detailing concerns about witness safety that arise with increased disclosure).

21. *See, e.g.*, *Ruiz*, 536 U.S. at 632 (discussing the increased time and resources necessary to prepare documents pre-trial if prosecutors are required to expand disclosure); *see also* Baer, *supra* note 9, at 51 (detailing how open-file rules often mandate early disclosure, requiring prosecutors to continually examine incoming information to determine if it's discoverable).

22. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); Robert Farb, *Discovery in Criminal Cases*, *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith ed. 2015), *available at* http://benchbook.sog.unc.edu/criminal/discovery (discussing the duty of North Carolina prosecutors to investigate and obtain discoverable information from law enforcement).

23. *See* Gershman, *supra* note 20, at 151 ("It is unreasonable to believe that the disclosure of impeachment information . . . would affect in any meaningful way the reliability of a defendant's open acknowledgment of guilt.").

24. 373 U.S. 83 (1963).

exculpatory and impeachment evidence before trial—is adequate to protect defendants' rights.[25] Some also point out that prosecutors often already provide broader discovery than required by law—and that in cases where prosecutors withhold evidence, they may have good reasons for doing so.[26]

Even as the debates between advocates and opponents of open-file discovery proceed, little has been written about the real-world operation of systems that have adopted the practice. To our knowledge, only one empirical study has examined the practical effects of open-file pre-plea discovery, and its scope was limited.[27] This study was conducted less than a year after the introduction of open-file discovery in Texas, and it focused primarily on how the system was being implemented, rather than on its broader costs and benefits.[28] Furthermore, no empirical research has compared jurisdictions with broad discovery rules to jurisdictions with more restrictive rules. As a result, the debates about optimal pre-plea discovery remain driven largely by speculation and anecdotal evidence, rather than hard data.

This Article aims to take a step toward filling that empirical gap. We describe below a study we conducted from September 2014 to January 2015, in which we surveyed prosecutors and defense attorneys in Virginia and North Carolina about their pre-plea discovery practices. These two adjacent states are demographically and geographically similar, but have notably different discovery rules. North Carolina mandates open-file discovery early in the criminal process.[29] Virginia, by contrast,

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25. *Infra* notes 122–123 and accompanying text.

26. *Cf.* BRUCE FREDERICK & DON STEMEN, ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT 75 (2012) (noting broad agreement among prosecutors that discretion is necessary to allow them to fashion what they perceive as the most effective and fair responses).

27. *See* TEX. CRIM. DEF. LAWYERS ASS'N & MANAGING TO EXCELLENCE CORP., THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT iv–v (2015) [hereinafter TCDLA REPORT ON MICHAEL MORTON ACT] (examining the effects of the Michael Morton Act, which introduced open-file discovery in Texas). For a discussion of four other empirical studies of discovery practices, none of which focuses on open-file or pre-plea discovery, see *infra* notes 132–136 and accompanying text.

28. *See* TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27, at v (noting that the study examines the fiscal impact of implementing open-file discovery in Texas).

29. Requests for discovery must be filed within ten days of finding of

requires much less disclosure and protects police reports and witness names and statements from discovery (unless they are exculpatory, in which case they must be disclosed before trial).[30]

Through a comparison of survey responses in these two states, our study first examines whether rules mandating early open-file discovery result in significantly different pre-plea disclosure practices. Relatedly, it evaluates whether open-file rules result in the disclosure of exculpatory evidence more reliably than traditional closed-file approaches. The survey next analyzes whether prosecutors in North Carolina attempt to evade stricter open-file rules by negotiating discovery waivers as part of plea negotiations. Finally, it solicits the general views of prosecutors and defense attorneys in both states concerning the advantages and disadvantages of open-file discovery.

We find that discovery rules do have a significant effect on discovery practices.[31] As might be expected, the open-file regime of North Carolina results in more extensive and predictable disclosure of several key categories of evidence than do the more restrictive Virginia rules.[32] This is so even though a large majority of Virginia prosecutors reported that they voluntarily provide broader discovery than required by law.[33]

More surprisingly, we find that open-file rules do not necessarily produce broader pre-plea disclosure of certain evidence that can be used to impeach prosecution witnesses.[34]

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probable cause, or the date the defendant waives probable cause. If the defendant is unrepresented, the ten days starts when defendant consents to proceeding on an information, or service of true bill upon defendant, or appointment of counsel. N.C. GEN. STAT. ANN. § 15A-902(d) (West 2015).

30. VA. SUP. CT. R. 3A:11. *Brady* also requires pre-trial disclosure of witness statements that may be exculpatory or have impeachment value. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963) (explaining that any witness statement that "would tend to exculpate [a defendant] or reduce the penalty" must be disclosed). But per *Ruiz* and related Fourth Circuit and Virginia state law, impeachment, and possibly factually exculpatory, evidence need not be provided before a guilty plea. *See* United States v. Ruiz, 536 U.S. 622, 628–32 (2002) (concluding that the government is not required to disclose exculpatory evidence before a guilty plea is entered); *see also infra* note 188 and accompanying text (discussing Fourth Circuit and Virginia state law).

31. *Infra* Part III.C.1.

32. *Id.*

33. *Infra* note 171 and accompanying text.

34. For example, at the pre-plea stage, Virginia prosecutors are more likely

Our finding likely reflects the fact that this evidence often does not become part of the file until closer to trial and is thus not required to be disclosed under open-file rules before a guilty plea.[35] The interaction of open-file discovery with the "due diligence" exception to *Brady* (under which prosecutors are relieved from the duty to disclose exculpatory and impeachment evidence when the defense can obtain the evidence through its own reasonable efforts)[36] also helps explain why the North Carolina disclosure rate of this evidence is *lower* than that in Virginia. Because North Carolina prosecutors consistently disclose witness names early in the process, they may expect defense attorneys to research for themselves whether the witnesses have any prior convictions. Virginia prosecutors, on the other hand, do not typically turn over witness names at the pre-plea stage and thus cannot expect defense attorneys to check witnesses' criminal records.

Although open-file does not consistently increase impeachment evidence provided to the defense, we found that it does enhance the disclosure of factually exculpatory evidence to some degree. Open-file rules appear to make the most difference where the exculpatory nature of the evidence is not obvious.[37] In such cases, prosecutors in Virginia have to make a deliberate

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than North Carolina prosecutors to disclose evidence of witness criminal records. *Infra* notes 179–181 and accompanying text.

35. *See* N.C. GEN. STAT. ANN. § 15A-902(d) (West 2015) (requiring disclosure within ten working days of the probable-cause hearing).

36. *Compare, e.g.*, Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002) (holding that information available to the defendant through diligent investigation need not be disclosed), *and* United States v. Ladoucer, 573 F.3d 628, 636 (8th Cir. 2009) (finding that, because the defendant could have obtained a copy of a transcript himself, the Government's failure to disclose was not a *Brady* violation), *with* Amado v. Gonzalez, 758 F.3d 1119, 1137 (9th Cir. 2014) (holding that a prosecutor's failure to disclose based on a premise that the defendant could have found the information through due diligence is "contrary to federal law . . . and unsound public policy"). *Cf.* United States v. Agurs, 427 U.S. 97, 102–03 (1976) (noting in passing that *Brady* applies to evidence that "had been known to the prosecution but unknown to the defense"). For a critique of the "due diligence" rule, see Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1 (2015); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2012).

37. *Infra* Part III.C.2.

judgment that the evidence is indeed exculpatory and material to the case in order to disclose it, whereas North Carolina prosecutors provide it automatically as long as the evidence is part of the file. We explain how our findings on this point fit within the broader literature discussing the causes of non-compliance with *Brady*.[38]

Our survey results also suggest that neither open-file nor closed-file rules ensure consistent disclosure of *Brady* evidence when the evidence is in the possession of investigating agencies, rather than prosecutors. It appears that, in some cases, the evidence is either not recorded or not transmitted by law enforcement pre-plea, and as a result, it is not included in the file that is turned over to the defense as part of initial discovery.[39] Our findings on this point are consistent with commentaries arguing that the success of open-file depends critically on investigators who are required and trained to document and convey evidence to the prosecution in a timely fashion.[40]

We find further that the parties do not attempt to evade the open-file rules in North Carolina by negotiating away discovery rights. Discovery waivers remain exceptional and are limited to specific types of evidence, such as the identity of confidential informants or the results of drug testing.[41] This result tends to contradict arguments that open-file is too onerous and would lead prosecutors to bargain for discovery waivers. Open-ended responses by North Carolina prosecutors and defense attorneys likewise indicate that liberal pre-plea discovery does not impose undue logistical burdens on prosecutors or undue hardships on witnesses.

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38. *Infra* notes 58–62, 200–201 and accompanying text.

39. *Infra* notes 322, 331–340 and accompanying text.

40. *See, e.g.*, Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 545 (2007) (observing that governmental agencies outside of the prosecutor's control may decide not to disclose information to the prosecutor, leading defendants to believe, incorrectly, that they have obtained all relevant information); Meyn, *supra* note 20, at 1122 ("The term 'open-file policy' is misleading. The policy provides only a vague degree of access to the prosecutorial file and no access to the police department's investigatory file."); Prosser, *supra* note 19, at 601, 606–07 (explaining issues that can arise when information is not reduced to writing and is therefore undiscoverable under some jurisdictions' rules).

41. *Infra* Part III.C.3.

With respect to the subjective views and impressions of prosecutors and defense attorneys in the two states, we uncover some similarities and some differences.[42] We find that prosecutors and defense attorneys tend to provide quite different accounts of what evidence is actually provided before a guilty plea. The two groups of legal actors also have distinct views of the disadvantages of open-file discovery, though they largely agree with respect to the advantages of open-file. We further uncover notable differences in the views of prosecutors in North Carolina and prosecutors in Virginia. The latter tend to view open-file discovery far more warily than do their North Carolina counterparts.

We discuss possible reasons for our findings and conclude with some implications for debates about discovery reform. While we believe that further empirical work would be helpful in measuring the direct effects of different discovery rules, our findings offer the first data-driven endorsement of the North Carolina open-file system over the closed-file system used in Virginia. While the open-file system may not always produce better disclosure of impeachment or all categories of exculpatory evidence, it does generally enhance disclosure of most types of evidence. It also appears to reduce discovery disputes and promote speedier dispositions of cases.

## *II. Regulating Pre-Plea Discovery in Criminal Cases*

### *A. The Constitutional Baseline*

Although discovery rules vary significantly across the United States, constitutional doctrine sets a baseline below which neither states nor the federal system can fall. In 1963, in *Brady v. Maryland*, the Supreme Court held that the Due Process Clause of the U.S. Constitution requires prosecutors to disclose, before trial, evidence that may exculpate defendants or mitigate their sentences.[43] In subsequent cases, the Court affirmed that

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42. *Infra* Part III.C.4.

43. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

prosecutors must also reveal to the defense impeachment evidence, i.e., evidence that tends to undermine the credibility of government witnesses.[44] Critically, the Court also held that prosecutors are responsible for disclosing not only evidence in their possession, but also information that is in the custody of law enforcement officers.[45] A number of state statutes, lower court decisions, ethical rules, and local court rules have reinforced the *Brady* rules for disclosing exculpatory evidence.[46]

The *Brady* framework for discovery aims to ensure fair and accurate outcomes in criminal cases.[47] It is supposed to achieve this goal by compelling prosecutors to consider weaknesses in their case and alerting defense attorneys to evidence in the defendant's favor.[48] In practice, *Brady* has not fully delivered on this promise, for several reasons.

First, the *Brady* framework provides a remedy for discovery violations only where the withheld evidence is material to the outcome—in other words, where it is reasonably likely that disclosure would have led to a different outcome.[49] But it is often

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punishment, irrespective of the good faith or bad faith of the prosecution.").

44. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding that if the reliability of a witness can help determine guilt or innocence, information regarding the reliability of the witness must be disclosed); United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.").

45. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

46. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (AM. BAR ASS'N 1980) (requiring disclosure to the accused "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2165 (2010) (noting that state prosecutors "have to comply not only with the federal constitutional obligations but with disclosure obligations established by state constitutional decisions, statutes, procedural rules, and/or ethics rules"); McConkie, *supra* note 15, at 11–12 (noting that federal prosecutors have to comply with DOJ internal discovery guidelines and with state ethical rules pertaining to discovery).

47. *Bagley*, 473 U.S. at 693.

48. *See* McConkie, *supra* note 15, at 13 (explaining that access to exculpatory and inculpatory evidence is essential for a defendant to understand the weaknesses of the prosecutor's case).

49. *See Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

difficult for defendants to show, after conviction, that the outcome would have been different had the disclosure occurred.[50] Indeed, it is a challenge to even learn that certain evidence was never disclosed.[51] This helps explain why only a small percentage of *Brady* violations are even litigated.[52]

Another problem with the *Brady* framework is that it is addressed primarily to the prosecution, but it is often police officers who fail to record and turn over exculpatory evidence.[53] In *Kyles v. Whitley*,[54] the Supreme Court attempted to address this problem when it noted that prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[55] It expressed hope that police and prosecutors could devise procedures that would help them fulfill this constitutional duty.[56]

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result of the proceeding would have been different."); *Kyles*, 514 U.S. at 454 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."); Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (explaining that a *Brady* violation would be found only where the nondisclosure prejudiced the accused); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 647 (2002) (discussing the Court's increasingly strict materiality standard). For a sampling of the scholarly critique of the materiality standard, see, e.g., Medwed, *supra* note 17, at 1543–44.

50. *See* Burke, *supra* note 17, at 489–90 (explaining that, even where defendants learn of non-disclosure, the materiality standard sets a high bar many defendants cannot meet).

51. *See* Medwed, *supra* note 17, at 1540 ("[P]roven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.").

52. *See, e.g.*, Burke, *supra* note 17, at 489 ("If [prosecutors] intentionally suppress evidence that might jeopardize a conviction, they can do so in the comfort of knowing there is little chance the evidence will ever come to light and therefore only a remote possibility of a challenge to their decision to withhold it."); Medwed, *supra* note 17, at 1541–42 ("Defense lawyers . . . usually lack the 'time, resources, or expertise' to conduct the type of massive pretrial investigation needed to ferret out this evidence. When a prosecutor chooses not to disclose evidence, that decision is seldom revealed to outsiders . . . .").

53. *See, e.g.*, Gershman, *supra* note 40, at 545 ("Prosecutors know that *Brady* evidence may be in the files of other government agencies, i.e., the police and other law enforcement agencies involved in the investigation.").

54. 514 U.S. 419 (1995).

55. *Id.* at 437.

56. *See id.* at 438 ("[N]either is there any serious doubt that 'procedures

In practice, this requirement has been difficult to meet because prosecutors have no supervisory authority over law enforcement and therefore cannot reliably ensure that officers document and transmit exculpatory evidence.[57]

More broadly, *Brady* does little to address what is perhaps the most common reason for nondisclosure—prosecutors' failure to recognize exculpatory evidence as such.[58] As scholars have amply documented, such omissions may occur entirely inadvertently. Prosecutors may fail to disclose as a result of insufficient training,[59] a lack of time or resources to review the evidence carefully,[60] or cognitive biases that prevent them (as well as law enforcement officers) from appreciating that certain evidence might undermine their case.[61] While *Brady* sanctions

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and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every other lawyer who deals with it.'" (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

57. As a result, a number of lower federal courts have interpreted *Kyles* more narrowly and have found no due process violation where the prosecution lacks authority over the person with knowledge of the information or where it would "place an unreasonable burden" on the prosecutor to search unrelated files for *Brady* evidence. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 755–56 (2015).

58. *See* Medwed, *supra* note 17, at 1542 (noting how, as a result of cognitive biases, "prosecutor[s] may process information selectively, undervaluing the potentially exculpatory evidence and overrating the strength of the rest of the prosecution case").

59. *See* Prosser, *supra* note 19, at 551, 569 (discussing how inexperienced prosecutors may have difficulty discerning what must be disclosed).

60. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecution Caseloads Harm Criminal Defendants*, 105 NW. U.L. REV. 261, 286 (2011) ("[W]hen prosecutors carry excessive caseloads, they handle them in a triage fashion. . . . If evidence is lurking in a case file that will ultimately lead to a defendant's case being dismissed, it will linger there until the prosecutor has time to focus on the matter.").

61. *See* Burke, *supra* note 17, at 495 (describing "the well-documented tendency to favor evidence that confirms one's working hypothesis"); *see also* Hadar Aviram, *Legally Blind: Hyperadversarialism,* Brady *Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1, 34–35 (2013) (noting how the partisan culture of prosecutors' offices tends to exacerbate confirmation biases that prevent adequate disclosure of *Brady* evidence); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) (discussing prosecutors' "tendency to develop a fierce loyalty to a particular version of events: the guilt of a particular suspect or group of suspects"); Keith R. Findley & Michael S. Scott, *The Multiple*

theoretically apply even where the nondisclosure is inadvertent, the infrequency of such sanctions provides little incentive for police departments and prosecutors to institute robust training and auditing necessary to prevent *Brady* violations.[62]

Finally, an important reason why *Brady* law has proven inadequate is that it applies before trial, yet the vast majority of cases today are resolved through guilty pleas.[63] The Supreme Court has expressly held that prosecutors need not turn over impeachment evidence before a guilty plea,[64] and a number of lower courts have applied this holding to factually exculpatory evidence as well.[65] The Court explained that pre-plea disclosure of impeachment evidence is not required because: (1) the duty to disclose impeachment evidence protects the fairness of the trial, not the fairness of criminal proceedings more broadly; (2) earlier disclosure would increase the risks of witness intimidation; and (3) pre-plea disclosure of impeachment evidence would unduly burden prosecutors.[66]

For all these reasons—application, timing, and enforcement—the *Brady* doctrine fails to guard adequately against failures to disclose exculpatory evidence. Some jurisdictions have attempted to strengthen *Brady*'s requirements

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*Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (noting how tunnel vision leads prosecutors "to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion").

62. *See, e.g.*, Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1593 (2003) (noting that "courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the [ethical] rule but not by other law"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 172–73 (2004) [hereinafter Medwed, *The Zeal Deal*] (discussing the reticence of courts and disciplinary authorities to punish prosecutorial misconduct).

63. In state systems, guilty pleas accounted for 94% of felony convictions in 2006. SEAN ROSENMERKEL ET AL., FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009).

64. United States v. Ruiz, 536 U.S. 622, 628–32 (2002).

65. *See, e.g.*, Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) (holding that a prosecutor need not disclose exculpatory evidence when a defendant waives a trial and pleads guilty). *But see, e.g.*, McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (noting that if a prosecutor fails to disclose exculpatory evidence of actual innocence before a defendant enters a guilty plea, this would likely violate the Due Process Clause).

66. *Ruiz*, 536 U.S. at 629, 631–32.

to some degree by statute or ethical rule. A few have abandoned the materiality requirement,[67] while others have required that exculpatory evidence be disclosed "as soon as practicable."[68] Such reforms remain the exception rather than rule, however, and they do not fully overcome *Brady*'s shortcomings. For example, the timing requirement is often too flexible and fails to guarantee that disclosure would occur before a guilty plea.[69] More problematically, even where rules have expanded *Brady* requirements on paper, enforcement of the rules remains weak.[70] As a result, the problem of police and prosecutors failing to recognize exculpatory evidence remains.[71]

### *B. Beyond the Baseline: Two Models of Discovery in Criminal Cases*

Beyond these requirements for disclosing exculpatory evidence, states and the federal system have adopted rules that mandate the disclosure of certain specified types of evidence, such as documents, expert reports, and statements by the defendant.[72]

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67. *See, e.g.*, ARIZ. R. CRIM. P. 15.1(b)(8) (requiring the disclosure of information that is "material *or* information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor" (emphasis added)); MD. R. 4-262(d)(1), 4-263(d)(5)-(6) (requiring disclosure of information that "tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged"); *see also* ILL. SUP. CT. R. 412(a)(vi) (omitting a materiality requirement for disclosure of certain enumerated types of *Brady* evidence); MASS. R. CRIM. P. 14(a)(1)(A)(ix) (same).

68. ILL. SUP. CT. R. 412(c)–(d); WIS. STAT. § 971.23(1)(h) (2007).

69. Even ethical rules like Model Rule 3.8(d), which have aimed to require earlier disclosure of exculpatory evidence, remain ambiguous as to the precise timing of the disclosure. Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 958 (2008).

70. *See, e.g.*, *id.* at 958 (noting that Rule 3.8(d) has not been enforced against prosecutors who fail to disclose exculpatory evidence before pleas); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 458 n.86 (2001) (same); Green, *supra* note 62, at 1593 (explaining that prosecutors are not sanctioned for failure to disclose under the Model Rules).

71. *See supra* notes 58–62 and accompanying text (examining factors contributing to prosecutorial failures to recognize and disclose exculpatory evidence).

72. *See generally* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL

The breadth of items required to be disclosed and the timing for the disclosure vary significantly from one jurisdiction to the next.[73] One can distinguish two models that fall at each end of the spectrum. On one end are states such as Virginia and New York, which largely follow the federal rules of criminal procedure and require a relatively limited set of items to be disclosed.[74] Critically, such "restrictive" jurisdictions do not mandate pretrial disclosure of witness names, witness statements, or police reports.[75] They also frequently tie disclosure to the date of trial and thus fail to ensure that disclosure occurs before a guilty plea.[76] We call this the "closed-file" model, and we identify ten states and the federal system as belonging in this category.[77]

On the other side of the spectrum are states such as North Carolina and Texas, following the "open-file" or "liberal" discovery model.[78] While states that follow this model differ somewhat in the scope of information they require to be disclosed, the chief characteristics of their discovery rules are similar. The prosecution is generally required to disclose, at some point after arraignment, either its entire case file (minus work product) or a broad set of evidentiary materials that encompasses nearly everything in the file (minus work product).[79] The key feature of such liberal discovery is that it presumptively requires the disclosure of witness names, witness statements, and police reports.[80]

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PROCEDURES: PROSECUTION AND ADJUDICATION 282 (2007).

73. *Id.* at 286–87.

74. *See* FED. R. CRIM. P. 16 (requiring limited disclosure by the prosecution upon motion by the defendant).

75. *See, e.g.*, VA. SUP. CT. R. 3A:11 (requiring only defendant statements, criminal records, and certain books, reports, and tests to be disclosed before trial). For other examples, see rules categorized as "closed-file" in Appendix B.

76. *See, e.g., id.* (requiring motion for disclosure at least ten days before trial). For other examples, see rules categorized as "closed-file" in Appendix B.

77. *Infra* Appendix B.

78. *Supra* note 5 and accompanying text.

79. *See, e.g.*, COLO. CRIM. P. 16 (requiring disclosure of a broad set of evidentiary materials); N.C. GEN. STAT. ANN. § 15A-903 (West 2015) (same); OHIO CRIM. R. 16 (same); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015) (same). For other examples, see rules categorized as "open-file" in Appendix B.

80. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-903(a) (West 2015) (requiring that the prosecution disclose its entire file, including witness names and statements, co-defendant statements, investigating officers' notes, police reports, and other

Even when states adopt liberal discovery provisions, they also enact measures to protect witness safety and the integrity of investigations. Typically, if prosecutors present particular concerns that disclosure may endanger the safety of witnesses or the integrity of the investigation, the court can issue protective orders allowing non-disclosure.[81] The law may also limit disclosure to self-represented defendants because of fears that they might tamper with the evidence or otherwise interfere with the investigation.[82] Finally, defense attorneys may be restricted in communicating certain witness information (such as home address and other personal data) to their clients.[83]

We identify seventeen states with rules that follow this "open-file" model.[84] The list includes states that, while not directly requiring the prosecution to disclose all non-work-product items in its file, mandate the disclosure of critical items such as witness names, witness statements, and police reports.[85] Although these states remain a minority, the trend in recent years is in the direction of broader and earlier discovery. At times, the triggers for reform have been high-profile exonerations of people who had been wrongfully convicted as a result of the prosecution's failure to disclose exculpatory evidence.[86] Concerns about fairness and wrongful convictions

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items).

81. *See, e.g.*, COLO. CRIM. P. 16(III)(d) (allowing the court to restrict discovery on a showing of cause); N.C. GEN. STAT. ANN. §§ 15A-903(a)(3) to 908(2) (West 2015) (limiting disclosure of discoverable information upon a showing of potential harm to a witness or "other particularized, compelling need not to disclose"); OHIO CRIM. R. 16(D) (listing scenarios in which a prosecutor may refuse to disclose otherwise discoverable information).

82. *See* OHIO CRIM. R.16(L)(2) ("The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule."); TEX. CODE CRIM. PROC. ANN. art. 39.14 (d) (West 2015) (providing that *pro se* defendants may review but not copy materials in the file).

83. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 39.14(f) (West 2015) (requiring defense attorneys to redact such information); ARIZ. R. CRIM. P. 39(j) (restricting disclosure of certain sensitive personal information); OHIO CRIM. R. 16(C) (allowing prosecutors to designate some information for defense counsel only).

84. *See infra* Appendix B (listing states that have open-file rules, which require disclosure of witness names, witness statements, and police reports).

85. *See generally, e.g.*, ARIZ. R. CRIM. P. 15.1.

86. *See* Phillip Bantz, *Death Row Inmate's Exoneration in North Carolina*

drove North Carolina and Texas to adopt open-file discovery in 2004 and 2014, respectively.[87] In other jurisdictions, reforms reflected a mix of motivations, but chiefly a belief that broader discovery is both fairer and more efficient than restrictive discovery.[88]

Another twenty-three states fall somewhere in the middle of the spectrum of pre-plea discovery.[89] They may require the prosecution to disclose witness names and statements but not police reports.[90] Or they may require the disclosure of witness names, but not statements,[91] or of only portions of a police report (e.g., those concerning surveillance or identification procedures).[92]

Many states falling on the restrictive end of the spectrum, or in the middle, are in the process of considering a shift toward broader and earlier discovery.[93] In this process, debates about the

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*Inspired Change*, N.C. LAW. WEEKLY, May 3, 2013, 2013 WLNR 11476236 (discussing how the exoneration of Alan Gell, who had been wrongfully convicted of murder in part because of withheld exculpatory evidence, led to the passage of legislation requiring open-file disclosure); Guy Loranger, *The Nifong Effect*, N.C. LAW. WEEKLY, June 4, 2007, 2007 WLNR 29556667 (discussing the Duke University lacrosse team case in which the prosecutor, Mike Nifong, withheld exculpatory evidence that was ultimately unearthed by the defendants because of North Carolina's open-file discovery rules); *see also* JUDICIARY & CIVIL JURISPRUDENCE COMM., HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, S.B. 1611, at 4 (Tex. 2013) (explaining that the change in discovery rules in Texas was motivated by the case of Michael Morton, who spent 25 years in prison before being exonerated).

87. *See* Bantz, *supra* note 86 (crediting Gell's exoneration with sparking legislative changes); JUDICIARY & CIVIL JURISPRUDENCE COMM., *supra* note 86, at 4 (discussing cases in North Carolina and Texas that led to an open-file discovery system).

88. *See, e.g.*, ARIZ. R. CRIM. P. 15.1 (committee comment to 2003 amendment) ("Codification of the common practice of initial disclosure before or at the arraignment phase of the proceedings is intended to facilitate effective communication and the efficient resolution of issues."); OHIO CRIM. R. 16 (staff notes to July 1, 2010 amendments) ("The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties.").

89. *See generally* Appendix B.

90. MISS. UNIF. R. COURT CIR. & CTY. CT. PRACTICE, R. 9.04.

91. ARK. R. CRIM. PROC., R. 17.

92. HAW. R. PEN. PROC., R. 16.

93. *See, e.g.*, N.Y. CTY. LAWYERS' ASS'N, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT AND RECOMMENDATIONS 2 (2006) [hereinafter NYCLA REPORT] (examining criminal discovery practice in New York and recommending

costs and benefits of open-file discovery have played a prominent role.[94]

### *C. The Rise of the Open-File Model: Costs and Benefits*

States considering discovery reform over the last decade have heard strong opinions both in favor of and against a shift toward the open-file model. Advocates of open-file have argued that it is the best means for ensuring the consistent disclosure of exculpatory evidence.[95] Open-file discovery largely eliminates the need for police and prosecutors to evaluate whether specific items of evidence qualify as *Brady* material.[96] Instead, it gives the defense the opportunity to review all recorded evidence and determine for itself which items might be favorable to the defendant.[97] Advocates have therefore argued that the practice resolves one of the key problems of the *Brady* regime—prosecutors and police officers failing to identify evidence as exculpatory.[98]

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"more open and earlier disclosure"). In 2015, Virginia went through its third unsuccessful effort to reform its own restrictive discovery rules. *See* Tom Jackman, *Virginia Decides Not to Change Rules That Withhold Documents from Defense*, WASH. POST (Dec. 12, 2015), https://www.washingtonpost.com/local/public-safety/va-decides-not-to-change-rules-that-withhold-documents-from-defense/2015/12/12/6f76d982-9dc5-11e5-bce4-708fe33e3288_story.html (last visited Apr. 7, 2016) (on file with the Washington and Lee Law Review).

94. *See, e.g.*, Jackman, *supra* note 93 (discussing arguments for and against open-file discovery); TEXAS DEFENDER SERVICE STUDY, *supra* note 18, at 1–3 (same).

95. *See, e.g.*, Burke, *supra* note 17, at 514 (arguing that open-file discovery removes prosecutorial discretion, resulting in defendant access to all material exculpatory evidence); Moore, *supra* note 15, at 1372 (arguing that open-file discovery "levels the playing field" and helps ensure public confidence in the justice system through more reliable verdicts); *see also* Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999) (recognizing that open-file discovery "may increase the efficiency and the fairness of the criminal process").

96. *See* Burke, *supra* note 17, at 514 (arguing that open-file discovery removes the burden from prosecutors to determine what is material exculpatory evidence).

97. *See* McConkie, *supra* note 15, at 13 (explaining that access to exculpatory and inculpatory evidence is essential for a defendant to understand the weaknesses of the prosecution's case).

98. *See, e.g.*, Medwed, *supra* note 17, at 1540 ("In some [wrongful conviction] cases, prosecutors simply deemed the evidence not to be

Because open-file discovery must be provided early in the process (typically at arraignment or soon thereafter), it is also defended on the grounds that it helps to ensure fair and informed guilty pleas.[99] Early and broad discovery provides defense attorneys with critical information that enables them to counsel their clients more effectively. This is particularly important in the many cases where—as a result of an underfunded and overwhelmed indigent defense system—defense attorneys lack the time or resources to investigate independently.[100] Open-file offers informational benefits to the prosecution as well. Because the defense is better educated and prepared early on, it can provide critical feedback to the prosecution about potential weaknesses in the case and allow the prosecution to make a more informed decision about the disposition of the matter.[101]

Supporters of open-file discovery further argue that the practice fosters cooperation between the parties and reduces discovery disputes. As the parties gain clarity about the facts in a timely fashion, open-file is also said to promote speedier resolution of the case, whether through a guilty plea or dismissal.[102] For all these reasons, many see open-file discovery as more efficient than more restrictive regimes. Indeed, efficiency has been a key reason behind discovery reforms in a number of jurisdictions.[103]

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important."); Prosser, *supra* note 19, at 600–01 ("[Open-file discovery] would remove much of the uncertainty inherent in the discretionary disclosure decisions prosecutors now have to make.").

99. *See, e.g.*, Cassidy, *supra* note 15, at 1466 (arguing that pre-plea disclosure promotes accurate and voluntary guilty pleas that "more closely mirror[] trial outcomes"); Moore, *supra* note 15, at 1372 ("Providing defendants with information obtained through government's superior investigative resources levels the playing field."); Ostrow, *supra* note 15, at 1583 ("[D]isclosure of evidence is critical to the fairness of the guilty-plea process.").

100. *See* Brown, *supra* note 10, at 1624 (arguing that "broad discovery partially compensates for restricted defense counsel").

101. *See* Burke, *supra* note 17, at 516 ("Defendants confronted with the evidence against them may be quicker to plead guilty if the evidence is strong, or to argue persuasively for dismissal if the evidence is weak, leading to earlier resolution of cases and the elimination of unnecessary trials." (citation omitted)).

102. *See, e.g.*, Medwed, *supra* note 17, at 1560 ("Defendants who are fully aware of the strength of the case against them might express greater willingness to accept plea bargains than those who lack such insight.").

103. *See, e.g.*, ARIZ. R. CRIM. P. 15.1 (committee comment to 2003

Finally, proponents of mandatory open-file rules contend that such rules ensure more consistent discovery practices and equal treatment of similarly situated defendants. In closed-file states, individual prosecutors or prosecutor's offices often provide broader discovery voluntarily, on a case-by-case basis.[104] While such discretionary discovery may benefit individual defendants, it creates divergent practices within the same state.[105] It invites diverse interpretations of "open-file," some of which result in significantly narrower disclosures than would be required under a formal, mandatory open-file policy.[106]

More problematically, discretionary discovery invites the risks of favoritism and discrimination.[107] Studies have found, for

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amendment) ("Codification of the common practice of initial disclosure before or at the arraignment phase of the proceedings is intended to facilitate effective communication and the *efficient* resolution of issues." (emphasis added)); OHIO CRIM. R. 16 (staff notes to July 1, 2010 Amendments) ("The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and *speedy* administration of justice through the expanded scope of materials to be exchanged between the parties." (emphasis added)); *see also* Allard Ringnalda, *Procedural Tradition and the Convergence of Criminal Procedure Systems: The Case of the Investigation and Disclosure of Evidence in Scotland*, 62 AM. J. COMP. L. 1133, 1151 (2014) (arguing that a number of common-law countries have recently expanded discovery in criminal cases primarily with the aim of improving the efficiency of the process).

104. *See, e.g.*, TEXAS DEFENDER SERVICE STUDY, *supra* note 18, at 5 (finding that under the previous restrictive Texas discovery rules, some prosecutor's offices used a form of open-file policy); NYCLA REPORT, *supra* note 93, at 1 (finding the same result under restrictive New York discovery rules).

105. *See, e.g.*, NYCLA REPORT, *supra* note 93, at 1 (noting that procedures for disclosure vary widely in four different boroughs of New York City); TEXAS DEFENDER SERVICE STUDY, *supra* note 18, at 5 (finding inconsistent disclosure practices across Texas under previous restrictive discovery rules).

106. TEXAS DEFENDER SERVICE STUDY, *supra* note 18, at 3 (finding that discretionary open-file policy in Texas resulted in "significantly fewer disclosures" than American Bar Association recommendations); Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do with It?*, 23 CRIM. JUST. 28, 33 (2008) (noting that jurisdictions with voluntary open-file procedures "do not provide information much beyond that mandated by Rule 16 of the Federal Rules of Criminal Procedure").

107. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1229 (1975) ("Although most defense attorneys do seem able to secure relatively broad informal discovery in jurisdictions in which the statutory right to discovery is extremely limited, some defendants suffer because their attorneys are not sufficiently trusted by the prosecutor's office to receive the usual privileges."); Prosser, *supra* note 19, at 600 (explaining that removing

example, that when prosecutors have discretion over how much discovery to provide, they make decisions based on factors such as the relationship between the prosecutor and the defense attorney, thus potentially punishing clients for the "sins" of their attorneys.[108] Open-file rules reduce the possibility for such discriminatory treatment, at least when it comes to the discovery process.[109] It also reduces the risk that some defense attorneys will represent their clients less zealously in order to remain in the prosecutor's good graces and receive favors such as broader discovery.[110]

Although the popularity of open-file laws is growing, important concerns about their effects remain. The first and chief concern is that open-file discovery endangers witness safety and witness privacy and therefore conflicts with the government's duty to protect the public.[111] Relatedly, opponents of open-file

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prosecutorial discretion will "equalize the disclosure of information among all defendants").

108. *See, e.g.*, MCDONALD, *supra* note 19, at 51 (finding that "prosecutors will make the discovery procedures more cumbersome for certain defense attorneys whom they disliked or distrusted"); Alschuler, *supra* note 107, at 1225 ("Recent studies indicate, however, that the benefit of informal discovery results not from an attorney's position as a public defender but simply from the attorney's personal relationship with individual prosecutors."); *see also* Frederick & Stemen, *supra* note 26, at 102 (reporting prosecutor statements that a better relationship with a defense attorney would result in "better flow of information and a more just resolution to a case").

109. *See* Yaroshefsky, *supra* note 104, at 59 (arguing that open-file disclosure models ensure "accountability and transparency" through equal disclosure among all prosecutors).

110. *See* Alschuler, *supra* note 107, at 1229 ("[T]he absence of a formal right of discovery seems to impose pressures upon defense attorneys to defend their clients less vigorously than they could. . . . it makes defense attorneys beholden to the prosecution and poses an obvious danger to their independence.").

111. *See, e.g.*, Sara N. Pole, Dep't of State Police, *Minority Comments*, SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICE & JUSTICES OF THE SUPREME COURT OF VA. 55 (Dec. 2, 2014) (discussing how open-file discovery "requires prosecutors and judges to gamble with witness safety"); NYSBA REPORT, *Response to Majority*, *supra* note 20, at 81 (noting that, because open-file discovery often occurs early in the trial process, prosecutors and judges will have trouble "accurately predict[ing] which defendants are likely to intimidate, threaten, harm, or kill the witnesses against them"); *see also* Baer, *supra* note 9, at 55 ("Information that convinces a defendant to admit his guilt is valuable to society; information that enables him to establish his innocence falsely by lying and threatening others is not."); Gershman, *supra* note 20, at 145 ("[T]here are considerable costs involved in

worry that disclosure of witness information would discourage some citizens from cooperating with law enforcement and jeopardize the integrity of investigations.[112]

Open-file discovery rules do provide some safeguards against abuses of the process. Typically, the rules allow prosecutors to apply for a protective order to keep such sensitive witness-related information from the defense.[113] But opponents of open-file discovery see such provisions as insufficiently protective of witness interests. As one opponent noted, they "require prosecutors and judges to gamble with witness safety by attempting to predict the unpredictable."[114] Opponents further note that applications for protective orders depend on prosecutors recognizing that certain information in their files might endanger a witness. But overworked and harried prosecutors may not have the time or energy to review the evidence carefully before disclosing it and may miss signs of potential threats to witnesses.[115] Some critics of open-file have also argued that protective orders would be insufficient to ensure witness safety because:

> [T]rial courts are not comfortable with ambiguous proof of threats. They balk at addressing the kinds of threats more commonly seen, such as property mysteriously destroyed, defendants' friends simply driving by a witness's home several times, calls from blocked or unknown numbers, and

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broadening preplea disclosure of impeachment evidence—costs that drain the efficient use of prosecutorial and judicial resources as well as threaten the privacy and safety of witnesses."); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 655 (2013) [hereinafter *Federal Criminal Discovery Reform*] (citing Deputy Attorney General James M. Cole's Senate Judiciary Committee testimony against proposed expansion of federal discovery).

112. *See* Pole, *supra* note 111, at 55 (noting concern about a "chilling effect" on victims and witnesses and that "[the U.S. Department of Justice] estimates only 50% of crime is reported and eighty-six (86%) of [Commonwealth Attorneys in Virginia] polled have had witnesses or victims express concerns about their information being released").

113. *Supra* note 81.

114. Pole, *supra* note 111, at 55.

115. *See id.* at 56 (noting that "69% of CAs [Commonwealth Attorneys in Virginia] polled said they would not have the funds, or would be a burden [sic], to redact information from criminal investigative files").

> statements to witnesses using just the right kind of tone or inflection.[116]

A second concern is that an open-file discovery regime would be unduly burdensome, particularly for prosecutors and law enforcement officers.[117] For example, prosecutors would need to maintain a log of documents disclosed to the defense to avoid claims that certain evidence was not in the file and was not disclosed. While an electronic discovery system can help with this, a switch to such a system is quite costly, at least at the outset.[118] Open-file discovery is also expected to require additional manpower to redact documents containing sensitive information and to litigate protective measures.[119]

Some critics further worry that open-file discovery will lead to defense abuses, such as the fabrication of stories to explain the evidence, and that this will undermine legitimate prosecutions.[120] More broadly, but along the same lines, commentators have

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116. C. David Sands III, Deputy Commonwealth's Attorney, Cty. of Orange, Va., Comment Letter on Proposed Virginia Criminal Discovery Rules (June 30, 2015) [hereinafter Letter from C. David Sands III] (on file with author).

117. *Supra* note 115.

118. SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY RULES TO THE CHIEF JUSTICE & JUSTICES OF THE SUPREME COURT OF VA., 13–14 (Dec. 2, 2014) [hereinafter SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY] (noting that the costs that the North Carolina Administrative Office of the Courts incurred for implementing a Discovery Automation System between 2006–2011 were just over $4.18 million).

119. Virginia Ass'n of Commonwealth's Attorneys (VACA), Public Comment on the Report of the Special Committee on Criminal Discovery Rules, June 29, 2015 [hereinafter 2015 VACA Letter] (on file with the Washington and Lee Law Review) ("The impact of additional personnel and software systems to integrate police reports into manageable formats to redact sensitive information will come at a tremendous cost. The additional burdens placed on the judiciary to review reports, assess good cause, conduct *in camera* reviews and hold hearings on discovery disputes will add untold hours to each case . . . .").

120. *See, e.g.*, Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond* Brady, 27 GEO. J. LEGAL ETHICS 643, 652 (2014) ("[O]pen file discovery could cause defendants to fabricate their defense strategy in reaction to the evidence against them."); Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 432 (2013). ("[I]f a defendant were entitled to a copy of the prosecution's playbook, the defendant could more readily tailor his defense to combat the prosecution . . . .").

argued that open-file discovery will tip the balance of advantages too far in favor of the defense.[121]

Finally, supporters of restrictive discovery rules maintain that *Brady* violations are rare and that switching to open-file is not necessary to ensure that prosecutors consistently disclose exculpatory evidence.[122] Open-file would thus only "inject confusion, severe logistical impracticalities, and arbitrary enforcement to an area of the law that is clearly established, well-understood, and in no apparent need of overhaul."[123] Some further point out that broader discovery is least needed pre-plea, because defendants would not plead guilty unless they in fact committed a crime, and they are in the best position to know whether or not they did so.[124]

For some, open-file discovery may be acceptable if left to the discretion of prosecutors, but not as a mandatory, categorical rule.[125] Discretionary open-file is lauded as more flexible and

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121. *See* Fox, *supra* note 120, at 432 ("'Broader discovery tilts the balance of advantage, which already favors the defendant . . . too far . . . to the benefit of the defendant.'" (quoting Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272–73 (2008))); VACA Letter, *supra* note 119 ("[T]he proposed changes provide enhanced information flow to the criminal defendant but not to the prosecution. . . . [W]hat is sought is a favorable environment for the criminal defendant rather than basic fairness and true reciprocity.").

122. *See, e.g.*, *Federal Criminal Discovery Reform*, *supra* note 111, at 655 (citing Deputy Attorney General James M. Cole's Senate Judiciary Committee testimony against proposed expansion of federal discovery); VACA Letter, *supra* note 119 ("There is no empirical data or specifically identified problem to support significant change [of Virginia discovery rules], nor is there any tangible evidence to suggest that the current Rules are inadequate in the manner in which discoverable information is shared.").

123. Joshua A. Boyles, Office of the Commonwealth's Attorney, City of Richmond, Va., Comment Letter on Proposed Virginia Criminal Discovery Rules (June 30, 2015).

124. *Cf.* Gershman, *supra* note 20, at 147 ("I am not convinced that significantly broadening the disclosure of impeachment evidence during plea bargaining is a necessary reform or that it will make much of a difference to defendants who are contemplating a plea.").

125. *See* VACA Letter, *supra* note 119 ("The prosecutor can and does root through the files of the government in order to assure the defendant has the information that he is entitled to have for his defense. The prosecutor does this as a matter of duty and obligation. This duty should not be replaced by rule-based, open file discovery on the cynical assumption that the prosecutor cannot be trusted.") .

more effective, because it allows prosecutors, who are among the first to learn about threats to witnesses or to the investigation, to withhold evidence in response to developments in the case.[126] Restricting disclosure in this way is also said to be less costly, as it does not require prosecutors to apply for a protective order from the court each time they have a piece of evidence that might endanger a witness.[127] Because prosecutors are likely to know the defense attorneys with whom they regularly work, they are also able to assess whether the defense is likely to abuse the disclosure to fabricate defenses.[128] One Virginia prosecutor opined in public comments that different rules should apply in "high-trust" and "low-trust" jurisdictions, depending on the relationship between the prosecution and the defense bar.[129]

## *III. The Practice of Pre-Plea Discovery: Comparing the Closed-File and Open-File Models*

### *A. The Empirical Gap*

As legislators and scholars debate the pros and cons of open-file discovery, it is critical to examine how such discovery has functioned in the states that have adopted it and how it compares to more traditional, closed-file discovery regimes. Does

126. *Cf.* Letter from C. David Sands III, *supra* note 116 ("I can personally attest after talking to hundreds of witnesses that threats are almost never as obvious as a face-to-face demand that they not testify. Threats are purposely surreptitious, ambiguous, and open-ended. . . . Unfortunately, trial courts are not comfortable with ambiguous proof of threats."); FREDERICK & STEMEN, *supra* note 26, at 72 (noting that most prosecutors believe that formal policies are generally harmful "given the complexity and uniqueness of cases").

127. *See* VACA Letter, *supra* note 119 ("Why should it be necessary for the Commonwealth to have to show good cause in order to redact sensitive information? This will add more work for judges, more *in camera* reviews, and the other litany of consequences mentioned previously.").

128. *Cf.* FREDERICK & STEMEN, *supra* note 26, at 98 (noting that prosecutor's relationships with defense attorneys "certainly affect how a case may be handled or how certain information is evaluated").

129. *See* Letter from C. David Sands III, *supra* note 116 (suggesting that "the relationship between the prosecution and defense . . . dictates how necessary the proposal's reforms are in different jurisdictions" and observing the different discovery practices that can be seen in "high-trust" and "lower-trust" jurisdictions).

it in fact provide the defense with better access to material evidence than traditional discovery practices? Does it enhance pre-plea compliance with *Brady*? How frequently do the parties negotiate around open-file rules and waive discovery?[130] Does open-file pre-plea discovery result in undue risks to witnesses, dangers to the investigation, fabrication of defenses, or other burdens to prosecutors or the judicial system? Does it speed up or slow down dispositions?[131] Does it confer an excessive "advantage" to the defense that should be remedied by broader reciprocal discovery? Does it have other disadvantages that have not been fully considered in the debates?

The answers to these questions are critical to an informed discussion about the desirability and feasibility of open-file, pre-plea discovery rules. Yet empirical work in this area has been scant. We have uncovered only five empirical studies of discovery practices, and while these studies provided important information on certain aspects of discovery, none aims to address the questions above in a comprehensive manner.[132] All five

130. *See* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 83–85 (2015) (examining discovery waivers in federal courts); Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 568–70 (1999) (discussing plea deals that require a defendant to waive discovery of all non-disclosed information, including *Brady* evidence).

131. *See, e.g.*, Moore, *supra* note 15, at 1383 ("Full open file discovery appears to be increasing the speed and fairness of plea bargaining."); THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 20 (2007), http://www.prearesourcecenter.org/sites/default/files/library/expanded discoveryincriminalcasesapolicyreview.pdf ("[A]utomatic discovery will cut down on court time and expense in that motions will not need to be filed for the appropriate pre-trial discovery to occur.").

132. *See generally* LAURAL HOOPER ET AL., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES (2011) (reporting results of survey of federal judges, prosecutors, and defense attorneys about disclosure of *Brady* evidence in federal court); NYCLA REPORT, *supra* note 93, at 1 (2006) (reporting results of survey of New York defense attorneys about discovery practices in different boroughs of New York City); William Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice: More Just—Or Just More Dangerous?*, 9 CRIM. JUST. 14 (1994) (reporting on a study that the New York State Assembly Codes Committee commissioned about discovery practices in select cities); TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27 (discussing findings of survey of Texas attorneys and prosecutors about the

studies focus on a single jurisdiction and do not compare the effect of different formal rules on discovery practices. Four of the studies examine pretrial discovery more broadly and do not examine what evidence is provided at the pre-plea stage.[133] The same four studies analyze practices in states with restrictive rules and therefore have little to say about the operation of open-file rules.[134] Only one of the studies, conducted in Texas at the end of 2014 and early 2015, examines open-file discovery practices.[135] Yet this study was conducted less than a year after open-file discovery rules were adopted in Texas, so it focuses mostly on issues related to implementation of the law.[136] It does not aim to compare open-file practices in Texas to more restrictive discovery practices, and it does not examine the reported advantages and disadvantages of open-file discovery more broadly.

To analyze the effects of different rules on pre-plea discovery practices, we chose to survey prosecutors and defense attorneys in North Carolina and Virginia about their experiences with pre-plea discovery. Our survey focuses on the perceptions of those involved in discovery and therefore does not directly test the effects of open-file discovery against those of more restrictive discovery. However, defense attorneys and prosecutors are the key actors in discovery and have first-hand experience with most of its effects. Their views and perceptions therefore offer an indicator of what really happens at this critical stage of the criminal process.

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implementation of open-file discovery rules); TEXAS DEFENDER SERVICE STUDY, *supra* note 18 (discussing study of Texas discovery practices before the adoption of open-file discovery).

133. *See* HOOPER ET AL., *supra* note 132 (discussing pretrial disclosure of *Brady* evidence, but not addressing discovery before guilty pleas); Middlekauff, *supra* note 132 (discussing pretrial disclosure, but not pre-plea disclosure); NYCLA REPORT, *supra* note 132 (same); TEXAS DEFENDER SERVICE STUDY, *supra* note 104 (same).

134. *See supra* note 133 and accompanying text (surveying practices of the federal system, New York, and Texas (before the adoption of open-file discovery)).

135. *See* TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27, at 12–15 (discussing the implementation of open-file rules in Texas).

136. *See id.* at 14–25 (discussing the planning for and consequences of implementation of the Michael Morton Act).

We chose Virginia and North Carolina because they are geographically close and have populations of similar size,[137] yet have starkly different discovery rules. Virginia's rules are restrictive, providing no witness statements, witness names, or police reports to defendants before trial, unless some of these documents are deemed exculpatory by the prosecutor.[138] North Carolina, on the other hand, has some of the most liberal discovery rules in the country, which have been in place for more than a decade.[139] In felony cases, prosecutors must generally make their complete files available to the defense upon request, unless they can show that specific information may jeopardize the safety of a witness or is protected work product.[140] By selecting the two demographically and geographically similar, but legally distinct jurisdictions, we were able to better isolate the effects of different legal frameworks on discovery practices.

### *B. Survey Method*

Our survey was designed to be brief to encourage participation and completion. We asked approximately twenty main survey questions, although some had subpart questions. We estimated that completion would take, on average, between five and ten minutes. The prosecutor survey is reproduced in the Appendix.[141]

The survey was confidential and voluntary, and we provided no financial incentive for participation. To recruit survey participants, we relied on two primary methods. The first

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137. *See State & County QuickFacts*, U.S. CENSUS BUREAU http://quickfacts.census.gov/qfd/states/51000.html (last updated Sept. 30, 2015) (last visited Oct. 13, 2015) (listing the Virginia Population at 8,326,289 and the North Carolina population at 9,943,964) (on file with the Washington and Lee Law Review).

138. *See* SUP. CT. VA. R. 3A:11 (requiring the disclosure of select items upon motion of the accused, but not including witness names, witness statements, or police reports).

139. *See supra* note 79–87 and accompanying text (discussing the history and provisions of North Carolina's open-file discovery rules).

140. *Supra* note 79–87 and accompanying text.

141. The defense attorney survey (not reproduced here) was largely the same, although the questions were rephrased to ask about what defense attorneys believed to be prosecutors' practices of disclosure in their jurisdiction.

method, for prosecutors only, was to approach chief prosecutors asking them for help in distributing the survey to attorneys in their offices. The second method, for both prosecutors and defenders, was to reach out to state legal organizations for their support. Below we describe these methods in greater detail.

Initially, we approached chief prosecutors individually, primarily via email.[142] We invited them to take the survey and to distribute to staff attorneys in their office. In Virginia, there are 120 commonwealth's attorneys and approximately 645 assistant attorneys (total = 765).[143] From these 120 individual invitations, thirty-seven offices agreed to participate, four actively declined, and the remainder did not respond. The majority of the thirty-seven cooperating offices were small, however, with twenty-six of them having five or fewer attorneys total in the office. Because we were not getting sufficient participation through our contacts with individual commonwealth's attorneys, we approached the Virginia Association of Commonwealth's Attorneys (VACA) with a request for its support. The President agreed to send out the survey invitation and link on our behalf to all Virginia commonwealth attorneys; she also posted a link to the survey on a website used by staff and chief prosecutors.

In response to these solicitations, 185 prosecutors (24% of all Virginia prosecutors) began the survey and 122 of these completed the survey (16% of all Virginia prosecutors). However, three of the 122 completers did not handle felony cases in the past year and were considered ineligible to participate in the full survey.

In North Carolina, we first emailed or faxed the forty-four district attorneys, asking them to take the survey and distribute to others in their office.[144] Out of these forty-four invitations, only five agreed to participate, one declined, and the remainder did not respond. We then approached the North Carolina Conference

142. We sent an invitation letter by fax when we could not locate an email for the chief prosecutors.

143. *See Purposes and Function*, COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL, COMMONWEALTH OF VIRGINIA, http://www.cas.state.va.us/agency.htm (last visited Oct. 13, 2015) (on file with the Washington and Lee Law Review).

144. *About the Conference*, N.C. CONFERENCE OF DISTRICT ATTORNEYS, http://www.ncdistrictattorney.org/about.html (last visited Apr. 3, 2016) (on file with the Washington and Lee Law Review).

of District Attorneys with a request for its support, and the Director sent out the survey invitation and link on our behalf to all 637 North Carolina prosecutors.

Overall, 119 prosecutors (19% of all North Carolina prosecutors) began the survey and of these, seventy-six completed the survey (12% of all North Carolina prosecutors). Of the seventy-six, six had not handled felony cases in the past year and were not included in our analyses.

To recruit public and private defense attorneys, we solicited assistance from statewide legal organizations. The Virginia Indigent Defense Commission provided us with a spreadsheet of Virginia public defenders and private defense attorneys certified to practice criminal law in the state. We sent 283 valid emails to Virginia public defenders.[145] Overall, 208 (73.5%) began the survey and of these, 153 (54.1%) completed the survey. We also sent valid emails to 1713 private defense attorneys in Virginia.[146] Three hundred forty-seven responded (20.3%) and began the survey, and 243 private defenders in Virginia completed the survey, for a 14.2% completion rate.

In North Carolina, we sent email invitations to 284 public defenders whose emails were available online. Overall, sixty-four (22.5%) North Carolina public defenders began the survey and forty-three completed it (15.1%). In addition, the North Carolina Office of Indigent Defense Services sent a survey invitation and link on our behalf to 810 valid email addresses of private defense attorneys who had been appointed to represent indigent defendants over the previous year.[147] Of North Carolina private defenders, ninety-five (11.7%) began the survey and sixty-one (7.5%) completed it.

Overall, we received responses from 1018 prosecutors and defense attorneys from Virginia and North Carolina. However, of these, eighty-three participants (8.2%) handled misdemeanors or

145. We sent a total of 320 email invitations to Virginia public defenders. However, thirty-seven bounced back as undeliverable.

146. We sent a total of 1918 emails, but 205 were undeliverable or the recipients were ineligible to participate in the survey as they did not practice criminal law at the trial level.

147. The North Carolina Office of Indigent Defense Services sent emails to 891 court-appointed private defense attorneys, but eighty-one of these emails were undeliverable.

juvenile cases exclusively in the past year and were considered ineligible to answer questions about felony discovery practices. As indicated above, 263 more participants (25.8%) did not complete the survey, dropping out after completing initial questions about the number and types of cases they typically handled (e.g., assault, domestic violence). Of the eligible participants (i.e., $n$ = 935), 75% completed all (or most) of the survey. For analytic purposes, our sample consists of 637 participants, which included 192 prosecutors and 445 defense attorneys.

Table 1 presents demographic characteristics (race, gender, and practical experience) of our sample by legal role and state.[148] As can be seen, the majority of the sample was white, which did not differ by role or state.[149] With regard to gender, approximately half of the Virginia prosecutors were men; in contrast, about two-thirds of the other samples (i.e., Virginia defenders, North Carolina prosecutors, and North Carolina defenders) were men.[150] This was not a statistically significant difference, however. Finally, on average, prosecutors and defenders (for both North Carolina and Virginia) had practiced five to fifteen years in their respective roles.[151] However, defenders had slightly more experience than prosecutors.[152]

The demographic and career-related characteristics of our sample tend to approximate the population of North Carolina prosecutors and defenders.[153] (We were unable to obtain similar demographic characteristics for Virginia prosecutors and defenders, as this information is not systematically collected.)

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148. *See infra* Table 1 (showing four groupings of Virginia and North Carolina survey participants by "prosecutor" and "defender" cross-referenced with their demographic characteristics).

149. *See infra* Table 1 (showing between 83 and 92.4% of participants as "White").

150. *See infra* Table 1 (showing Virginia prosecutors at 51.7%, while all other categories ranged from 61.4 to 65.2%).

151. *Infra* Table 1.

152. *Infra* Table 1. We note here that although gender and practical experience differed by legal role, these two characteristics (as well as race) did not influence one of our main dependent variables, number of documents turned over as part of initial discovery package, r's < -.05. Thus, we do not consider gender, practical experience, or race further in our analyses.

153. Telephone Interview with Marie Jankowski, Deputy Dir., Va. Indigent Def. Comm'n (June 17, 2015).

More specifically, according to information supplied from the North Carolina Administrative Office of the Courts,[154] among Public Defenders and Assistant Public Defenders, 74.5% are non-minorities and 50.7% are men. In their current roles as (Assistant) Public Defenders, the average number of years of experience is 8.83 years.[155] Among North Carolina District Attorneys and Assistant District Attorneys, 83.5% are non-minorities, and 55.4% are men; in their roles only as prosecutors, the average number of years of experience was 9.67 years.[156]

*Table 1: Demographic Characteristics*

| | **NC Prosecutors N = 73** | **VA Prosecutors N = 119** | **NC Defenders N = 94** | **VA Defenders N = 351** | **Statistic** |
|---|---|---|---|---|---|
| Gender: % Male | 61.4% | 51.7% | 62.8% | 65.2% | $\chi^2$ (3) = 6.88 $\Phi$ = .11 |
| Race: % White | 83.6% | 92.4% | 83.0% | 86.9% | $\chi^2$ (3) = 5.21 $\Phi$ = .09 |
| Mean Career Experience (SD) | 3.74a (1.60) | 3.89a (1.64) | 4.32ab (2.02) | 4.36b (2.20) | $F$(3, 631) = 3.06* partial $\eta^2$ = .01 |

Notes. *$p$<.05. Career experience: 1 = 0–2 years, 3 = 5–10 years, 4 = 10–15 years, 8 = More than 30 years. SD = Standard deviation.

Of the 445 defense attorneys who completed our survey, 60% were private ($n$ = 265), and 40% were public defenders ($n$ = 180).[157] Within and across state, public and private defenders had approximately the same proportion of whites[158] and men,[159] and

154. E-mail from John W. King, Research Associate, N.C. Office of Indigent Def. Serv., to Jenia I. Turner, Professor, Southern Methodist Univ. Dedman School of Law (June 23, 2015).

155. The North Carolina Administrative Office of the Courts does not maintain information about the number of years that an attorney has been licensed, but rather only the number of years in practice as a public defender or a district attorney. *Id.*

156. E-mail from Margaret B. Wiggins, Hum. Resources Assoc., N.C. Office of Indigent Def. Serv., to Allison D. Redlich, Assoc. Professor of Law, Univ. at Albany (June 15, 2015).

157. In Virginia, there were 141 public and 210 private criminal defenders. In North Carolina, there were thirty-nine public and fifty-five private criminal defenders.

158. ($\chi$2s(1) $\leq$ 3.51, $p$'s $\geq$ .06).

159. ($\chi$2s(1) $\leq$ 3.65, $p$'s $\geq$ .06).

similar average number of years of practical experience.[160] Finally, we also asked defenders if they had ever practiced as a prosecutor. The majority of defenders (72%) had not.[161]

In sum, our overall response rate varied by state and to some degree, by legal actor type. In both Virginia and North Carolina, 16% of the state's prosecutors completed the survey. For defenders, rates were more variable ranging from a low of 7% to a high of 36%, depending on the state and public or private status.

Like most surveys of this nature, our sample is non-representative, as we did not randomly select individuals to participate, and persons self-selected to examine and complete the survey.[162] Although we attempted to reach out broadly to the populations of attorneys in Virginia and North Carolina, our results may not generalize to all attorneys in these states because of the non-representativeness of our sample.[163] Nonetheless, our response rates and our completion rate of 75% are quite comparable to, or exceed, rates from similar surveys.[164]

In addition, as noted earlier, the demographic composition of our respondents was similar to the demographic composition of prosecutors and defense attorneys in North Carolina (we were not able to obtain comparable data on Virginia). Our analysis of the data also indicates that responses concerning our main topic—frequency of discovery provided in six key categories—were not affected by race, gender, or years of experience as attorney, which

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160. ($F(1, 439) \leq 2.55, p\text{'s} \geq .11$).

161. In Virginia, 72% of defenders never worked as prosecutors. In North Carolina, 75% had not.

162. *See Bias in Survey Sampling*, STAT TREK, http://stattrek.com/survey-research/survey-bias.aspx (last visited Oct. 13, 2015) (explaining the difference between representative and non-representative samples in a survey, and discussing how bias may arise from non-representative sampling and what effects such bias may have) (on file with the Washington and Lee Law Review).

163. *See id.* (explaining that non-representative samples may not be generally applicable because of this potential bias).

164. *See* TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27, at 4 (displaying results from a recent Texas Criminal Defense Lawyers Association study on Texas discovery practices and showing participation at around 8%); N.Y. CTY. LAWYERS' ASS'N, *supra* note 93, at 1 (noting that 750 surveys were mailed, and 131 responses were used to write the report, resulting in a 17.5% response rate, although it is unclear whether this percentage included only completed surveys, or partially-completed surveys as well).

may help to allay concerns about the non-representativeness of our samples.[165]

### C. Survey Findings

#### 1. Breadth and Frequency of Pre-Plea Discovery

We first aimed to determine whether statutorily prescribed open-file discovery results in significantly broader discovery to defendants. To do so, we surveyed the frequency with which prosecutors turn over fourteen types of evidence to the defense before a guilty plea by the defendant.[166] We examined frequency by state and by legal actor role.[167] Prosecutors reported on their own behaviors, whereas defenders reported on their experiences with prosecutors.

The table below covers eleven of the fourteen categories of evidence we inquired about. Tables 3a and 3b (discussed in Part III.C.2) present findings on the three categories concerning exculpatory and impeachment evidence.

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165. *Supra* note 152 and accompanying text. We tested whether any relationship existed between these demographic characteristics and the frequency of the following categories of discovery provided: witness names, witness statements, police reports, factually exculpatory evidence in the prosecutor's possession, impeachment evidence in the prosecutor's possession, and exculpatory or impeachment information that is not in the prosecutor's possession but which may be requested. We found no such relationship.

166. *See infra* Table 2a (showing eleven of the fourteen categories of evidence surveyed); *infra* Table 3a (showing the remaining three categories).

167. *Infra* Table 2a; *infra* Table 3a.

*Table 2a:* In felony cases, what types of documents do you turn over either as part of an initial discovery package or later, but before a defendant pleads guilty? Please indicate how often you disclose such documents, assuming they are present.

| | Virginia Prosecutors (%) | | | North Carolina Prosecutors (%) | | | X2(2); Φ |
|---|---|---|---|---|---|---|---|
| | Never | Sometimes | Always | Never | Sometimes | Always | |
| Defendant's statements | 0 | 1.7 | 98.3 | 0 | 1.4 | 98.6 | 0.28; .01 |
| Co-defendant's statements | 2.6 | 37.6 | 59.8 | 0 | 1.4 | 98.6 | 35.85***; .43 |
| Names of witnesses | 13.6 | 59.3 | 27.1 | 0 | 15.5 | 84.5 | 58.43***; .56 |
| Witness statements | 6.8 | 58.5 | 34.7 | 0 | 1.4 | 98.6 | 76.18***; .63 |
| Witnesses' criminal records | 4.2 | 52.9 | 42.9 | 17.1 | 57.1 | 25.7 | 11.90**; .25 |
| Statements of potential testifying experts | 1.7 | 16.4 | 81.9 | 0 | 13.7 | 86.3 | 0.63; .06 |
| Statements of non-testifying experts | 8.0 | 42.9 | 49.1 | 0 | 20.3 | 79.7 | 16.77***; .30 |
| Search warrant affidavits | 12.0 | 34.2 | 53.8 | 2.7 | 5.5 | 91.8 | 29.93***; .40 |
| Defendant's criminal record | 1.7 | 1.7 | 96.6 | 0 | 2.8 | 97.2 | 1.47; .09 |
| Police report | 19.7 | 35.9 | 44.4 | 0 | 1.4 | 98.6 | 58.22***; .55 |
| Materials related to identification procedures | 1.7 | 22.2 | 76.1 | 1.4 | 4.1 | 94.5 | 11.54**; .25 |

*p < .05; [168] **p < .01; ***p < .001

168. The p value, which we set at the threshold of .05 or lower for statistical significance, can be thought of as the chance that we are incorrectly rejecting the null hypothesis. That is, for each "significant" difference, there is a 5% or

*Table 2b:* In felony cases, what types of documents does the prosecutor turn over either as part of an initial discovery package or later, but before a defendant pleads guilty? Please indicate how often such documents are disclosed, assuming they are present.

| | Virginia Defense Attorneys (%) | | | North Carolina Defense Attorneys (%) | | | X2(2); Φ |
|---|---|---|---|---|---|---|---|
| | Never | Sometimes | Always | Never | Sometimes | Always | |
| Defendant's statements | 0.9 | 8.9 | 90.2 | 1.1 | 11.7 | 87.2 | 0.72; .04 |
| Co-defendant's statements | 16.9 | 68.6 | 14.5 | 2.1 | 27.7 | 70.2 | 117.55***; .52 |
| Names of witnesses | 32.3 | 56.4 | 11.3 | 7.4 | 39.4 | 53.2 | 79.88***; .43 |
| Witness statements | 32.0 | 57.3 | 10.8 | 1.1 | 37.2 | 61.7 | 112.82***; .51 |
| Witnesses' criminal records | 39.2 | 50.0 | 10.8 | 53.2 | 38.3 | 8.5 | 5.89*; .12 |
| Statements of potential testifying experts | 17.5 | 44.1 | 38.5 | 12.0 | 43.5 | 44.6 | 1.12; .05 |
| Statements of non-testifying experts | 52.2 | 39.2 | 8.6 | 26.1 | 50.0 | 23.9 | 16.17***; .19 |
| Search warrant affidavits | 41.4 | 32.1 | 26.5 | 5.3 | 35.1 | 59.6 | 36.09***; .29 |
| Defendant's criminal record | 3.7 | 13.2 | 83.0 | 3.2 | 5.3 | 91.5 | 4.69; .10 |
| Police report | 20.8 | 51.2 | 28.0 | 1.1 | 9.6 | 89.4 | 114.81***; .51 |
| Materials related to identification procedures | 23.8 | 58.4 | 17.7 | 5.3 | 39.4 | 55.3 | 58.11***; .36 |

*p < .05; **p < .01; ***p < .001

lower chance that the difference we observed is not meaningful and is instead due to pure chance (i.e., random variation).

We find that statutorily mandated open-file discovery results in broader disclosure of almost all types of evidence and that the difference in levels of disclosure reported in North Carolina and Virginia is statistically significant for all but three types of evidence.[169] This is true with respect to co-defendants' statements, witness names, witness statements, statements of non-testifying experts, search warrant affidavits, materials related to identification procedures, and police reports.[170] The difference is statistically significant when we compare the responses of Virginia and North Carolina prosecutors as well as the responses of defense attorneys from each state. In short, while many of our Virginia prosecutor respondents maintained that they voluntarily provided broader discovery than they were required by law,[171] such practices are not widespread or consistent enough to produce levels of discovery similar to those of North Carolina open-file.[172]

The three types of evidence for which open-file rules did not produce significantly broader discovery were the defendant's statements, the defendant's criminal record, and statements of testifying experts.[173] We believe that several factors explain why respondents reported similar rates of disclosure for these three categories of evidence in North Carolina and in Virginia. First, rules in both states require the disclosure of this evidence, albeit at a different stage of the proceeding.[174] Second, none of these

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169. *Supra* Table 2a.

170. *Supra* Table 2a.

171. In a response to Question 10 in our survey, reproduced in Appendix A, a large majority of Virginia prosecutors asserted that, in a large majority or all of their cases, they disclose a broader set of documents than they are required to under the law pre-plea.

172. This pattern of results comports with preliminary data collected in an ongoing study by Professors Jenny Roberts and Ronald Wright, who asked defenders from multiple states, including North Carolina and Virginia, how often they received discovery from prosecutors before plea negotiations. Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. (forthcoming 2016). The average response of nine felony-practicing defenders in North Carolina was "often," whereas the average response of twenty-four Virginia defenders was "sometimes." *Id.* The data were supplied to the authors on July 31, 2015.

173. *Supra* Table 2a.

174. Virginia rules require prosecutors to disclose all three of these types of evidence upon motion of the defendant, which must be made "at least 10 days

items raises concerns with respect to the safety of witnesses or the integrity of the investigation.[175] Third, two of the items—the defendant's statements and criminal record—tend to be available to the prosecution pre-plea. Accordingly, a large majority of defense attorneys and prosecutors in both jurisdictions noted that these items are "always" provided before a guilty plea.[176] By contrast, because statements of testifying experts may not always be available pre-plea, they are disclosed with lesser frequency.[177] However, because they must be provided at some point in the process in both Virginia and North Carolina, the frequency of disclosure is similar by state.[178]

With respect to witness criminal records, North Carolina prosecutors and defense attorneys reported a lower rate of disclosure than their Virginia counterparts.[179] Although the difference by state was statistically significant (at $p < .05$), it was quite small, particularly for defenders.[180] The interesting question here is why North Carolina prosecutors are frequently failing to disclose the witness criminal records before a guilty plea, despite the open-file rules. A combination of factors may help explain this result. First, it is likely that prosecutors do not obtain these records until later in the process, so this evidence is

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before the day fixed for trial." VA. SUP. CT. R. 3A:11. North Carolina Rules allow requests for open-file discovery to be filed within ten days of finding of probable cause, or the date the defendant waives probable cause. N.C. GEN. STAT. ANN. § 15A-902(d) (West 2015).

175. This concern can be seen in the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 16 (describing in comments to amendments that the limitations on disclosure include considerations of the safety of witnesses and the integrity of the investigation).

176. Note, however, that defense attorneys suggested that these were provided much less frequently than prosecutors stated they were being provided. *See infra* Table 2c (showing that Virginia defense attorneys responded that defendant criminal records were "always provided" at 83%, compared to a 96.6% "always provided" response from Virginia prosecutors).

177. *See infra* Table 2c (showing an 81.9% "always provided" figure for Virginia Prosecutors and a 38.5% "always provided" figure for Virginia defense attorneys).

178. *Infra* Table 2c.

179. *See infra* Table 2c (showing higher "never disclosed" percentages for witness criminal records in both North Carolina categories as opposed to Virginian counterpart categories).

180. *See infra* Table 2c (comparing Virginia disclosure at 10.8% to North Carolina disclosure at 8.5%).

simply not part of the prosecutor's file that is required to be disclosed to the defense pre-plea in North Carolina. Second, as some respondents pointed out, defense attorneys can obtain the witnesses' records on their own; the early disclosure of the prosecutor's file provides them with the names of the witnesses, so they simply need to run a background check. Accordingly, as we learned from some of the open-ended comments on our survey, at least some North Carolina prosecutors believe that researching witness criminal records is a responsibility of the defense, not their own. This belief is consistent with the defense due diligence exception to *Brady*, which exempts prosecutors from disclosing exculpatory or impeachment evidence that the defense could reasonably obtain on its own.[181]

Responses to the question about frequency of pre-plea discovery differed not only by state, but also by legal actor as shown in Table 2c; for almost all categories, defense attorneys from both North Carolina and Virginia stated that they received evidence much less frequently than prosecutors from the respective jurisdiction indicated that they provided such evidence.[182]

It is possible that some of the difference in responses can be explained by selection biases.[183] Perhaps the prosecutors who took our survey tend to be disproportionately openhanded disclosers. Conversely, defense attorneys who took the survey might disproportionately deal with less generous prosecutors (and were thus potentially using the survey to express frustration with the system). As with other voluntary surveys, it is impossible to completely rule out selection bias as a cause of the

181. As noted earlier, under this doctrine, prosecutors are relieved from the duty to disclose exculpatory and impeachment evidence when the defense can obtain the evidence through its own reasonable efforts. *Supra* note 36 and accompanying text.

182. *Infra* Table 2c. The only two exceptions came from North Carolina, with respect to the defendant's criminal record and police reports. Although defense attorneys stated that they received these items pre-plea somewhat less frequently than prosecutors stated that they provided them, the difference was not statistically significant. *Infra* Table 2c.

183. *See Statistics and Probability Dictionary: Selection Bias*, STAT TREK, http://stattrek.com/statistics/dictionary.aspx?definition=selection_bias (last visited Oct. 17, 2015) (defining selection bias in survey sampling as "the bias that results from an unrepresentative sample") (on file with the Washington and Lee Law Review).

observed differences.[184] However, it appears that at least to some degree, perceptions of how frequently evidence is disclosed are colored by the professional role of the survey participants.[185]

*Table 2c:* Percentage frequency of pre-plea disclosure by legal actor and state

| | Virginia Prosecutors (%) | | | | Virginia Defenders (%) | | | X2(2); Φ |
|---|---|---|---|---|---|---|---|---|
| | Never | Sometimes | Always | | Never | Sometimes | Always | |
| Defendant's statements | 0.0 | 1.7 | 98.3 | | 0.9 | 8.9 | 90.2 | 8.21**; .13 |
| Co-defendant's statements | 2.6 | 37.6 | 59.8 | | 16.9 | 68.6 | 14.5 | 93.02***; .45 |
| Names of witnesses | 13.6 | 59.3 | 27.1 | | 32.3 | 56.4 | 11.3 | 16.82***; .19 |
| Witness Statements | 6.8 | 58.5 | 34.7 | | 32.0 | 57.3 | 10.8 | 36.03***; .28 |
| Witness criminal records | 4.2 | 52.9 | 42.9 | | 39.2 | 50.0 | 10.8 | 83.99***; .43 |
| Statements of potential testifying experts | 1.7 | 16.4 | 81.9 | | 17.5 | 44.1 | 38.5 | 65.18***; .38 |
| Statements of non-testifying experts | 8.0 | 42.9 | 49.1 | | 52.2 | 39.2 | 8.6 | 90.67***; .55 |
| Search warrant affidavits | 12.0 | 34.2 | 53.8 | | 41.4 | 32.1 | 26.5 | 29.23***; .25 |
| Defendant's criminal record | 1.7 | 1.7 | 96.6 | | 3.7 | 13.2 | 83.0 | 14.04***; .17 |
| Police report | 19.7 | 35.9 | 44.4 | | 20.8 | 51.2 | 28.0 | 10.79**; .15 |
| Materials related to identification procedures | 1.7 | 22.2 | 76.1 | | 23.8 | 58.4 | 17.7 | 138.02***; .55 |

*p < .05; **p < .01; ***p < .001

184. *See id.* (discussing the practical impossibility of removing "voluntary response" selection bias due to the natural tendency to over-represent individuals with strong opinions or a more accessible means of response).

185. *Infra* Table 2c.

| | North Carolina Prosecutors (%) | | | | North Carolina Defenders (%) | | | X2(2); Φ |
|---|---|---|---|---|---|---|---|---|
| | Never | Sometimes | Always | | Never | Sometimes | Always | |
| Defendant's statements | 0 | 1.4 | 98.6 | | 1.1 | 11.7 | 87.2 | 7.46**; .21 |
| Co-defendant's statements | 0 | 1.4 | 98.6 | | 2.1 | 27.7 | 70.2 | 23.12***; .37 |
| Names of witnesses | 0 | 15.5 | 84.5 | | 7.4 | 39.4 | 53.2 | 17.85***; .33 |
| Witness statements | 0 | 1.4 | 98.6 | | 1.1 | 37.2 | 61.7 | 32.49***; .44 |
| Witnesses' criminal records | 17.1 | 57.1 | 25.7 | | 53.2 | 38.3 | 8.5 | 24.36***; .39 |
| Statements of potential testifying experts | 0 | 13.7 | 86.3 | | 12.0 | 43.5 | 44.6 | 30.43***; .43 |
| Statements of non-testifying experts | 0 | 20.3 | 79.7 | | 26.1 | 50.0 | 23.9 | 49.19***; .55 |
| Search warrant affidavits | 2.7 | 5.5 | 91.8 | | 5.3 | 35.1 | 59.6 | 21.96***; .36 |
| Defendant's criminal record | 0 | 2.8 | 97.2 | | 3.2 | 5.3 | 91.5 | 3.07; .14 |
| Police report | 0 | 1.4 | 98.6 | | 1.1 | 9.6 | 89.4 | 2.37; .12 |
| Materials related to identification procedures | 1.4 | 4.1 | 94.5 | | 5.3 | 39.4 | 55.3 | 31.82***; .44 |

*p < .05; **p < .01; ***p < .001

### *2. Disclosure of Exculpatory Evidence*

Our survey asked several questions concerning the disclosure of *Brady* evidence. First, we asked participants directly whether they disclose, before a guilty plea, three types of exculpatory and impeachment evidence: (1) factually exculpatory evidence that is

in the prosecutor's possession; (2) information in the prosecutor's possession that might be used to impeach the credibility of a prosecution witness; and (3) exculpatory or impeachment evidence that is in the possession of another government agency, but which prosecutors are able to request.[186]

Constitutional law does not mandate the disclosure of impeachment evidence before a guilty plea.[187] The question of whether *factually exculpatory* evidence must be provided pre-plea remains unsettled.[188] Because constitutional law does not set a firm requirement in this area, one may expect to see better disclosure of *Brady* evidence in an open-file state like North Carolina, where prosecutors must turn over everything in their files shortly after arraignment, than in Virginia, where procedure rules allow more limited disclosure delayed until closer to trial.

Our findings do not unequivocally confirm this hypothesis. To begin, North Carolina and Virginia prosecutors reported

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186. *Infra* Appendix A.

187. United States v. Ruiz, 536 U.S. 622, 629 (2002).

188. The Fourth Circuit, which covers Virginia and North Carolina, does not require the disclosure of factually exculpatory information before a guilty plea. *See* United States v. Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010) ("When a defendant pleads guilty, those concerns [supporting *Brady* disclosures] are almost completely eliminated because his guilt is admitted."). State courts in both Virginia and North Carolina have also not required this evidence. For North Carolina, see State v. Allen, 731 S.E.2d 510, 521 (N.C. Ct. App. 2012) (determining that the *Ruiz* holding should apply in similarly postured North Carolina cases). *But cf.* State v. Williams, 362 N.C. 628, 637 (2008) (disagreeing with state's contention that *Brady* only required the State to turn over evidence "at trial"). Virginia state law does not seem to provide broader protection than federal law. Our research found a single appeals court case from 1998 stating that a defendant can withdraw a guilty plea if the prosecution had failed to disclose impeachment evidence before the plea and if this materially affected the defendant's decision whether to plead guilty. *See* Jefferson v. Commonwealth, 500 S.E.2d 219, 224 (Va. Ct. App. 1998) (allowing withdrawal of the plea where the record established "any defense at all" to the indictments, and it was "reasonably probable that nondisclosure of the exculpatory impeachment evidence had the 'least . . . influence' on the plea"). However, *Jefferson* was decided before *Ruiz*, and a more recent Virginia Supreme Court case held that disclosure of *Brady* evidence mid-trial is permissible as long as "the defendant has sufficient opportunity to make use of . . . [it] at trial." Commonwealth v. Tuma, 740 S.E.2d 14, 18 (Va. 2013). Likewise, a recent Virginia State Bar Legal Ethics Opinion suggested that state law does not require pre-plea disclosure of *Brady* evidence. VA. STATE BAR, LEGAL ETHICS OP. 1862, "TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS, http://www.vsb.org/docs/LEO/1862.pdf.

roughly similar rates of pre-plea disclosure of factually exculpatory evidence.[189] More strikingly, North Carolina prosecutors reported a *lower* rate of disclosing impeachment evidence before a guilty plea than did their Virginia counterparts.[190] Likewise, the percentage of North Carolina prosecutors who stated they "always" disclose, pre-plea, exculpatory and impeachment evidence that is in the possession of another government agency was *significantly lower* than the percent of Virginia prosecutors who responded the same.[191]

While these responses by prosecutors do not appear to confirm the hypothesis that open-file produces better disclosure of exculpatory evidence, responses by defense attorneys point in the opposite direction. North Carolina defenders stated that they received all three categories of exculpatory and impeachment evidence *more frequently* than did their Virginia counterparts.[192] In one category—that of factually exculpatory evidence in the prosecutor's possession, the difference between the rates reported by North Carolina defenders and their Virginia counterparts was statistically significant.[193] In short, defense attorneys' responses may be read to support the hypothesis that open-file discovery produces more consistent disclosure of *Brady* material.

189. *Supra* Table 3a.

190. *See supra* Table 3a (showing that 89% of North Carolina prosecutors reported "always" disclosing impeachment evidence pre-plea as compared to 96.6% of Virginia prosecutors).

191. *See supra* Table 3a (showing 59.7% "always" disclosures from North Carolina prosecutors in comparison to 83.9% "always" disclosures from Virginia prosecutors).

192. *Supra* Table 3a.

193. *See supra* Table 3a (reflecting a 46.2% "always" response from North Carolina defenders compared to a 35% "always" response from Virginia defenders).

*Table 3a:* In felony cases, what types of documents do you [the prosecutor] turn over either as part of an initial discovery package or later, but before a defendant pleads guilty? Please indicate how often you [the prosecutor] disclose such documents, assuming they are present.

| | Virginia Prosecutors (%) | | | North Carolina Prosecutors (%) | | | X2(2); Φ |
|---|---|---|---|---|---|---|---|
| | Never | Sometimes | Always | Never | Sometimes | Always | |
| Factually exculpatory evidence in DA possession | 0 | 0.8 | 99.2 | 0 | 2.7 | 97.3 | 1.06; .07 |
| Impeachment evidence in DA possession | 0 | 3.4 | 96.6 | 0 | 11.0 | 89.0 | 4.39*; .15 |
| Exculpatory or impeachment evidence not in DA possession (but requestable) | 0.8 | 15.3 | 83.9 | 2.8 | 37.5 | 59.7 | 13.90***; .27 |
| | **Virginia Defense Attorneys (%)** | | | **North Carolina Defense Attorneys (%)** | | | **X2(2); Φ** |
| | Never | Sometimes | Always | Never | Sometimes | Always | |
| Factually exculpatory evidence in DA possession | 5.2 | 59.8 | 35.0 | 10.8 | 43.0 | 46.2 | 9.71**; .15 |
| Impeachment evidence in DA possession | 23.6 | 62.4 | 14.0 | 19.6 | 62.0 | 18.5 | 1.15; .05 |
| Exculpatory or impeachment evidence not in DA possession (but requestable) | 47.5 | 46.9 | 5.6 | 33.3 | 60.2 | 6.5 | 5.97*; .12 |

*p < .05; **p < .01; ***p < .001

*Table 3b:* Differences by legal actor regarding reported disclosure of *Brady* material.

| | **Differences between Virginia Prosecutors and Defense Attorneys** | **Differences between North Carolina Prosecutors and Defense Attorneys** |
|---|---|---|
| | **X2(2); Φ** | **X2(2); Φ** |
| Factually exculpatory evidence in DA possession | 146.04***; .56 | 49.49***; .55 |
| Impeachment evidence in DA possession | 262.92***; .76 | 81.07***; .70 |
| Exculpatory or impeachment evidence not in DA possession (but requestable) | 278.67***; .78 | 55.16***; .58 |

*p < .05; **p < .01; ***p < .001

What explains the different patterns of responses between prosecutors and defense attorneys? To answer this question, we must examine each category of *Brady* material separately. We begin with factually exculpatory evidence. Prosecutors from both states say that they disclose at about the same very high rate, more than 97%.[194] Defense attorneys, however, report dramatically lower rates of disclosure by prosecutors in both states.[195] Defense attorneys' answers also suggest that, pre-plea, factually exculpatory evidence is being provided significantly less frequently in Virginia than in North Carolina.[196]

We believe that the difference in these responses occurs because of a different interpretation by each side of what is meant by "exculpatory" evidence. Prosecutors respond based on what they would do once they have determined that certain evidence is in fact exculpatory. Almost all say they would turn it over[197]—perhaps because of a belief that this is the fair thing to do—even though, as a formal legal matter, they may be able to

194. *Supra* Table 3a.

195. *See supra* Table 3a (showing 35% "always" disclosure in Virginia and 46.2% "always" disclosure in North Carolina).

196. *Supra* Table 3a.

197. *See supra* note 194 and accompanying text (showing responses indicating over 97% disclosure from prosecutors in both states).

argue that such evidence need not be disclosed until later in the process.[198]

Defense attorneys respond with reference to what evidence they believe is exculpatory, but in their view, prosecutors do not always share this assessment of the evidence.[199] As the scholarship on *Brady* violations has shown, the defense perspective on this question is likely correct; prosecutors frequently fail to recognize that certain evidence is exculpatory, whether because of cognitive biases or because of a lack of time and resources to investigate the evidence more thoroughly, particularly before a guilty plea.[200] These different perspectives can explain the divergent reports by prosecutors and defense attorneys as to how often factually exculpatory evidence is disclosed. They also help explain why North Carolina defense attorneys report a significantly higher disclosure rate than do Virginia attorneys—because open-file disclosure automatically produces evidence in the prosecutor's file, cognitive biases and the lack of time and resources are less likely to stand in the way of adequate *Brady* disclosure.[201]

With respect to impeachment evidence, we obtained a different pattern of results. North Carolina defense attorneys report only slightly higher rates of prosecutorial disclosure compared to Virginia defense attorneys, while North Carolina prosecutors report *significantly lower* rates of disclosure than do

198. *Supra* note 188 and accompanying text.

199. *Infra* note 240 and accompanying text.

200. *Supra* notes 58–62 and accompanying text.

201. Even in North Carolina, prosecutors may be able to withhold certain evidence if a confidential informant is involved or if the safety of a witness is in jeopardy. N.C. GEN. STAT. ANN. § 15A-904(1a) (West 2015). This may explain why only 46% of North Carolina defense attorneys responded that prosecutors "always" disclosed factually exculpatory evidence pre-plea, while 43% believed prosecutors did so "sometimes." *Supra* Table 3a. In addition, although the question specifically stated that the factually exculpatory evidence was in the prosecutor's possession, respondents may have easily overlooked this qualifier, particularly because the question came at the end of a long table. *Infra* Appendix A. Therefore, defense attorneys may also have been thinking of cases where exculpatory evidence in North Carolina was not disclosed before a guilty plea as part of open-file simply because it had not yet been transmitted to the prosecution. Subsequent responses indicate that delayed transmission of *Brady* evidence is a notable problem in North Carolina and in Virginia. *Infra* notes 322, 335–340 and accompanying text.

their Virginia counterparts.[202] These responses are consistent with our findings on criminal records of prosecution witnesses, where North Carolina respondents again reported less frequent pre-plea disclosure than did their Virginia counterparts.[203] Prior records of prosecution witnesses are one type of impeachment evidence that respondents to our survey may have considered. In North Carolina, defense attorneys have independent access to such evidence so they could research these on their own.[204] Accordingly, under the "due diligence" exception to *Brady*, prosecutors would not have a duty to disclose this information.[205]

In Virginia, defense attorneys could also run background checks on witnesses, but they are unlikely to know who the witnesses are, because the law does not require prosecutors to turn over witness names.[206] Accordingly, prosecutors cannot rely on the "due diligence" exception to *Brady*. Instead, Virginia prosecutors must determine on their own whether any information about witnesses, including impeachment information, must be disclosed pursuant to *Brady*. This may help explain why North Carolina prosecutors reported lower rates of disclosure of impeachment evidence compared to Virginia prosecutors.

This is just one possible explanation of the results in this category. It is not entirely satisfactory, as it leaves open the question why defense attorneys in North Carolina reported slightly higher levels of disclosure of impeachment evidence than did Virginia defense attorneys. We offer another possible explanation later in this section.

With respect to the third category of evidence—*Brady* evidence that is not in the prosecutor's possession—the significantly lower reported rate of disclosure by North Carolina

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202. *Supra* Table 3a.

203. *See supra* Tables 2a & 2b (showing that Virginia prosecutors are more likely to turn over witness criminal records than North Carolina prosecutors).

204. *See, e.g.*, N.C. GEN. STAT. ANN. § 132-1.4 (West 2015) (classifying basic witness information, such as name, address, and violations of the law, as public records).

205. *See* Weisburd, *supra* note 36, at 147–53 (discussing the "due diligence" exception to *Brady* when facts are readily available to the defendant).

206. *See* VA. SUP. CT. R. 3A:11(b) (requiring only defendant statements, criminal records, and certain books, reports, and tests to be disclosed before trial).

prosecutors may reflect their increased awareness that a number of items are not in their files when they make their initial disclosure to the defense. This is consistent with subsequent comments, by some prosecutors and many defense attorneys in North Carolina, that a major disadvantage of open-file discovery is that it does not guarantee completeness of the files that are being disclosed, particularly pre-plea, because much of the information is not transmitted to the prosecution until later in the process.[207] Open-ended comments by respondents suggest that in Virginia, too, law enforcement frequently fails to transmit evidence to prosecution until later in the process.[208] But this failure is likely not as glaring as in North Carolina, where the prosecution turns over its entire file to the defense and then has to supplement its disclosure each time law enforcement sends over more evidence.

Alternatively, responses to this question may corroborate the criticism (shared by some defense attorneys and prosecutors in subsequent comments) that open-file can make some prosecutors too complacent about their disclosure obligations. Because they are turning over their entire files, North Carolina prosecutors may tend to think that they have met their duties under *Brady*. As a result, they may not be as proactive as their Virginia counterparts in following up with investigating agencies to determine if additional *Brady* material might exist.

Yet both of these explanations of why North Carolina prosecutors are reporting similar or lower rates of disclosure of *Brady* evidence than Virginia prosecutors are at odds with responses by defense attorneys from the two states. North Carolina defense attorneys reported significantly higher rates of

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207. *Infra* notes 322, 340 and accompanying text; *see also infra* Table 9 (showing that roughly one-third of North Carolina prosecutors responded that one reason for refraining from broader discovery before a guilty plea is the lack of time to check with all agencies). For a discussion of the duty of North Carolina prosecutors to investigate and obtain discoverable information, see Farb, *supra* note 22.

208. *See infra* notes 322–323 and accompanying text (discussing the strategies currently employed in the existing system and potential drawbacks to an open-file system); *see also infra* Table 9 (showing that 35% of Virginia prosecutors responded that one reason for refraining from broader discovery before a guilty plea is the lack of time to check with all agencies).

prosecutorial disclosure of *Brady* evidence than did their Virginia counterparts.[209]

One alternative explanation of the results is that Virginia prosecutors are overestimating the frequency with which they disclose *Brady* evidence. Discovery has been the subject of intense debate and proposals for reform in Virginia over the last several years.[210] In December 2014 (while we were conducting our survey), a special committee appointed by the Virginia Supreme Court proposed that the Virginia criminal procedure rules be amended to provide for broader and earlier discovery.[211] The proposal was open for public comments until August 2015, and it generated significant opposition from a number of Virginia prosecutors.[212] Because the issue was so politically sensitive at the time we administered the survey, consciously or unconsciously, some Virginia prosecutors may have been eager to show that they are disclosing *Brady* material at high rates and that there is no pressing need for reforming the rules. Finally, because our sample was not random, but instead relied on the willingness of respondents to take the survey, our survey may have been especially likely to attract responses from those prosecutors in Virginia who provide broader discovery than required.

The over-reporting hypothesis is consistent with responses from defense attorneys. As noted earlier, defense attorneys from North Carolina reported a higher rate of pre-plea disclosure of *Brady* material than did their Virginia counterparts.[213] Moreover, defense attorneys in both states reported a significantly lower rate of disclosure of *Brady* material than did prosecutors.[214] Also consistent with the over-reporting hypothesis, the gap between

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209. *See supra* Table 2b (reflecting the higher turnover rates of North Carolina prosecutors for every type of discovery material except witness criminal records).

210. SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY, *supra* note 118, at 22, 37–38 .

211. *See id.* (comparing current text of rules with proposed amendments).

212. *See id.* at xv (describing the timeline for the report, including the public comment); *see also* Public Comments to Virginia Discovery Committee Report (on file with the Washington and Lee Law Review).

213. *Supra* Table 3a.

214. *Supra* Tables 3a & 3b.

the reported disclosure rates by prosecutors and reported rates by defenders is broader in Virginia than it is North Carolina.[215]

We also asked participants whether prosecutorial decisions to disclose exculpatory and impeachment evidence depended upon whether the information was material to the outcome. Under constitutional law, materiality remains a valid limit on disclosure of exculpatory and impeachment evidence.[216] Among Virginia prosecutors, 5% answered "yes," 87% answered "no," and 8% answered "sometimes." North Carolina prosecutors' responses did not significantly differ from those of Virginia prosecutors, as 6.8%, 84%, and 10% answered "yes," "no," and "sometimes," respectively.

But the answers to this question differed significantly by legal actor role. Roughly 34% of North Carolina defense attorneys and 40% of their Virginia counterparts stated that prosecutorial decisions to disclose exculpatory and impeachment evidence depend upon whether the information was material to the outcome.[217] As our analysis of responses to a series of

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215. *Supra* Tables 3a & 3b.

216. For North Carolina, see State v. Allen, 731 S.E.2d 510, 520 (N.C. Ct. App. 2012) ("The defendant bears the burden of proving that undisclosed evidence was material."). For Virginia, see Workman v. Commonwealth, 636 S.E.2d 368, 374 (Va. 2006) (describing material *Brady* evidence as evidence that, if suppressed, "undermines confidence in the outcome of the trial" (citing United States v. Bagley, 473 U.S. 667, 678 (1985))). In North Carolina, ethical rules do not eliminate the materiality requirement. *See* N.C. R. PROF'L CONDUCT 3.8(d) (mandating disclosure of "all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinion"). But in Virginia, prosecutors are ethically required to disclose exculpatory evidence without regard to its materiality—as long as the prosecutor knows that the evidence "tends to negate the guilt of the accused." VA. R. PROF'L CONDUCT 3.8(d). On the other hand, the same ethical rule simply requires "timely disclosure" and does do not necessarily apply pre-plea. *See id.* (requiring "timely disclosure . . . of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused"). For clarification that "timely" does not necessarily mean pre-plea, see VIRGINIA STATE BAR, LEGAL ETHICS OPINION 1862, "TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS 2–3 (2012) (discussing the use and meaning of "timely" in terms of sharing information in an efficient manner).

217. Virginia Prosecutors versus Virginia Defenders: $x2(2) = 101.20$, $p < .0001$, $\Phi = .47$; North Carolina Prosecutors versus North Carolina Defenders: $x2(2) = 29.54$, $p < .0001$, $\Phi = .42$; Virginia Prosecutors versus North Carolina Prosecutors: $x2(2) = 0.32$, $p = .85$, $\Phi = .04$; Virginia Defenders versus North Carolina Defenders: $x2(2) = 4.27$, $p = .12$, $\Phi = .10$.

hypothetical scenarios in the following paragraphs suggests, materiality may indeed play a more important role in disclosure decisions than prosecutorial responses to this question might indicate.

To test the likelihood of disclosure of *Brady* material, we also asked participants to respond to three hypotheticals in Part II of our survey. The hypotheticals were at the end of the survey and were optional, so only a portion of the respondents chose to answer them. Because only a self-selected group answered the hypothetical questions, the results may be subject to some response bias.

The hypotheticals concerned impeachment or factually exculpatory evidence and are reproduced in full in Appendix A. They tested the likelihood of disclosing different types of *Brady* evidence, both impeachment and potentially factually exculpatory. All three were intentionally structured so as to allow respondents to validly conclude that the evidence is likely not material to the outcome of the case. Strong independent evidence—a video-recording that clearly showed the assailant's face, as well as the victim's identification of the defendant—corroborated the less reliable account of another eyewitness. The hypotheticals thus aimed to test, at least in part, the extent to which materiality affects prosecutors' decisions to disclose. We were interested to find out whether "close" cases—i.e., cases in which the duty to disclose under *Brady* was ambiguous—would be resolved differently by prosecutors in North Carolina and Virginia.

The first hypothetical involved the disclosure of a prior fraud conviction of one of the two eyewitnesses to the crime and aimed to test whether prosecutors disclosed such potential impeachment evidence before a guilty plea.[218] The impeachment evidence was not likely to affect the outcome of the case, as strong independent evidence pointed to the defendant's guilt. Our findings are laid out in Table 4 below.

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218. *Infra* Appendix A.

*Table 4, Hypothetical Scenario 1:* %YES

| North Carolina Prosecutors (N = 36) | Virginia Prosecutors (N = 78) | Statistic |
|---|---|---|
| 55.6% | 79.5% | $\chi^2$ (1)=42.62***; Φ=.42 |
| **North Carolina Defenders (N = 38)** | **Virginia Defenders (N = 167)** | |
| 21.1% | 34.7% | $\chi^2$ (1)=2.65; Φ=.11 |
| $\chi^2$ (1) = 9.36**; Φ = .36 | $\chi^2$ (1) = 6.99**; Φ = .25 | |

As the table shows, a significantly lower percentage of North Carolina prosecutors stated that they would disclose this type of information before a guilty plea than would prosecutors in Virginia.[219] This result is consistent with our earlier findings on witness criminal records and on impeachment evidence, where North Carolina prosecutors similarly reported significantly lower rates of pre-plea disclosure than did Virginia prosecutors.[220]

Participants were given the option to explain their answers, and several North Carolina respondents (on both the defense and prosecution side) explained that prosecutors would not disclose this information before a guilty plea because the information would be accessible to the defense so prosecutors need not disclose it.[221] Another explanation given was that prosecutors would not typically look up witnesses' prior records until just before trial, so it would not be part of the file before a guilty plea.[222]

Some Virginia respondents (mostly on the defense side) also noted that defense attorneys there could look at the prior records of witnesses themselves, which might explain some of the non-disclosure in that state.[223] But this presumes that Virginia

219. *See supra* Table 4 (showing that 79.5% of Virginia prosecutors responded that they would disclose the information, compared to 55.6% of North Carolina prosecutors).

220. *Supra* Tables 2a, 3a.

221. *See* Jenia I. Turner & Allison D. Redlich, *Pre-Plea Discovery Practices: A Survey of North Carolina Prosecutors,* Question No. 27, Respondent No. 36 (2014) [hereinafter *Pre-Plea: NC Prosecutors*] ("We are not required to disclose witnesses [sic] criminal records. They are public record and can be found by defense counsel.").

222. *See id.* at Question No. 27, Respondent No. 21 ("As a general practice, though, I do not take the time to look up criminal histories of witnesses in every case—at least pre-trial.").

223. *See, e.g.,* Jenia I. Turner & Allison D. Redlich, *Pre-Plea Discovery*

prosecutors would disclose the names of their prospective witnesses, which they are not required to do.[224]

Among Virginia prosecutors who said they would not disclose the prior fraud conviction, a more common explanation for non-disclosure was that the evidence was relevant to trial, but not to a guilty plea. As one explained: "In plea negotiations, there is the issue that the defendant, who knows whether he is guilty or not, can make decisions on whether to plea[d] or not, independently of the strength of the case against him or her. The prior conviction goes to credibility and issues raised at trial[,] not plea negotiations."[225] Another reason given to support non-disclosure in Virginia was that the prior fraud conviction of the prosecution witness would not be material to the outcome—thus confirming our hypothesis that materiality would influence the disclosure decisions of at least some prosecutors.[226] Yet another response conditioned disclosure of this evidence on a specific request by a defense attorney.[227] Formally, the duty to disclose exculpatory evidence applies even in the absence of a specific request by the defense, so this factor ought not be relevant.[228] But courts have

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*Practices: A Survey of Virginia Defense Attorneys,* Question No. 27, Respondent No. 92 ("No one will give you witnesses criminal history in advance because it's not required. It's up to defense counsel to do the due diligence necessary to protect the client and counsel.") [hereinafter *Pre-Plea: VA Prosecutors*]; *see also id.*, Respondent No. 69 ("They give me witness lists and I can run their CCRE if I want their history.").

224. *See* VA. SUP. CT. R. 3A:11(b) (requiring only defendant statements, criminal records, and certain books, reports, and tests to be disclosed before trial).

225. *See, e.g.*, *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 27, Respondent No. 24; *see also id.* at Question No. 27, Respondent No. 28 ("The Virginia rule on witness criminal history is that it must be provided in time for it to be useful. This has been determined to be at the time the witness is being called. The fraud conviction would be for impeachment only and could easily be asked about at trial.").

226. *See id.* at Question No. 27, Respondent No. 21 ("No, [I would not disclose the witness's prior fraud conviction] because I believe that I could prove the case without that witness.").

227. *See id.* at Question No. 27, Respondent No. 102 ("[No, I would not disclose the witness's prior fraud conviction] [u]nless the defense attorney specifically asks, in which case I would disclose it.").

228. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 110 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.").

considered the existence of a specific defense request in determining whether non-disclosure was material to the outcome, so this might explain why such a request would influence some prosecutors' decisions.[229]

With respect to the other two hypotheticals concerning potentially exculpatory, but arguably immaterial, evidence, we obtained responses pointing to higher rates of disclosure in North Carolina than in Virginia. Specifically, a significantly higher percentage of North Carolina defense attorneys than Virginia defense attorneys believe that prosecutors in their jurisdiction would disclose this evidence pre-plea. [230] In addition, a higher percentage of North Carolina prosecutors stated that they would disclose this type of evidence than did Virginia prosecutors (although the difference was not statistically significant).[231]

The table below shows the percentage of "yes" responses to Hypothetical Scenario 2, which asked whether prosecutors would disclose, pre-plea, the failure of a key eyewitness to initially pick out the defendant from a photo array.[232] The eyewitness did pick out the defendant from a subsequent lineup, and independent evidence, including a video clearly showing the defendant's face, supported conviction.

229. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682–83 (1985) ("[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption."); *see also* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b) (5th ed. 2013) (discussing relevant cases).

230. *Infra* Table 5.

231. *Id.*

232. *Infra* Appendix A.

*Table 5, Hypothetical Scenario 2:* %YES

| **North Carolina Prosecutors (N = 36)** | **Virginia Prosecutors (N = 76)** | **Statistic** |
|---|---|---|
| 97.3% | 89.6% | $\chi^2$ (1) = 2.03; $\Phi$ = .13 |
| **North Carolina Defenders (N = 41)** | **Virginia Defenders (N = 167)** | |
| 75.6% | 50.9% | $\chi^2$ (1) = 8.15**; $\Phi$ = .20 |
| $\chi^2$ (1) = 7.55**; $\Phi$ = .31 | $\chi^2$ (1) = 33.93***; $\Phi$ = .37 | |

From the optional explanations that accompanied some of the "Yes" or "No" responses, we can conclude that three factors tended to motivate decisions of Virginia prosecutors not to disclose this information before a guilty plea: (1) a belief that the evidence was not material to the outcome; (2) a belief that this evidence must be disclosed before trial, but not before plea; and (3) a belief that such evidence should be disclosed only if the defense requests it. None of these factors seems specific to Virginia, however, so they are unlikely to explain the difference in responses by state.

In North Carolina, no respondents gave a reason for failing to disclose. Among those who explained their motivations for disclosing, a few noted that information concerning identification procedures is statutorily required to be included in the investigative report.[233] The report itself is included in the prosecutor's file that must be disclosed to the defense. This may help explain the higher rate of reported disclosure in North Carolina than in Virginia, where no statute requires the reporting of identification procedures.

The third hypothetical concerns the disclosure by the prosecutor of a statement by a jailhouse informant, who was described as a friend of the defendant.[234] The statement suggests that another jail inmate—not the defendant—committed the crime, but it is potentially unreliable because the informant is a friend of the defendant. It is also likely not material to the outcome because of the strong independent evidence supporting conviction.

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233. *See Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 28, Respondent No. 56 ("If this information was not in the law enforcement report, it would be a violation of our state's eyewitness identification statute.").

234. *Infra* Appendix A.

Once again, a significantly greater percentage of respondents in North Carolina stated that prosecutors would disclose this evidence before a guilty plea than did respondents in Virginia.[235]

*Table 6, Hypothetical Scenario 3:* %YES

| **North Carolina Prosecutors (N = 37)** | **Virginia Prosecutors (N=77)** | **Statistic** |
|---|---|---|
| 97.2% | 84.2% | $\chi^2$ (1) = 4.03*; $\Phi$ = .19 |
| **North Carolina Defenders (N = 39)** | **Virginia Defenders (N = 160)** | |
| 59.0% | 35.0% | $\chi^2$ (1) = 7.53**; $\Phi$ = .19 |
| $\chi^2$ (1) = 15.62***; $\Phi$ = .46 | $\chi^2$ (1) = 49.93***; $\Phi$ = .46 | |

A few of the Virginia prosecutors who stated that they would not disclose this type of evidence offered explanations for their decision. A couple focused on the unreliability of the informant.[236] Two others pointed out that this evidence would be known by the defendant because he was friends with the informant—therefore, the prosecutor would not have to turn it over because the defense would have independent means of obtaining the information.[237] Most of the open-ended explanations by prosecutors, in both Virginia and North Carolina, noted that while the information was unreliable (and may therefore require further investigation), they would nonetheless disclose it as it is potentially exculpatory and covered by *Brady*.[238]

While a large majority of prosecutors in both states claimed that they would disclose the informant's statement, a much lower percentage of defense attorneys agreed.[239] In the open-ended explanations of Virginia defense attorneys, many noted that prosecutors would not consider this evidence exculpatory.[240] In

235. *Supra* Table 6.

236. *See Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 29, Respondent No. 22 ("The informant is unreliable.").

237. *See id.* at Question No. 29, Respondent No. 20 (remarking that, if the defendant knows the informant, there would be no need for the prosecution to turn any information over to the defense).

238. *Id.* at Question No. 29; *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 28.

239. *Supra* Table 6.

240. *See, e.g.*, Jenia I. Turner & Allison D. Redlich, *Pre-Plea Discovery Practices: A Survey of Virginia Defense Attorneys*, Question No. 34, Respondent No. 50 (2014) [hereinafter *Pre-Plea: VA Defense Attorneys*] ("Prosecutors in my jurisdiction would not consider this exculpatory.").

North Carolina, few explanations were provided, but most of these focused on whether the prosecutor would have the information in the file.[241] A number worried that law enforcement may not provide the information to the prosecutor, which would naturally result in non-disclosure.[242]

The responses to the hypotheticals suggest that *Brady* evidence is generally more likely to be provided in North Carolina than in Virginia, except if it concerns the prior record of a prosecution witness. As discussed earlier in this Section, we obtained a somewhat different pattern of responses when we asked prosecutors directly whether they would disclose impeachment or exculpatory evidence before a guilty plea.[243] What explains the seemingly conflicting answers? We believe several explanations are plausible, and further research into this question would be helpful to clarify what drives the results.

One possibility is that when the question expressly presents the evidence as exculpatory, prosecutors from both states are likely to respond in similar ways as to whether they would disclose it. But when a hypothetical presents facts with evidence that is of debatable exculpatory or impeachment value, open-file is more likely to make a difference with respect to disclosure. Because North Carolina prosecutors do not have to make a judgment on the exculpatory nature of the evidence before disclosing—if it is in the file, they are required to disclose it[244]—they disclose at higher rates. By contrast, Virginia prosecutors

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241. *See, e.g.*, Jenia I. Turner & Allison D. Redlich, *Pre-Plea Discovery Practices: A Survey of North Carolina Defense Attorneys*, Question No. 34, Respondent No. 3 (2014) [hereinafter *Pre-Plea: NC Defense Attorneys*] ("[T]he DA would turn this over if LE [law enforcement] advised them of this—the danger is always whether the LE has informed the DA before Court.").

242. *Id.*; *see also id.*, at Respondent No. 7 ("Jailhouse informants are usually not found by the DA until the DA and defense attorney go through the law enforcement investigative file with the detective at the pretrial readiness conference. Although there is a continuing duty to disclose, the police generally do not give the information to the DA about informants until the readiness conference.").

243. *Supra* Part III.C.2; Table 3a.

244. *See* N.C. GEN. STAT. ANN. § 15A-903 (West 2015) (requiring the state to disclose the "complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant").

are not required to disclose such evidence before a guilty plea,[245] so doubts about the materiality and reliability of the evidence reduce the frequency with which they provide it to the defense.

With respect to evidence concerning one particular type of impeachment evidence—a witness's prior fraud conviction—both the hypotheticals and the category responses suggest that such evidence is less likely to be provided pre-plea in North Carolina than in Virginia. As discussed earlier, this likely occurs because witness criminal records do not become part of a North Carolina prosecutor's file until later in the process and because the records are available to defense attorneys to look up independently and are therefore not seen as the responsibility of prosecutors to provide.

Finally, consistent with our previous findings, responses on the disclosure rates of exculpatory evidence differ dramatically by actor role. Defense attorneys believe that prosecutors in their jurisdiction would disclose the hypothetical evidence much less frequently than prosecutors stated that they would.[246] We believe that at least in part, this likely reflects different perspectives on what evidence counts as "exculpatory." It may also reflect how legal roles shape perceptions of what occurs in the criminal justice system—a finding that is consistent with previous surveys of defense attorney and prosecutor experiences.[247]

### *3. Discovery Waivers*

A common concern about open-file discovery is that it is more costly for prosecutors—specifically, that early disclosures are more time-consuming and burdensome to prepare and that broader disclosure is more likely to uncover holes in the prosecution's case.[248] If that is indeed the case, we may expect

245. *Supra* note 188 and accompanying text.

246. *Supra* Table 6.

247. *See, e.g.*, MCDONALD, *supra* note 19, at 67, 77–78, 87 (finding that prosecutors and defense attorneys have different perspectives on the strength of a case and on the choice between plea bargaining and trial); Middlekauff, *supra* note 132, at 17–18, 54 (reporting different perceptions of discovery between prosecutors and defense attorneys); Aviram, *supra* note 61, at 35 (discussing how "[c]onfirmation bias influences prosecutors and defense attorneys").

248. *See* Brian P. Fox, *An Argument Against Open-File Discovery in*

requests for waivers of discovery rights to be more common in open-file jurisdictions. To the extent that prosecutors find open-file discovery burdensome, they could simply negotiate to bypass such discovery in exchange for sentencing or other concessions to defendants. While open-file discovery typically occurs *before* negotiations, the timing of plea bargaining is not regulated, so negotiations can occur earlier in the process if prosecutors desire a waiver.

Studies of plea bargaining and discovery at the federal level, in New York, and in Texas have found that parties do indeed negotiate waivers of discovery.[249] Yet two of these jurisdictions—the federal and New York—have relatively restrictive discovery rules, which ought not impose any significant burdens on the prosecution. The existence of waivers in jurisdictions like New York and the federal system may mean that prosecutors in fact find restrictive discovery more costly because of the higher administrative burden in responding to discovery motions. Alternatively, because prosecutors are not providing open-file discovery in these two jurisdictions, they may be more worried about the risk that an unintentional *Brady* violation might pose to the finality of a conviction.[250] Both of these factors might help explain the use of negotiated discovery waivers in restrictive discovery jurisdictions. It is also possible that prosecutors in those jurisdictions have such overwhelming leverage in negotiations that discovery waivers are simply a bonus addendum to a take-it-or-leave it offer to the defense. Prosecutors

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*Criminal Cases*, Note, 89 NOTRE DAME L. REV. 425, 437 (2013) (contending that the burdens placed on the prosecutors and public defenders by open-file discovery are significant).

249. *See* Klein et al., *supra* note 83, at 83–85 (discussing waivers in federal courts); N.Y. ST. B. ASS'N TASK FORCE ON CRIMINAL DISCOVERY, FINAL REPORT 66 (2014) [hereinafter NYSBA TASK FORCE] (noting the use of discovery waivers in some counties in New York); TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27, at 24 (reporting that waivers were a "very prominent topic of the defense attorney and prosecutor focus group sessions" conducted as part of the study).

250. For a suggestion that this concern encourages waivers in the federal system, see Cassidy, *supra* note 15, at 1431 (describing prosecutorial concerns about liability for information held by other government entities but unknown to the prosecutor and about the challenges of identifying evidence as "material" before the trial).

may therefore use discovery waivers because they cost little in terms of sentencing or charging concessions to the defendant.[251]

The use of discovery waivers in Texas, however, raises different questions. To begin, the law that introduced open-file discovery in Texas, the Michael Morton Act, appears to prohibit discovery waivers.[252] One would therefore expect some reticence on part of prosecutors to negotiate waivers. The new law also requires open-file discovery, which would generally insulate convictions from *Brady* challenges,[253] so this would not be a strong reason for prosecutors to seek waivers. Yet because open-file discovery is so recent in Texas, administrative burdens are still relatively high as counties transition to the new system.[254] These administrative burdens, as well as the remaining uncertainty surrounding the operation of the law (including uncertainty about its protection against *Brady* challenges), likely explain the use of discovery waivers in Texas. Finally, it may be too soon to know whether waivers will in fact become commonplace in Texas. As one defense attorney quoted in the study of the Michael Morton Act explained, some defense attorneys are actively challenging these waivers:

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251. *See, e.g.*, Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 608 (2014) (discussing scenarios in which plea-bargaining appears less like a negotiation and more like an ultimatum); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (noting considerable prosecutorial leverage in plea negotiations).

252. *See* TEX. CODE CRIM. PROC. ANN. art 39.14(n) (West 2014) ("This article does not prohibit the parties from agreeing to discovery and documentation requirements *equal to or greater than* those required under this article." (emphasis added)).

253. *Brady* challenges may still occur and succeed where investigating agencies fail to transmit exculpatory evidence to the prosecution and such evidence was therefore not included in the open-file disclosure. Under *Kyles v. Whitley*, the prosecution is responsible for disclosing exculpatory evidence even when the evidence is not in its custody, but is in the custody of investigating agencies working on the case. Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

254. *See* Terri Langford, *Costs and Questions as TX Implements New Discovery Law*, TEXAS TRIB. (May 29, 2014), http://www.texastribune.org/2014/05/29/michael-morton-act-driving-evidence-costs-das/ (last visited Oct. 19, 2015) (discussing the increasing costs associated with producing copies of documents under the new law) (on file with the Washington and Lee Law Review).

> There are some attorneys in town that are opposed to signing those waivers. For a few of them, they'll choose to go on the record and acknowledge. They'll refuse to sign those forms. The DAs and the County Attorneys absolutely hate it. They usually call their supervisors or whatever. But they have successfully, the attorneys that are opposed to signing, have successfully done it, the alternative method prescribed in the Morton Act, which is to do it on the record. But I think that the vast majority of cases, you're signing forms. I guess we'll wait to find out if that's a mistake or not.[255]

It is possible that in the future more defense attorneys will refuse to sign the waivers or that courts will in fact enforce the provision banning discovery waivers.[256] It is also possible that over time, Texas prosecutors will simply find that they do not need to negotiate waivers, as they become more used to the new discovery regime and find that it is not unduly burdensome.

Because discovery waivers have been documented in both restrictive and open-file jurisdictions, we expected to find that such waivers are also used in both North Carolina and Virginia. Our survey, however, did not find evidence of regular negotiations of discovery waivers in either state.

In Virginia, only 4.7% (6 of 127) of prosecutors responded that they had obtained a waiver of discovery rights as part of plea negotiations. All six of the respondents stated that they had obtained such waivers in 10% or less of their felony cases in the past year. Virginia defense attorneys did not disagree substantially with this assessment: 88% (330 out of 377) stated that the prosecution had not requested a waiver of discovery rights as part of plea negotiations in felony cases over the past year; and 6% (22 out of 377) stated that the prosecution requested such waivers only very rarely (in 1–10% of cases). The remaining 6% had experienced waivers in more than 10% of their cases.

Defense attorneys who responded that the prosecution had requested discovery waivers at some point over the past year also had the option of describing the types of evidence for which waivers were requested. While a few Virginia defense attorneys

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255. TCDLA REPORT ON MICHAEL MORTON ACT, *supra* note 27, at 24.

256. A Texas State Bar opinion from November 2014 suggests that such waivers may be unethical. *See* State Bar of Texas, *Opinion No. 646*, 78 TEX. B.J. 78, 78 (2015) (finding that certain types of discovery waivers may violate ethical rules following the passage of the Michael Morton Act).

mentioned exculpatory or impeachment evidence as the subject of waivers, more common were waivers for non-exculpatory evidence and "other" types of evidence, such as the identity of confidential informants.[257] Under "other" waivers, defense attorneys identified a practice of informal waivers, whereby prosecutors offer a favorable plea, which is conditioned on defendants foregoing discovery. As one explained: "Although no formal waiver is ever requested, it seems implied that if the offer is accepted without disclosure then the disclosure will not be made. If disclosure is demanded then the plea bargain offer is withdrawn."[258] Another explained that the motivation behind this practice is to conserve prosecutorial resources: "The prosecutor claimed it was because of the economy of his time; could devote time to other cases if he didn't have to answer discovery."[259]

While Virginia prosecutors did not acknowledge that such informal waivers are negotiated, it is possible that they did not mention them because they interpreted the question to focus on

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257. Among defense attorneys who reported the use of discovery waivers, 48% reported that prosecutors requested waivers for non-exculpatory evidence discovery while 25% reported that prosecutors requested waivers for impeachment or factually exculpatory evidence. We asked respondents to identify the reasons that motivated prosecutors to negotiate discovery waivers. In Virginia, the top three reasons selected by defense attorneys were: (1) concern about harm to ongoing investigations (31 out of 39 defender respondents selected this one); (2) concern that pre-plea discovery would stand in the way of an expeditious resolution of the case (25 out of 42 defender respondents selected this one); and (3) concern about witness safety (25 out of 41 defender respondents selected this option). Of the four Virginia prosecutors who responded to this question, two selected as their motivation for requesting waivers the concern about harm to ongoing investigations and three selected the concern about witness safety.

258. *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 16, Respondent No. 33; *see also id.* at Question No. 16, Respondent No. 105 ("Prosecutors never request formal written discovery waiver. Rather, there might for instance be an offer to reduce to misdemeanor, or agree on a sentence below the guidelines, in exchange for foregoing disclosure of the identity of an informant."); *id.* at Question No. 16, Respondent No. 261

> If counsel requests discovery prosecutors will view it as a rejection of any plea offer in most cases. It is implied in any case where a plea has been accepted. If you wish to ask for discovery before the plea you can and the court will order it, but there is a fair chance the prosecution will try to withdraw any plea offers.

259. *Id.* at Question No. 16, Respondent No. 250; *see also id.* at Question No. 16, Respondent No. 252 ("[I]f you make us investigate and work for to provide you with more detailed facts, the offer is off the table.").

formal waivers. But even among defense attorneys, only a small minority noted this practice, so it is likely that discovery waivers—whether formal or informal—are indeed rare.

In North Carolina, only 4.9% (4 out of 81) prosecutors stated that they had negotiated discovery waivers in felony cases in the past year, and all four of them had rarely done so (in 10% or less of their felony cases). North Carolina defense attorneys confirmed that discovery waivers are uncommon: 91% (93 out of 102) stated that, in the past year, prosecutors had never requested discovery waivers as part of plea negotiations in felony cases, and 6% stated that such waivers occurred in only 10% or less of felony cases. In North Carolina, the few respondents who did mention negotiated waivers stated that such waivers typically concerned specific types of evidence, such as the identity of confidential informants or the (future) testing of drugs.[260]

Neither prosecutors nor defense attorneys in North Carolina selected "exculpatory evidence" as a type of evidence for which discovery waivers were requested.[261] Moreover, unlike in Virginia, North Carolina respondents did not report waivers to avoid burdensome motions. This makes sense, as open-file discovery does not require formal motions. Moreover, to the extent that waivers are driven by fears of *Brady* challenges, they are also less needed in an open-file jurisdiction like North Carolina because prosecutors are generally turning over everything in their file.[262] This may help explain the relative scarcity of discovery waivers in North Carolina.

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260. *See Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 16, Respondent No. 10 ("If you make me get this video ([o]r test these drugs), then the misdemeanor plea will go away."); *id.* at Question No. 16, Respondent No. 20 ("Generally they seek a waiver to disclose undercover informant's information in drug cases.").

261. A few did, however, select impeachment as a reason for requesting waivers. One out of two prosecutor respondents and two out of seven defense attorney respondents did so. These responses may reflect waivers pertaining to the identity of confidential informants.

262. However, the occasional waivers of confidential informant identity were likely driven by concerns about *Brady* challenges. North Carolina prosecutors can legitimately withhold the identity of confidential informants under the discovery rules, so the waivers appear primarily to serve the purpose of protecting against *Brady* claims. *See* N.C. GEN. STAT. ANN. § 15A-904 (a1) (West 2015) ("The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.").

In brief, our survey found no evidence that a shift to open-file leads to more frequent negotiations of discovery waivers—if anything, waivers appear to be slightly more common in Virginia, where discovery is more restrictive, than in North Carolina. This suggests that waivers may frequently be driven by administrative burdens associated with discovery motions and by concerns about protecting against *Brady* challenges. While the study of the new Texas discovery statute suggests that waiver requests may be common in some open-file jurisdictions as well, the Texas law is too recent to allow a clear conclusion to this effect.

#### *4. Advantages and Disadvantages of Open-File Discovery*

At the end of the survey, we included several open-ended questions, which asked participants to comment on their perceptions of discovery practices in their jurisdiction. We asked participants whether they were satisfied with existing discovery practices and what they believed the advantages and disadvantages of open-file discovery were. Two to three coders independently reviewed responses to these open-ended questions. The rate of agreement on coding categories was 78% or higher. When discrepancies between coders occurred, we deferred to the senior scholar's rating.

##### *a. Satisfaction with Pre-Plea Discovery Practices*

Our first open-ended question asked participants whether they believe that pre-plea discovery in their jurisdiction (either by law or office policy) works well. Participants were also asked to elaborate on why, in their view, it did or did not. On this question, responses varied significantly by state.

In Virginia, views of prosecutors and defense attorneys were starkly opposed. Prosecutors, by and large, believed that discovery works well. Out of 101 Virginia prosecutors who responded to this question, only four expressed any misgivings about their jurisdiction's discovery policy.[263] A majority explained

263. *See, e.g.*, *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 17, Respondent No. 33 ("Not really. It worked better when we had open

that either they or their office as a whole provide open-file discovery or at least broader discovery than is required by law.[264] Yet even those who said they provide only as much as required by law opined that the practice works well.[265] Some of these respondents stated that even the more limited discovery practice adequately ensures the disclosure of exculpatory information, while others noted that it is satisfactory because it protects witnesses.[266]

By contrast, a majority of Virginia defense attorneys stated that discovery in Virginia does not work well.[267] Common concerns mentioned were: (1) that discovery is too limited;[268] (2) that it is left to the discretion of prosecutors and is therefore inconsistent;[269] (3) that it is overly burdensome on the defense because defense attorneys are often told they have to go in person to the prosecutor's office to make copies or take handwritten notes summarizing the evidence;[270] and (4) that prosecutors do not always get all the evidence from police.[271] These complaints

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discovery. . . .").

264. *See, e.g., id.* at Question No. 17, Respondent No .4 ("Yes. We practice open-file discovery. It ensures an even playing field and promotes efficiency in the litigation process.").

265. *See, e.g., id.* at Question No. 17, Respondent No. 53 ("It works well here because it is required by law.").

266. *See, e.g., id.* at Question No. 17, Respondent No. 62 ("Yes, because it protects witnesses.").

267. Out of ninety-nine respondents, only twenty-seven stated that it works well, while fifty stated that it does not work well, and twenty-two stated that it sometimes works well. *Id.*

268. *See Pre-Plea: VA Defense Attorneys, supra* note 240, Question No. 21, Respondent No. 74 ("No. There are very few rights to discovery under [Virginia] law.").

269. *See, e.g., id.* at Question No. 21, Respondent No. 20 ("NO! It impedes justice, leaves too much discretion with the prosecutors who are more concerned with winning than with facts and justice being served."); *id.*, at Respondent No. 101 ("Inconsistent, and different across the jurisdictions.").

270. *See, e.g., id.* at Question No. 21, Respondent No. 308 ("No. The jurisdiction I work in has a 'fig-leaf' 'open file' discovery policy. That means I can make an appointment to go in and LOOK at the prosecutor's file. But I am ABSOLUTELY FORBIDDEN to have copies. So I'm supposed to make hand-written copies of lengthy witness statements and any other documents in the file.").

271. *See, e.g., id.* at Question No. 21, Respondent No. 53 ("Discovery is generally provided in an untimely manner and is incomplete. This is due primarily to law enforcements [sic] providing reports late and the reports are

were similar to concerns expressed by defense attorneys who commented publicly on the proposed discovery reform in Virginia.[272]

In North Carolina, both prosecutors and defense attorneys were generally satisfied with the operation of open-file discovery. Only two out of sixty-four prosecutors stated that open-file discovery does not work well. In one case, the respondent noted that "[e]ven providing everything, frivolous discovery motions abound."[273] In another case, the respondent thought that open-file discovery should be provided even earlier if low-level felony were expected to plead out at the probable cause hearing.[274] Another four respondents stated that the policy works well "sometimes" or "somewhat."[275] In all, 90.6% (58 out of 64) of North Carolina prosecutors were satisfied with open-file discovery, and many defended the policy in strong and unequivocal terms.[276]

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incomplete.").

272. *See, e.g.*, Virginia Association of Criminal Defense Lawyers, Letter Comment on Proposed Virginia Criminal Discovery Rules (June 26, 2015) (noting that "current discovery rules are inadequate for due process and fair trials" and that the expansion of discovery by prosecutors in some Virginia counties leads to rules that "are inconsistent and malleable").

273. *Pre-Plea: NC Prosecutors*, *supra* note 221, Question No. 17, Respondent No. 18.

274. *See id.* at Question No. 17, Respondent No. 23 ("No, I think it is unrealistic that we expect low level felony pleas in a PC setting without providing discovery.").

275. *See, e.g.*, *id.* at Question No. 17, Respondent No. 27 ("It can cut both ways. Many prosecutors have to weigh the balancing act of keeping the victims and witness safe while providing all the information. Generally pre-plea discovery helps both sides evaluate the case.").

276. *See, e.g.*, *id.* at Question No. 17, Respondent No. 15 ("The thought of a defense attorney advising his or her client to enter into a plea knowingly and voluntarily, without knowing the evidence in a case, sounds preposterous. As a prosecutor our job is to search for the truth."); *id.* at Question No. 17, Respondent No. 26 ("Yes because if a defendant's attorney is provided all of the discovery materials they can better advise their clients and the cases move through the system more efficiently."); *id.* at Question No. 17, Respondent No. 38

> Yes. It facilitates a dialogue focused on resolution of the case and reduces greatly any accusations of hiding or keeping evidence or exculpatory statements or items from the defendant. In codefendant cases it facilitates cooperation in resolving cases. It also builds trust and a good working relationship between the defense and prosecution.

While defense attorneys were somewhat less positive about pre-plea discovery in North Carolina, a large majority—69.5% (57 out of 85), stated that the practice works well in their jurisdiction.[277] Only thirteen stated that it does not work well, and another eleven stated that it works well "sometimes" or "somewhat."[278] Among those defense attorneys who had misgivings about the way discovery operates in North Carolina, a common concern was that prosecutors are reluctant to press law enforcement for information relevant to the case, but missing from the file.[279]

In summary, while more restrictive discovery—as practiced in Virginia—seems to polarize the views of prosecutors and defense attorneys, open-file discovery—as practiced in North Carolina—appears to be well-received by both.

### *b. Advantages of Open-File Discovery*

We next asked respondents what they thought were the major advantages of "open-file" discovery. Once again, we found some differences between North Carolina and Virginia prosecutors, as well as between prosecutors and defense attorneys.

Whereas twenty out of 101 Virginia prosecutors (20%) believed there were no advantages to open-file discovery, none of the sixty-six North Carolina respondents (0%) believed the same. We therefore see a much more negative view of open-file among Virginia prosecutors—for whom open-file is a choice but not a mandate—than among their North Carolina counterparts, who are required to provide open-file discovery by law. A similar contrast emerges in responses about the disadvantages of open-file, which are discussed in the next section.[280]

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277. *Pre-Plea: NC Defense Attorneys*, *supra* note 241, Question No. 21.

278. *See, e.g.*, *id.* at Question No. 21, Respondent No. 18 ("Depends on the DA. Some DAs seem to provide everything they have, and others provide almost nothing."); *id.* at Question No. 21, Respondent No. 64 ("Unfortunately it varies by county.").

279. *See, e.g.*, *id.* at Question No. 21, Respondent No. 80 ("[T]he local DA attempts to comply [with] the law, but does not seem to work at getting local law enforcement to comply.").

280. *Infra* Part III.C.4.c.

Among prosecutors who did identify benefits of open-file, there was broad agreement on what those benefits were. In both Virginia and North Carolina, the most commonly mentioned advantage by prosecutors was efficiency. Roughly 35% of Virginia prosecutors and 41% of North Carolina prosecutors who answered this question believed efficiency to be a major advantage of open-file discovery. While some used the word efficiency, others gave examples, such as spending less time trying to figure out what to disclose, not having to respond to discovery motions, and resolving the case more quickly.[281]

The second most commonly mentioned advantage was protection against inadvertent nondisclosure of exculpatory evidence and against claims of such nondisclosure.[282] Roughly 36% of North Carolina prosecutors and 30% of Virginia prosecutors identified this as an advantage of open-file.[283] Virginia prosecutors also tended to note that open-file has the advantage of facilitating guilty pleas (21%), ensuring that the parties are better informed (21%), promoting fairness (18%), and fostering trust and cooperation among the parties and the court (12%). The same advantages were also mentioned by some North Carolina prosecutors: ensuring that the parties are better informed (26%), promoting fairness (21%), facilitating guilty pleas (20%), and fostering trust and cooperation among the parties and the court (11%).

Defense attorneys agreed with prosecutors about these advantages of open-file discovery, though their ranking was somewhat different. One of the two most frequently noted advantages of open-file discovery was that the practice ensures better informed decisions and more effective assistance of the client.[284] The other was that open-file

281. *See, e.g.*, *Pre-Plea: NC Prosecutors*, *supra* note 221, Question No. 18, Respondent No. 54 ("[It p]uts all the cards on the table, and you can arrive at the strengths and weaknesses of a case in a timely manner between opposing counsel."); *id.* at Question No. 18, Respondent No. 69 ("It saves time on pretrial motions.").

282. *See, e.g.*, *id.* at Question No. 18, Respondent No. 53 ("It [is] a procedural safeguard to act as a stop-gap to prevent inadvertent non-[disclosure].").

283. Respondents often identified more than one advantage of open-file discovery. That is why the percentages add up to more than 100%.

284. *See, e.g.*, *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22, Respondent No. 89 ("[It a]llows the defendant access to make a quick

discovery promotes fairness and transparency.[285] A high number of respondents also noted that speedier guilty pleas,[286] efficiency,[287] and better relationships between the parties[288]

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informed decision as to whether to plead guilty. It is the most reliable means to assure that the defendant has access to all discovery that he is entitled to."). Twenty-nine out of seventy-two North Carolina defense attorneys and 105 out of 307 Virginia defense attorneys mentioned this as a major advantage. *See generally id.* at Question No. 22; *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22. Nine North Carolina defense respondents and sixty-four Virginia defense respondents also mentioned that open-file discovery promotes the truth, a related advantage. *See, e.g.*, *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22, Respondent No. 20 ("I believe that open-file discovery allows clients and attorneys to make educated and rational decisions based on the evidence available. It helps stop gamesmanship and focuses the resolution of cases on the facts and law of the case."); *id.* at Question No. 22, Respondent No. 22

> The Defendant does not feel that the Defense Counsel and Prosecutor are collaborating to force a plea. As a Public Defender, I have limited resources and may not have the opportunity to explore certain avenues of investigation that law enforcement has already pursued. If, with broad pre-trial discovery, I can speak intelligently to those issues that are of concern to my client, it goes a long way in fostering a good client attorney relationship. It also assists in making the client more receptive to any legal advice I may give.

285. *See, e.g.*, *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22, Respondent No. 11 ("It creates a transparent process, and there is less chance of trial by ambush."). Thirty-three out of seventy-two North Carolina defense attorneys, and 123 out of 307 Virginia defense attorneys noted this as a major advantage. *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22; *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22.

286. *See, e.g.*, *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22, Respondent No. 93 ("Expedited resolution of the majority of cases by negotiated guilty plea."). Twelve North Carolina defense respondents and seventy-seven Virginia defense respondents stated this as a major advantage. *See generally Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22; *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22.

287. *See Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22, Respondent No. 9 ("I believe it actually expedites the case."). Six North Carolina defense respondents and fifty-one Virginia defense respondents stated this as a major advantage; *see generally, e.g.*, *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22; *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22.

288. *See, e.g.*, *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22, Respondent No. 28 ("I think it enhances the relationship between defense and prosecution attorneys and prevents suspicion."). Seven North Carolina defense respondents and twenty-seven Virginia defense respondents mentioned this as a major advantage. *See generally id.* at Question No. 22; *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22.

and with the client[289] were important advantages of open-file discovery. Four out of seventy-two North Carolina defense attorneys and eleven out of 307 Virginia defense attorneys stated that open-file has no advantages.[290] Most of these respondents did not believe that the practice called "open-file" truly provided them with the entire evidence in the case.[291] On the whole, however, both Virginia and North Carolina defense attorneys related very positive views of open-file discovery.

### *c. Disadvantages of Open-File Discovery*

We asked participants what they believed were the major disadvantages of "open-file" pre-plea discovery. The responses differed significantly between North Carolina and Virginia prosecutors, as well as between prosecutors and defense attorneys in each state.

As in the previous question, answers from Virginia prosecutors revealed a much more negative view of open-file policy than answers from their North Carolina counterparts.

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289. *See, e.g.*, *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22, Respondent No. 161 ("Fosters a better relationship between defendants and their attorneys."). Six North Carolina defense respondents and thirty-five Virginia defense respondents mentioned this as a major advantage. *See generally id.*; *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22.

290. *See generally Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 22; *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 22.

291. *See, e.g.*, *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 21, Respondent No. 85

> There are no advantages to it. A defense lawyer should file a discovery motion in every case after he or she sees what is in the prosecutor's open file. . . . Overall open file discovery is a fraud. In state and federal courts it allows the prosecution to simply say "I have given you everything in the file" and they are protected. Such prosecutors on both levels routinely prevent exculpatory evidence from ever making it into their file and thereby they thwart the purpose of the open file. I have had numerous federal and state judges indicate that they will not compel the production of evidence not in the prosecutors "open file" and so that prevents its pre-plea or pretrial production to defense counsel. . . . If prosecutors placed individual defendant rights ahead of their conviction record it would be a great tool, but as it has been applied, it is a joke.

Whereas 43.1% (25 out of 58) North Carolina prosecutors responded that they believed open-file discovery has no major disadvantages, only 7.3% (7 out of 96) Virginia prosecutors believed the practice has no major disadvantages.

The most common disadvantage mentioned by Virginia prosecutors was the risk of witness intimidation or manipulation.[292] Roughly 47% (45 out of 96) Virginia prosecutors identified this as a major disadvantage.[293] By contrast, only 10.3% (6 out of 58) of North Carolina prosecutors believed that witness intimidation was a significant disadvantage of open-file discovery.[294]

Most Virginia prosecutors mentioned witness safety or witness intimidation as a problem in general terms.[295] A couple of respondents, however, offered concrete examples:

> I used to follow "open file" discovery by handing my file to defense counsel and letting them look through it and make copies. However, several bad experiences involving defense attorneys' use of private witness information to confront citizen witnesses caused me to change that policy. . . . Most troubling, was a drug buy tape given to defense in discovery was copied by a defendant and then played for other potential defendants in order to burn the informant. Three individuals heard the tape and were so enraged by learning the informant's identity that they tracked down the informant, shot and killed the informant, and shot the informant's wife in the head. Based on these and other experiences, I no longer allow unfettered access to my files under an "open file" policy.[296]

> Some attorneys are not trustworthy and almost all of their clients will obstruct the quest for the truth for their personal advantage. Witnesses are in jeopardy and have been threatened, injured, and killed in my jurisdiction.[297]

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292. *See, e.g.*, *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19, Respondent No. 61 ("The only disadvantage I see is that it potentially endangers witnesses and victims, or subjects them to harassment. This can be reduced/prevented by redacting their names and/or information.").

293. *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19,

294. *See, e.g.*, *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19, Respondent No. 45 ("[It] sometimes affects safety of witnesses.").

295. *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19.

296. *Id.* at Question No. 19, Respondent No. 27.

297. *Id.* at Question No. 19, Respondent No. 12.

In North Carolina, of the six prosecutors who identified witness intimidation as a major disadvantage of open-file, only three gave more specific responses. The first prosecutor to discuss an example of witness intimidation was not certain that open-file was in fact a contributing factor to the intimidation:

> I have had one case where retaliation occurred. A "snitch" was able to be identified by the information in the file and he was later beaten up. I don't know if that outcome would have been any different if I had waited to give discovery out, but I doubt it.[298]

Another North Carolina prosecutor noted that "the major disadvantage is that defendants take the information given and place it on social media" and that "[t]his tends to scare witnesses."[299] The respondent did not point to a concrete example from his or her experience. Finally, a third North Carolina prosecutor noted,

> Although I have yet to see this come up, I've been concerned that we may disclose the location of a witness, namely a woman staying at a battered women's shelter, for example, through a note somebody made in the file. This could, in turn, be passed to the defendant, resulting in an attack. Again, I've yet to see it come up, but since the files aren't filtered and everything is just turned over, the possibility is there."[300]

These isolated cases apart, prosecutors in North Carolina tend not to see witness safety as a significant problem with open-file discovery. By contrast, witness intimidation is perceived as a much more serious problem in Virginia, where prosecutors are not required to disclose witness information unless it is exculpatory or impeachment evidence (in which case it must be disclosed before trial). This finding is consistent with most of the anecdotal evidence from other jurisdictions with liberal discovery practices, which suggests that open-file discovery does not increase the risk of witness intimidation.[301]

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298. *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19, Respondent No. 62.

299. *Id.* at Question No. 19, Respondent No. 102.

300. *Id.* at Question No.19, Respondent No.21.

301. *See e.g.*, Avis E. Buchanan, *Fairer Trials and Better Justice in D.C.*, WASH. POST, Oct. 28, 2011, at A1 ("Those opposed to open-file discovery argue that it can lead to additional witness-safety concerns or witness intimidation,

The most common disadvantage that North Carolina prosecutors mentioned was the resource and logistical burden of open-file discovery. Still, only 13.8% (8 out of 58) of North Carolina respondents identified this as a major disadvantage. By contrast, 25% (24 out of 96) of Virginia prosecutors believed logistical and resource burdens to be a significant disadvantage of open-file discovery. One Virginia prosecutor worried about the "time spent redacting personal identifying info of victims/witnesses." Another described the logistical challenges as follows:

> Documenting what was in the file when counsel actually viewed the file is nearly impossible unless we hire additional staff to organize and numerically stamp each page. There are no resources for that. Similarly, most interviews with witnesses and defendants are being recorded. Even were we to redact reports and statements, the videos will have the identifying information as part of the interview process and therefore be available to the defense. Unless we were to hire a technology expert to copy and redact the interviews, this will remain a problem. There are no resources for that and it would lead to complaints of tampering.[302]

In North Carolina, a few prosecutors also commented that open-file discovery can be "time consuming" and onerous.[303] As one elaborated, it imposes a "[m]assive burden on prosecutors office to copy and provide documents that have nothing to do with

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but that hasn't happened in the jurisdictions that use it. In studies by some of the states and cities with open-file discovery (Florida, San Diego, Philadelphia, Detroit and Newark), no causal link between the practice and witness intimidation has been found."); N.Y. STATE ASSEMBLY CODES COMM., CRIM. DISCOVERY IN N.Y. STATE: CURRENT PRACTICE AND PROPOSALS FOR CHANGE 13 (1991) (noting the same study). *But see* NYSBA REPORT, *Response to Majority*, *supra* note 20, at 92 (citing statements from Philadelphia prosecutor's office that open-file rules have contributed to widespread problems of witness intimidation).

302. *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19, Respondent No. 12; *see also id.* at Question No. 19, Respondent No. 36 ("Documenting what has been provided to defense counsel in the file. If additional information is provided to prosecutors, how to document that defense had an opportunity to review the information. Issues with defense alleging certain items were not in the file. Protecting/redacting confidential information about witnesses.").

303. *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19, Respondents Nos. 20, 23, 35, 39, 52, 55, 74.

case but because law enforcement looked at or has in their possession we make sure to provide to defense."[304] Another pointed out that it takes a "[g]reat deal of man power to copy all of the discovery and provide it in every case as well as making the paper trail to prove it has been done if there is alter a claim that open file discovery has not been complied with."[305] While some of these remarks from North Carolina prosecutors echo those of Virginia prosecutors, it is notable that a much smaller percent of the North Carolina respondents voiced such concerns. These statements should also be read alongside the responses of Virginia prosecutors and North Carolina prosecutors who cited efficiency as one of the main advantages of open-file discovery.[306]

Another misgiving among prosecutors about open-file discovery had to do with the potential abuse of the disclosed information by the defense. Prosecutors expressed concerns about the fabrication of defenses based on the information disclosed and about false allegations by defense attorneys that certain evidence was not properly disclosed. One Virginia prosecutor lamented that open-file discovery leads to

> [m]isuse by defense attorneys who twist the information they receive, and misrepresent the law to the court, and use the information in a way that is not supported by statute or case law to impeach witnesses. I have seen this done and the mistrust of the prosecutor's office it creates in the police department. It makes the officers more likely to not include exculpatory information in their report.[307]

This concern was much more common among Virginia prosecutors (26% identified it as a major disadvantage) than among their North Carolina counterparts (10.3% identified it as such).[308] Moreover, North Carolina prosecutors tend to worry primarily about unfounded allegations that discovery was not produced than about fabricated defenses.[309] By contrast, Virginia

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304. *Id.* at Question No. 19, Respondent No. 52.

305. *Id.* at Question No. 19, Respondent No. 74.

306. *Supra* note 281 and accompanying text.

307. *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19, Respondent No. 26.

308. *Compare Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19, *with Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19.

309. Only two out of the six North Carolina prosecutors who saw defense

prosecutors frequently express a concern about the defense "twisting" the evidence and "distorting" the truth.[310] The mistrust of what defense attorneys might do with the evidence in an open-file system appears to be higher in Virginia than in North Carolina.

The last concern by prosecutors has to do with the shift that open-file discovery creates in the balance of advantages between the parties. A number of prosecutors lamented that open-file discovery asks them to reveal their cards, while the defense does not have to reciprocate fully.[311] A few prosecutors further noted that a major disadvantage of open-file is that the "[d]efense might see weaknesses in my case that I might not want them to be aware of (not exculpatory material, of course, which I always turn over.)." This concern was shared by 14.6% (14 out of 96) of Virginia prosecutors and 10.3% (6 out of 58) of their North Carolina counterparts.

Perhaps not surprisingly, many prosecutors in both states would like to see the balance of advantages adjusted in some ways. In a question concerning discovery from the defense, a large majority of prosecutors in North Carolina (72.3%) and Virginia (70.5%) stated that the defense should be required to provide broader reciprocal discovery.[312] This is so even though, in North Carolina, the defense is already required to disclose (after receiving open-file from the prosecution) a variety of items, including reports of testifying experts, test reports, notice of

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misuse as a major disadvantage worried about the defense "twisting" the evidence. One worried about the defense "shoring up" his case based on disclosures and hampering ongoing investigations. *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19, Respondent No. 27. The other worried about the defense contacting witnesses who can be encouraged to amend their statements. *Id.* at Question No. 18, Respondent No. 28.

310. Seventeen out of the twenty-five Virginia prosecutors who stated that defense abuse was a major disadvantage of open-file expressed concerns of this nature. *See, e.g.*, *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 19, Respondent No. 26 (discussing "[m]isuse by defense attorneys who twist the information they receive, and misrepresent the law to the court").

311. *See, e.g.*, *id.* at Question No. 19, Respondent No. 5 (noting as a major disadvantage that "[d]efense is not required to provide us any discovery").

312. Roughly 17% of North Carolina Prosecutors and 18% of Virginia Prosecutors stated that the defense should not be required to disclose more. The remaining 10–12% of the respondents either had no opinion or did not express an unequivocal opinion on this question.

intent to introduce at trial certain defenses,[313] names and background of testifying experts,[314] and a list of witnesses.[315] These items must only be disclosed later in the process—and in the case of witness lists, not until the beginning of jury selection.[316] For that reason, many North Carolina prosecutors believe that defense witness names should be disclosed earlier, and some noted that defense witness statements should also be provided. Finally, some stated that the scope of defense disclosure was sufficiently broad, but they lamented that courts do not enforce discovery rules against the defense.[317]

In Virginia, disclosure by the defense is much more limited than in North Carolina and covers only certain tests and reports, notice of alibi, and, if the defendant intends to rely on an insanity

313. *See* N.C. GEN. STAT. ANN. § 15A-905(c)(1) (West 2015) (requiring the disclosure of intent to introduce defenses including alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication).

314. *See id.* § 15A-905(c)(2) (requiring notice to the state of any expert witnesses that the defendant reasonably expects to call as a witness at trial).

315. *See id.* § 15A-905(c)(3) (requiring disclosure, at the beginning of jury selection, of a list of witnesses the defendant reasonably expects to call during trial).

316. *Id.*

317. *See, e.g.*, *Pre-Plea: NC Prosecutors*, *supra* note 221, at Question No. 19, Respondent No. 46

> The defense gets away with not handing over a lot of information. They are never reprimanded or sanctioned for behavior that would not be allowed in civil litigation. There is nothing preventing a defense attorney from never disclosing information that they are required to hand over. It only benefits the defendant to withhold information as defense attorneys know that there is no way a judge will not allow something that benefits the defendant for fear that the case will be overturned if there was a conviction without it. I have been prosecuting felony cases for 3 years and have handled thousands of felonies and I can count on one hand the number of times I have received reciprocal discover[y] from the defendant. We get absolutely zero.

*Id.* at Question No. 19, Respondent No. 17

> Yes, but mostly, because most of the time, even when reciprocal discovery motions are filed, they are often not complied with or judges don't enforce them with the same rigor as defense motions. It is not so much that the state should have broader discovery, but the defense should be required to give what the statutes require them to. While perhaps not equal in scope, it should be equal in obligation.

defense, reports related to that defense.[318] This disclosure is conditional on disclosure of specified items by the prosecution and must be provided "within a reasonable time but not less than ten days before trial or sentencing, as the case may be."[319] It is therefore perhaps not surprising that a large majority of Virginia prosecutor respondents stated that the defense should provide broader disclosure. Most of those who specified the type of evidence to be disclosed thought that prior records or other impeachment information about defense witnesses should be provided.[320] Some respondents asking for broader disclosure by the defense in Virginia recognized that rules currently require only limited disclosure by the prosecution as well. So statements in favor of broader defense disclosure were at times accompanied by an acknowledgement that the prosecution may have to provide more as well.[321]

Finally, a few prosecutors worried that open-file discovery might lull prosecutors and defense attorneys into a false sense of security about the information that must be uncovered, as one Virginia prosecutor explained:

> Sometimes law enforcement doesn't provide us with copies of everything. For example, they may show up for court and have photos that we didn't know existed. This wouldn't be any better if we followed the statutory discovery rules but it looks bad for us because we've indicated we've made everything available and then there's something we didn't know about. In these cases we've just continued the case if the information is something that the defense needs time to investigate.[322]

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318. *See* VA. SUP. CT. R. 3A:11(c) (applying to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment).

319. *Id.*

320. *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 20.

321. *See, e.g.*, *id.* at Question No. 20, Respondent No. 49

> [C]ertainly if the prosecution were required to provide everything, then a reciprocal burden should be placed on the defense. If the motivation is to seek the truth in the criminal justice system, then defense counsel shouldn't object to that philosophy. However, I have found that the defense bar and defense organizations are simply using political avenues to try and advance their strategic position, not provide fair trials for their clients.

322. *Id.* at Question No. 19, Respondent No. 28; *see also id.* at Question No. 19, Respondent No. 30 ("Far too many prosecutors rely on open file to provide exculpatory information. Oftentimes, situations present themselves where a file

A few worried that open-file discovery might have perverse effects, leading law enforcement to omit information from the file, to protect it from disclosure to the defense, as one Virginia prosecutor asserted:

> Mandating an open-file policy will lead to files with less information. We do not generate our own information—it is provided to us by other agencies (police, etc.). They are not fans of their work-product becoming accessible to the public (which is always a risk under an open-file discovery scheme).[323]

Another question also tested what features of broad discovery prosecutors find problematic. This question asked prosecutors to select reasons for which they might refrain from providing broader discovery than required by law. In Virginia, 91% of prosecutors listed concerns about witness safety as a reason for refraining from broader discovery.[324] By contrast, only 52% of North Carolina respondents did so.[325] Additionally, whereas 84% of Virginia prosecutors listed concerns about harm to an ongoing investigation as a reason for refraining from providing broader discovery, only 46% of their North Carolina counterparts did so.[326] And while roughly a quarter of Virginia prosecutors responded that a lack of good relations with the defense or a concern that a defendant might manipulate the evidence would be a reason for them to refrain from providing broader discovery, just over 1% of North Carolina respondents shared this view.[327] In both jurisdictions, however, the lack of time to check with investigating agencies was a reason for roughly a third of the respondents to refrain from broader discovery.[328]

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not only needs to be opened . . . counsel's attention must be directed to the exculpatory information to make sure it's seen.").

323. *Id.* at Question No. 19, Respondent No. 87.

324. *Infra* Table 9.

325. *Infra* Table 9.

326. *Infra* Table 9.

327. *Infra* Table 9.

328. *Infra* Table 9.

*Table 9:* Reasons for Refraining from Broader Pre-Plea Discovery Than Required by Law: % Yes, Prosecutors

| | **Virginia Prosecutors; n=107** | **North Carolina Prosecutors; n=62** | **X2(1); Φ** |
|---|---|---|---|
| No time to check with all agencies | 35.5 | 32.3 | 0.18; 0.03 |
| Concern about witness safety | 91.3 | 52.3 | 35.34***; 0.46 |
| Concern about witness willingness to testify | 47.7 | 10.0 | 25.34***; 0.39 |
| Concern about harm to ongoing case | 84.1 | 46.0 | 26.27***; 0.39 |
| Lack of time/resources to review for privilege | 19.8 | 23.7 | 0.49; 0.05 |
| Concern about impeding timely resolution | 3.7 | 5.1 | 0.12; 0.03 |
| Evidence was overwhelming | 29.6 | 16.4 | 3.99*; 0.15 |
| Concern about financial cost | 4.7 | 3.4 | 0.21; 0.04 |
| Lack of good relations with defense | 26.2 | 1.7 | 16.65***; 0.31 |
| Concern defendant would manipulate evidence | 25.2 | 1.7 | 15.84***; 0.31 |
| Concern about the strength of evidence | 10.3 | 1.7 | 4.47*; 0.16 |

*p < .05; **p < .01; ***p < .001

Responses to this question suggest that Virginia prosecutors are more sensitive to the risks that disclosure might pose to witness safety and ongoing investigations and are more concerned about defense misuse of disclosed evidence. While North Carolina prosecutors share the preoccupation about witness safety and the integrity of investigation, the number of prosecutors who selected these concerns as reasons for refraining from broader discovery is dramatically lower than the corresponding number for Virginia.[329]

329. *Supra* Table 9.

As may be expected, defense attorneys had a different perspective from that of prosecutors about the disadvantages of open-file discovery. In North Carolina, 46.4% of respondents (32 out of 69) believed that open-file discovery has no major disadvantages.[330] In Virginia, the percentage of defense attorneys who believed the same was lower—33.3% (101 out of 303).[331] It is important to note, however, that many Virginia defense attorneys described the disadvantages of *discretionary*, not mandatory, open-file practice, because this is the only type of open-file discovery they had experienced first-hand.

A common complaint about discretionary open-file was that it was "open-file" in name, but in reality frequently incomplete. A third of Virginia defense respondents (102 out of 303) believed this was a major disadvantage of open-file policy.[332] Some further complained about police officers and other investigative agencies not including relevant information in the file sent to the prosecutor.[333] As one stated, the main disadvantage of open-file discovery is

> [c]rappy, incomplete police reports. In many cases, after reviewing the prosecution file, I have more questions than answers. If the police officer leaves important details out of the report or does a poor investigation, there may be a ton of exculpatory evidence that neither the prosecutor, nor I, have any idea about.[334]

Others noted that open-file policy made prosecutors "lazier" and gave them an excuse not to seek out exculpatory evidence from law enforcement.[335] A number observed that prosecutors failed to inform them of evidence that was received after the defense attorneys had reviewed the file.[336] Many pointed out that

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330. *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 23.

331. *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 23.

332. *Id.*

333. *Id.*

334. *Id.* at Question No. 23, Respondent No. 88.

335. *See e.g.*, *id.* at Question No. 23, Respondent No. 91 ("It develops lazy prosecutors who do not know their case, because they have not been forced to actually comb through their file."); *id.* at Question No. 23, Respondent No. 153 ("They don't think they ever have to do anything except open their file. I don't get information that isn't written and given to the prosecution.").

336. *See e.g.*, *id.* at Question No. 23, Respondent No. 156 ("Prosecutors rely on the file, don't search for more, and if things are added later they do not alert

there were frequent disagreements about whether certain evidence was in the file when the defense reviewed it, because there was no requirement to document the evidence provided to the defense. The following statements by Virginia prosecutors sum up these concerns:

> Some jurisdictions that say they use it don't always put everything in the file—I have a case with a co-defendant where a lot of the pertinent information was in the other file. In that same case the prosecutor didn't obtain additional exculpatory information as required and relied upon the open file discovery to say that what was provided was sufficient. A final problem is that sometimes they will update the file and not tell the defense attorney that more information has been received, so the defense attorney is left guessing as to when to look for more evidence in the CA file. I think discovery just needs to be sent to the defense attorney and supplemented as it comes in.[337]

> There is little regulation about what is included or not—often times prosecutors will provide a book or box of documents, but there is no way to know what is being held back; there needs to be an effective process for notification when new documents, info, etc. is added to the file and a way to document what is viewed and to have actual copies of items (as opposed to being able to look at and hand copy items).[338]

> Defense counsel only sees what the prosecutor chooses to put in his file—I had a case in [omitted] where the prosecutor added documents to his file several times before trial—and although we stopped by to inspect the file several times—he still offered new evidence at trial that we had never seen—and of course the judge let it in—he said he had provided it; we said he had not—the defense always loses that one.[339]

Similar concerns about the incompleteness of the file also emerged in the North Carolina responses, but a somewhat smaller percentage of defense respondents—26.1%, believed this was a major disadvantage of open-file discovery.[340] These findings

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defense counsel.").

337. *Id.* at Question No. 23, Respondent No. 12.

338. *Id.* at Question No. 23, Respondent No. 175.

339. *Id.* at Question No. 23, Respondent No. 107.

340. The following statement by a North Carolina defense attorney was representative:

> The only disadvantage is that the DAs rely on the police to turn over

are consistent with existing anecdotal evidence and commentary noting that even open-file disclosure fails to produce certain material evidence (including *Brady* evidence) that remains in the custody of investigative agencies.[341]

In a related concern, 7.9% (24 out of 303) of Virginia defense respondents and 7.2% (5 out of 69) of their North Carolina counterparts expressly noted that open-file discovery can make prosecutors and defense attorneys complacent and passive.[342] Thus prosecutors may fail to seek out exculpatory evidence from investigative agencies, as is their duty under *Brady*, and defense attorneys may wrongly assume that the file is complete and fail to investigate further.

In Virginia, 24.1% of defense attorneys also complained that open-file discovery, as practiced by prosecutors in their state, unduly burdened them.[343] The most common complaint was that attorneys were not permitted to copy materials, but had to go to the office in person to view the materials and take notes.[344] By contrast, only 11.6% of North Carolina defense attorneys believed open-file discovery to be burdensome.[345] Moreover, only half of these North Carolina respondents believed that open-file was

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> their entire file. There may be an occasion where the entire police file is not turned over, and the DAs office may not be motivated to follow-up. The prosecutor takes on faith that the police have turned everything over, and may not be aware that something is missing. We as Defense Lawyers also might not be aware, and thus might not think to challenge the DAs if something may be missing.

*Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 23, Respondent No. 13.

341. *See, e.g.*, Gershman, *supra* note 40, at 545 (acknowledging that even under the most liberal open-file policies, prosecutorial files may not contain all relevant documents, including *Brady* evidence); Meyn, *supra* note 20, at 1122 (stating that the term "open-file" is potentially misleading, as prosecutorial files may not include all information available to law enforcement); Prosser, *supra* note 19, at 596, 601, 606–07 (discussing limitations on the open-file discovery policy, including the failure by prosecutors to record all the information they receive).

342. This concern was also implicit in a number of the comments about the file being incomplete, so this percentage likely underestimates the number of defense respondents who would agree with this proposition.

343. *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 23.

344. *Id.*

345. *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 23.

burdensome to defense attorneys; the rest were talking about burdens on prosecutors or on the justice system.[346]

A few defense attorney respondents in Virginia and North Carolina also brought up concerns about abuse of the evidence by clients or dangers to witnesses (including confidential informants).[347] Just over 7% of North Carolina respondents (5 out of 69) noted as a major disadvantage of open-file that a client might manufacture defenses based on the disclosed evidence, that witnesses might be intimidated, or that ongoing investigations might be jeopardized.[348] Just over 4% (13 out of 303) of Virginia defense attorneys noted similar concerns. Some of these respondents, however, presented this as a preoccupation of prosecutors, not one that they necessarily shared.[349]

Finally, a concern that some Virginia respondents mentioned reflected the discretionary nature of open-file discovery there:

> No consistency across jurisdictions, and even across prosecutors in the same office. Allows favoritism toward some attorneys too. It also puts defense attorneys in an uncomfortable position, as they have to ask nicely for the discovery, usually agreeing not to file a motion for pre-trial discovery, which then means that the prosecutors cannot be held accountable for failure to provide discovery.[350]

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346. *Id.*

347. *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 23; *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 23.

348. *See, e.g.*, *Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 23, Respondent No. 45 ("Occasionally I will have clients lie to me to fit the facts of the discovery. For instance, they will see what the discovery says and then fabricate a story to around the prosecutor's theory of the case."); *id.* at Question No. 23, Respondent No. 22 ("Defendants will seize upon ANY discrepancy in hopes that she or she could be found not guilty. Rarely have I had an experience with a client contacting a witness. Less than 5 times in 12 years of felony trial work."); *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 23, Respondent No. 82 ("I'm sure there are some clients who would arrange to have alibi witnesses to refute vague eyewitness testimony if given enough information.").

349. *See, e.g.*, *Pre-Plea: VA Defense Attorneys*, *supra* note 240, at Question No. 23, Respondent No. 32 ("Prosecutors here believe it would help defendants construct defenses."); *id.* at Question No. 23, Respondent No. 64 ("I can see none, but I know our local prosecutors are always concerned about witness security.").

350. *Id.* at Question No. 23, Respondent No. 101.

While only two people mentioned this type of concern as a major disadvantage of open-file discovery in Virginia, it came up more frequently as a reason for dissatisfaction with the Virginia discovery policy (an earlier question in the survey), and it was also mentioned in a number of public comments to the proposed discovery rule reform in that state.[351]

In short, while a sizable percentage of defense attorneys see no major disadvantages in open-file discovery, many are still concerned about the lack of completeness of the file that is being disclosed and the sense of complacency and passivity that open-file might encourage among defense attorneys and prosecutors. In Virginia, defense attorneys were also concerned about the burdens that the current discretionary open-file policy imposes on them, as they have to go to the prosecutor's office in person to view the file and are then not permitted to make any copies, but must take handwritten notes.

### *IV. Pre-Plea Discovery: Implications*

Debates about the merits of broader pre-plea discovery continue as jurisdictions from Virginia to New York to the federal system consider discovery reform.[352] Advocates of open-file discovery argue that it produces more informed decisions by defendants about whether to plead guilty.[353] The practice is also said to speed up the resolution of cases and reduce discovery disputes.[354] Finally, open-file is seen by its advocates as fairer and more consistent, as it reduces, or even eliminates,

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351. *See, e.g.*, *id.* at Question No. 21, Respondent No. 36 ("In some counties where we receive 'open file' discovery, it works very well because we see everything including police reports (with the exception of some witness statements). In some counties it does not work well because discovery is provided orally about 30 minutes before preliminary hearing, as a general rule."); *id.* at Question No. 21, Respondent No. 64 ("It varies by local jurisdiction.").

352. *See* NYSBA TASK FORCE, *supra* note 249 (suggesting that changes in discovery rules are needed); *see also* SUPREME COURT OF VA., REP. OF THE SPEC. COMM. ON CRIMINAL DISCOVERY, *supra* note 118 (recommending reform of Virginia discovery rules); *Federal Criminal Discovery Reform*, *supra* note 111 (discussing federal reform proposals).

353. *Supra* notes 99–100 and accompanying text.

354. *Supra* notes 102–103 and accompanying text.

prosecutorial discretion about what evidence is exculpatory.[355] In response, supporters of the closed-file model argue that open-file is neither necessary nor desirable. Specifically, they contend that open-file does not necessarily produce better disclosure of exculpatory evidence,[356] that it imposes significant logistical burdens on the prosecution,[357] and that it increases the risk of witness intimidation.[358] Our study attempts to assess the validity of these competing claims by comparing the experiences of prosecutors and defense attorneys in an open-file jurisdiction to those in a closed-file jurisdiction. Our findings lead us to endorse the arguments in favor of open-file pre-plea discovery, albeit with some caveats and qualifications.

### *A. Methodological Caveats*

Before laying out the implications of our survey, we address several potential critiques of our method. The first has to do with our low response rates, ranging from roughly 10%–20% for each of the four categories of respondents.[359] These rates may raise a concern about selection bias and lack of representativeness of our responses. As noted earlier, we addressed this critique in part by analyzing whether relationships exist between demographic characteristics of our respondents (race, gender, practical experience) and frequency of discovery provided. We found none.[360] Likewise, we found no significant correlation between caseload handled by respondents and frequency of discovery provided, and none between the type of crime handled by respondents and the frequency of discovery.

Moreover, as discussed earlier, our response rate is consistent with or higher than the response rates of other surveys

355. *Supra* notes 95–98, 104–108 and accompanying text.

356. *Supra* notes 122–124 and accompanying text.

357. *Supra* notes 117–118 and accompanying text.

358. *Supra* notes 111–116 and accompanying text.

359. The four categories are: North Carolina prosecutors (11.1%), North Carolina defense attorneys (9.5%), Virginia prosecutors (16%), and Virginia defense attorneys (19.84%). *See generally Pre-Plea: NC Prosecutors*, *supra* note 221; *Pre-Plea: NC Defense Attorneys*, *supra* note 241; *Pre-Plea: VA Prosecutors*, *supra* note 223; *Pre-Plea: VA Defense Attorneys*, *supra* note 240.

360. *Supra* note 152 and accompanying text.

of prosecutors and defense attorneys.[361] To some degree, low response rates are an inherent practical limitation of the survey method, particularly when busy professionals are being polled. Beyond running the data analyses we discussed earlier, another remedy for low response rates would be to supplement our survey with other types of empirical studies—interviews of practitioners, observational studies of discovery practices, and simulated discovery studies, both in North Carolina and Virginia and in jurisdictions beyond them.[362] We hope to be able to do some of this research in the future, and we would welcome efforts by other scholars to supplement our study along these lines.

Another limitation of our survey—and of surveys generally—is that it tests perceptions of discovery practices rather than directly monitoring the practices themselves. Particularly when it comes to defense attorneys, perceptions of what is disclosed may, in many situations, be educated guesses. Defense attorneys would typically not know that certain evidence was withheld from them unless their clients had independent knowledge of the evidence existing or the attorneys deduced from their own investigations and analysis of the case that evidence was missing. In some cases, the evidence may only be uncovered after plea negotiations fall apart and the case goes to trial, or after the case is on appeal, or at the post-conviction stage. But in some cases, the evidence would not surface at all.[363] Defense attorneys may therefore not have a fully accurate picture of the evidence that is being withheld from them. In addition, the stark differences in the disclosure rates reported by prosecutors and those reported by defense attorneys suggest that professional roles may color perspectives on this issue. For all those reasons, perceptions of discovery practices must be treated with caution.

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361. *See supra* Part III.C. (stating that our response rates and our completion rate of 75% are quite comparable to, or exceed, rates from similar surveys).

362. *See generally* Jennifer K. Robbenolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777 (2002) (arguing that each type of empirical method has its own shortcomings, and to remedy this, researchers should study the same question using a variety of quantitative and qualitative methods).

363. *See* Medwed, *supra* note 17, at 1540 ("[P]roven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.").

Yet whatever effects professional role has on perceptions of Virginia prosecutors and defense attorneys would also seem to affect the perceptions of their counterparts in North Carolina. Because our survey focuses on comparing the two jurisdictions, and not simply on the absolute numbers of disclosure within each jurisdiction, we can distill effects and trends that are not influenced solely by professional affiliation.

Another potential critique of our approach is that we have neglected one or more variables that influence discovery practices. In other words, perhaps it is not the different discovery rules, but rather a factor we have failed to take into account that best explains the different discovery practices in North Carolina and Virginia. We have, however, considered several alternative explanations and have found none that adequately accounts for the findings of our survey.

For example, we have examined whether different rates of violent crime may explain the more serious concerns that Virginia prosecutors have about open-file disclosure. We found that violent crime rate is higher in North Carolina than in Virginia, which cuts against the theory that the more generous discovery provided in North Carolina can be explained by lower levels of violent crime.[364] Moreover, Virginia ranks 34th in the country in terms of violent crime, so the unusually restrictive discovery practices there cannot be explained by reference to an exceptionally high violent crime rate.[365]

The absence of a significant correlation between violent crime rates and frequency of discovery is further confirmed by our data analysis. Our survey asked prosecutors to indicate the types of crimes they had handled over the past year.[366] We analyzed whether the type of crime handled influenced the discovery that prosecutors provided in key categories (we focused on witness statements, witness names, and police reports, where the concern about witness safety is likely to be the greatest and therefore most likely to lead to restricted disclosure). We found no

364. *See 2014 Crime in the United States*, FBI (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-5 (last visited Oct. 19, 2015) (listing violent crime statistics for all fifty states) (on file with the Washington and Lee Law Review).

365. *Id.*

366. *Infra* Appendix A, Questions No. 2, 3.

significant relationship between the handling of violent crimes and the amount of information provided to the defense.

We also examined whether caseload or guilty plea rates might explain different rates of discovery. We had asked respondents about the number of felonies they had handled over the past year and about the percentage of felony cases resolved through a guilty plea. After reviewing the data, we found no significant relationship between the reported number of cases handled per year and discovery provided, nor between the reported percentage of cases disposed via guilty pleas and discovery provided. In addition, according to data collected by the Department of Justice (Bureau of Justice Statistics) in 2007, in North Carolina, the average felony caseload per prosecutor is 113.48 closed cases per year (SD = 56.68).[367] In Virginia, the average felony caseload per prosecutor is significantly lower, at 77.09 (SD = 59.17) closed cases per year.[368] Therefore, restrictive discovery in Virginia cannot be justified on the grounds of a heavier caseload. As a matter of statewide practice, whereas North Carolina has a higher rate of plea dispositions (97%) than Virginia (89.8%), both states adjudicate a large majority of their felony cases via guilty pleas.[369] Therefore, neither caseload nor guilty plea rates would seem to affect disclosure practices.

One feature we did not consider is the size of offices (and related to this, whether offices were in rural or urban areas). It is possible that office size influenced attitudes toward discovery.[370] Virginia's prosecutor's offices are, on average, two to three times smaller than North Carolina offices.[371] Moreover, some anecdotal

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367. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL PROSECUTORS SURVEY [CENSUS] (2007), https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/33202 (last visited Apr. 4, 2016) (on file with the Washington and Lee Law Review). In North Carolina, data were available for 40 offices. In Virginia, data were available for 115 offices.

368. *Id.* This difference is statistically significant, p = .007.

369. VIRGINIA CRIMINAL SENTENCING COMMISSION, 2014 ANNUAL REPORT 33 (2014); NORTH CAROLINA JUDICIAL BRANCH, TRIAL COURTS: STATISTICAL AND OPERATIONAL REPORT, JULY 1, 2013–JUNE 30, 2014, at 5 (2014).

370. *Cf.* Ronald F. Wright, *Persistent Localism in the Prosecutorial Services of North Carolina*, 41 CRIME & JUST.: A REV. OF RES. 211 (Michael Tonry ed., 2012) (discussing the urban versus rural divide within North Carolina's prosecutor offices).

371. While Virginia and North Carolina have roughly similar sized populations and Virginia has a somewhat lower crime rate, Virginia has 120

evidence points to a correlation between office size and level of discovery. In open-ended responses, several Virginia prosecutors indicated that because they practiced in a very small, rural jurisdiction, defense attorneys and prosecutors knew each other well, so discovery proceeded informally and without much dispute.[372] At the same time, in public comments on the proposed discovery reform, the Virginia Association of Commonwealth's Attorneys opined that some less affluent offices (typically smaller, rural offices) would have fewer resources to handle the logistical burdens associated with switching to open-file discovery.[373]

Although we did not inquire about the size of office in which respondents practiced, we did compute correlations between respondents' caseload and frequency of discovery reported, as well as between prosecutor specialization and discovery reported, and we found no significant correlations. Caseload and specialization are not perfect proxies for office size, however, so it is still possible that office capacity has some influence on the results of our survey.[374] This is an open question for future research.

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prosecutor's offices, whereas North Carolina has 44. *Supra* notes 137, 143–144 and accompanying text.

372. *See, e.g.*, *Pre-Plea: VA Prosecutors*, *supra* note 223, at Question No. 17, Respondent No. 25 ("Yes [our discovery practice works well]—we are a small rural county. The vast majority of our cases are handles by the public defenders office. There is no way that they could do their job without the ability to just come in and read our file. The cases that are handled by private attorneys, the vast majority are local folks that respect our position and appreciate that we do open file."); *id.* at Question No. 17, Respondent No. 119 ("Yes, [our discovery practice works] very well. As prosecutors, we should have nothing to hide. The only time we deny open file is in child sexual abuse cases or cases where witness safety is an issue. We are also a rural jurisdiction, and what we do may not work as well in a large jurisdiction.").

373. *See* VACA Letter, *supra* note 119 ("The fiscal impact of this [proposed new discovery] rule would be disparate throughout the Commonwealth with more affluent localities affected less while many other localities would be affected greatly.").

374. It is difficult to predict how office size might affect the level of discovery provided. On the one hand, prosecutors and defense attorneys in smaller counties are more likely to know and trust one another. Moreover, problems of witness intimidation are more likely to arise in urban areas, where organized crime is more prevalent. At the same time, rural areas are likely to have fewer resources to handle the switch to open-file discovery and that might be a reason to oppose it.

There may also be intangible differences—such as how adversarial the criminal justice culture within each state is—that could help explain why North Carolina prosecutors tend to provide broader discovery than their Virginia counterparts. This is difficult to test. While our results seemed to indicate greater levels of mistrust between Virginia prosecutors and defense attorneys than between their North Carolina counterparts, it is unclear whether this mistrust is the *result* of more adversarial rules or a *cause* of the more adversarial rules in Virginia.

In reviewing the history of the North Carolina open-file discovery law, we saw no evidence that congeniality among prosecutor and defense attorneys contributed to the passage of the legislation. To the contrary, it appears that a driving factor was public outcry against egregious prosecutorial failure to disclose exculpatory evidence and the resulting wrongful convictions.[375] While Virginia has also uncovered wrongful convictions that were at least in part the product of prosecutorial misconduct, the failures do not appear to have been as serious and headline-grabbing as those in North Carolina.[376]

We also uncovered some evidence that tends to confirm the significance of formal legal rules rather than culture in explaining the difference we observed in North Carolina and Virginia discovery practices. Open-file discovery rules do not apply in district courts in North Carolina, which handle mostly misdemeanor cases.[377] If culture, rather than rules, drove

375. *See, e.g.*, Bantz, *supra* note 86 (describing the story of Alan Gell, who was wrongfully convicted in part as a result of withheld exculpatory evidence, and explaining that his exoneration provided the impetus for discovery reform); Loranger, *supra* note 86 (arguing that the withholding of exculpatory evidence in the Duke lacrosse case was a reminder of the importance of open-file discovery); Joseph Neff, *'Open File' Law Gives Defense a Tool to Force Out Evidence*, RALEIGH NEWS & OBSERVER (Apr. 12, 2007), http://www.newsobserver.com/2007/04/12/82840/open-file-law-gives-defense-a.html (last visited Oct. 18, 2015) (detailing how prosecutors withheld information in the case of Alan Gell, which led to the open-file discovery law in North Carolina) (on file with the Washington and Lee Law Review).

376. *See generally* INNOCENCE COMM'N FOR VA., A VISION FOR THE JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VA. (2005) (discussing wrongful convictions, including some caused by withheld exculpatory evidence, in Virginia).

377. *See* State v. Fuller, 176 N.C. App. 104, 108 (2006) ("Article 48 of the North Carolina General Statutes, Discovery in the Superior Court, applies only to cases within the Superior Court's original jurisdiction."); *see also* Dean P.

discovery practices, we might expect discovery in district court to be as open and generous as in superior court, which handles felony cases in North Carolina.[378] Yet that is not what our responses suggested. In open-ended answers, several of our North Carolina participants suggested that discovery continues to be more limited in misdemeanor than in felony cases.[379] These statements offer another indication that formal discovery rules make a difference.

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Loven, *Discovery in District Court*, NCIDS (2008), http://www.ncids.org/Defender%20Training/2008%20Spring%20Conference/DiscoveryDistrictCourt.pdf (stating that North Carolina's discovery statutes only apply to cases having original jurisdiction in superior court, and therefore do not apply to misdemeanor cases with original jurisdiction in the district court).

378. Open-file discovery might be more burdensome for prosecutors in misdemeanor cases because of the significantly higher number of cases that each prosecutor handles and the frequent lack of a "file" to disclose. This might help explain the different practices between misdemeanor and felony discovery even within the same state. Yet apparently some prosecutors in North Carolina provide such discovery even in misdemeanor cases as a matter of grace. Moreover, misdemeanor cases are less likely to raise issues of witness safety than felony cases, so from that perspective, open-file should be more feasible in misdemeanor cases.

379. *See Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 21, Respondent No. 23 ("In NC there is a two tiered system so my client may be willing to take a plea in District Court, pre-indictment, where there is no right whatsoever to discovery."); *id.* at Question No. 25, Respondent No. 83 ("We need it [open-file discovery] in District Court."); *id.* at Question No. 11, Respondent No. 29 ("In our jurisdiction, we are not entitled to discovery until the Defendant's case is brought to Superior Court, and many times cases linger or pleas are offered in District Court where there is no right to discovery."); *id.* at Question No. 21, Respondent No. 94 ("Physical discovery is never provided in felony cases that are reduced to a misdemeanor. We are often allowed to read the report, but not allowed to copy it."); *id.* at Question No. 11, Respondent No. 98 ("[I]f they offer a misdemeanor early in the process, the defendant is not provided with full discovery."); *see also* Loven, *supra* note 377 (noting the restriction of open-file discovery rules to cases having original jurisdiction in superior court). *But cf. Pre-Plea: NC Defense Attorneys*, *supra* note 241, at Question No. 13, Respondent No. 10 (noting that defense is "entitled [to] disc. in to open file Superior Court. Often given in district court for felony pleas anyway to resolve cases quickly"); *id.* at Question No. 11, Respondent No. 13 ("Local DAs office practice is to provide open file at preliminary stage in District Court also.").

### *B. Legal and Policy Implications*

While we recognize the methodological limitations of our survey, we believe that we can draw certain implications for discovery law from the comparative data we collected from North Carolina and Virginia. Specifically, our findings suggest that open-file pre-plea discovery can promote better informed case outcomes, including better informed guilty pleas. Prosecutors and defense attorneys in North Carolina report more frequent pre-plea disclosure of most types of evidence than do their counterparts in Virginia.[380] These differences are statistically significant and at times quite dramatic.[381] Moreover, a high number of respondents from both states—especially on the defense side—identify the ability of the defendant to make more informed decisions about pleading guilty as a key advantage of the open-file model.[382] These results suggest that open-file can help improve the fairness and accuracy of plea bargaining by giving defendants the information necessary to make an intelligent decision whether and to what charges to plead guilty.

With respect to whether open-file enhances the disclosure of exculpatory and impeachment evidence, our conclusions are more tentative. On the whole, the North Carolina discovery regime seems to produce better pre-plea disclosure of factually exculpatory evidence.[383] Compared to their Virginia counterparts, North Carolina defense attorneys report significantly higher prosecutorial disclosure rates of factually exculpatory evidence in the prosecutor's possession and *Brady* evidence that is in the possession of investigating agencies.[384] Moreover, in response to hypothetical scenarios, a greater percentage of prosecutors and defense attorneys in North Carolina than those in Virginia respond that exculpatory and impeachment evidence (other than witness criminal records) is provided pre-plea.[385] Open-file may therefore enhance disclosure of *Brady* evidence in "close" cases,

380. *Supra* Tables 2a & 2b.
381. *Supra* Tables 2a & 2b.
382. *Supra* Section III.C.4.b.
383. *Supra* Section III.C.2.
384. *Supra* Table 3a.
385. *Supra* Tables 4–6.

where the exculpatory nature of the evidence or its materiality to the outcome of the case is debatable. It removes the need for prosecutors to evaluate whether certain documents qualify as *Brady* material and thus eliminates the risk that prosecutors would fail to disclose as a result of cognitive biases or lack of time to review the evidence carefully.[386]

Yet our survey also uncovers areas in which open-file discovery does not appear to produce broader pre-plea discovery of *Brady* material. The first area concerns certain types of impeachment evidence, such as the prior records of prosecution witnesses. In North Carolina, prior records are not commonly part of the prosecution's file pre-plea so they are not automatically disclosed at that stage.[387] Instead, under open-file rules, prosecutors disclose witness names early in the process, but then leave it to defense attorneys to research the prior records of the witnesses. This shift of responsibilities is permitted under the "due diligence" exception to *Brady* and does not appear controversial among North Carolina practitioners.[388] It reveals, however, that even after the adoption of open-file discovery, independent defense investigation remains a key component of adequate representation.[389]

Our results also indicate that some evidence, including *Brady* material, is not being adequately recorded or promptly transmitted to the prosecution by investigating agents in Virginia and North Carolina. As a result, even when the prosecution turns over its entire file to the defense before a guilty plea, that file is frequently lacking information material to the case.[390] The prosecution has a duty to supplement disclosure as it receives new evidence, so the information may ultimately be provided to the defense before trial. Given the high rate of guilty pleas in our

386. *Supra* notes 61, 95–98 and accompanying text.

387. *Supra* notes 180–181, 202–204 and accompanying text.

388. *Supra* notes 202–204 and accompanying text.

389. Therefore, broader discovery should not be used as an excuse to further reduce spending on indigent criminal defense, under the pretext that defense investigations are no longer vital, as has occurred to some degree in England and Scotland. *See* Ringnalda, *supra* note 103, at 1153–54 (stating that the traditional assumption has been that after fair notice of the case, the defense has the responsibility to investigate and look for exculpatory evidence).

390. *Supra* notes 322–341 and accompanying text.

criminal justice system, however, the unavailability of some *Brady* evidence pre-plea is a cause for concern.

The incompleteness of the prosecution's file highlights an important area where open-file fails to deliver on its promise, and closed-file discovery fares no better.[391] To ensure adequate disclosure of *Brady* evidence that is not in the prosecutor's custody, reforms would have to extend beyond mandating open-file discovery. One possibility would be to strengthen requirements and training for police officers to record and convey exculpatory evidence to prosecutors in a timely fashion.[392] Some commentators have also proposed requiring prosecutors to certify that they have inquired with law enforcement about the existence of any additional evidence that is not (yet) in the file, but is relevant to the case.[393] Our results suggest that such reforms may be necessary for open-file discovery to fulfill its goals.

Responses to the survey also indicate that defense attorneys and prosecutors tend to regard open-file discovery as more efficient than restrictive discovery. While both North Carolina and Virginia respondents expressed some concerns about certain logistical burdens of open-file discovery, on the whole, respondents viewed efficiency as a key advantage of open-file discovery.[394] A large number of prosecutors and defense attorneys in both states noted that open-file reduces discovery disputes and speeds up case dispositions.[395]

Our respondents, on both the defense and prosecution side, also maintained that negotiated discovery waivers in North Carolina are quite rare.[396] This further suggests that prosecutors

391. *See id.* (finding that in both Virginia and North Carolina, defense attorneys express concern about the prosecutor's file being incomplete).

392. *See* NYSBA TASK FORCE, *supra* note 249, at 68–74 (encouraging reforms to improve the flow of information between police and prosecutors).

393. *See* Prosser, *supra* note 19, at 596 (arguing that prosecutors should be required to go on record that they exercised due diligence in complying with discovery obligations); NYSBA TASK FORCE, *supra* note 249, at 40 (recommending that the prosecution and defense should be required to file a "certificate of compliance" when they have completed their discovery obligations); *see also* MASS. R. CRIM. P. 14(a)(3) (2015) (stating that all parties must file a Certificate of Compliance after all discovery has been provided).

394. *Supra* notes 281, 287 and accompanying text.

395. *Supra* notes 281, 287 and accompanying text.

396. *Supra* Part III.C.3.

do not view open-file discovery as burdensome enough to bargain away. We recognize that our survey reflects perceptions of participants, rather than hard data on efficiency. Further study of the actual economic costs and benefits of open-file discovery would therefore be helpful to inform reform efforts. But at least the perceptions of prosecutors and defense attorneys tend to support efficiency-based arguments in favor of open-file discovery.[397]

Our survey also found little evidence to suggest that open-file discovery increases risks to the safety of witnesses. Although a number of Virginia prosecutors feared this consequence of open-file and had even experienced it, neither North Carolina prosecutors nor North Carolina defense attorneys identified witness safety as a significant concern.[398] While a few North Carolina respondents mentioned risks to witnesses, some also noted that these risks were mitigated by the available protective measures.[399] This is particularly notable given that North Carolina has a higher violent crime rate per capita than does Virginia.[400]

One possible interpretation of our finding is that prosecutors who have experienced only restrictive discovery magnify fears about the dangers of open-file discovery. A similar dynamic has been reported with respect to other criminal justice reforms. When various jurisdictions first considered mandating the videotaping of interrogations, for example, law enforcement officers had serious concerns about logistical burdens and about the effects of recording on conviction rates.[401] Once videotaping was introduced, however, these concerns generally subsided.[402]

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397. *Cf. Federal Criminal Discovery Reform*, *supra* note 111, at 673–74 (noting that the need "to seek court orders [to protect witness safety] with somewhat greater frequency hardly seems burdensome").

398. *Supra* notes 292–301 and accompanying text.

399. *Supra* notes 292–301 and accompanying text.

400. *See 2014 Crime in the United States*, *supra* note 364 (listing violent crime statistics for all fifty states).

401. *See, e.g.*, THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 13–16 (2004) (describing the concerns law enforcement had regarding recording and how experience tended to change those attitudes).

402. *See id.* (showing that once videotaping was introduced, despite initial concerns, law enforcement became accepting of the new technology).

The responses from North Carolina may likewise be read to mean that once a jurisdiction adopts open-file discovery, prosecutors become more accepting of the system after observing first-hand that risks to witness safety can be adequately managed through protective measures.

It is important to emphasize again, however, that our study measured perceptions of practitioners, rather than the actual effects of open-file discovery. While practitioners' perceptions are unlikely to be entirely mistaken, witness intimidation is one area where such perceptions should be treated with greater caution. Neither defense attorneys nor prosecutors have direct knowledge about witness intimidation—they rely on witnesses to report such offenses, and studies have found that witnesses frequently underreport threats and even attacks.[403] Accordingly, further empirical study, surveying witnesses themselves, would be the optimal means of assessing the actual effects of open-file on witness intimidation.

Likewise, while our survey cannot directly measure the fairness and consistency of discovery provided under open-file and closed-file models, practitioners' responses suggest that these are key advantages of open-file discovery. A very high number of Virginia prosecutors stated that, in most or all of their cases, they provide broader discovery than required by law.[404] While commendable as an effort to encourage more informed and credible dispositions, in a closed-file state, these actions end up introducing variation and unpredictability in the way defendants are treated in different counties or by different prosecutors. It was also clear that Virginia (as well as North Carolina) defense attorneys did not believe that prosecutors were turning over discovery items as frequently as prosecutors reported.[405]

Open-file discovery was also described by many of our respondents—in both Virginia and North Carolina—as promoting trust between defense and prosecution.[406] Given the dramatic

403. *See, e.g.*, Elizabeth Connick & Robert C. Davis, *Examining the Problem of Witness Intimidation*, 66 JUDICATURE 439, 443 (1983) (reporting that only 63% of the witnesses who had reported intimidation to the researchers had also reported the threats to criminal justice officials).

404. *Supra* note 264 and accompanying text.

405. *Supra* Tables 2a, 2b, 2c, 3a, 3b, 4, 5, 6.

406. *Supra* notes 283–288 and accompanying text.

differences in the perceptions of defense attorneys and prosecutors about what occurs during discovery, this may be a welcome additional benefit of the practice. It is notable that the gap in perceptions of what was being disclosed was narrower in North Carolina than in Virginia.[407] Although these differences were statistically significant for only a few categories, it is possible that open-file discovery helps reduce the polarization of defense and prosecution views.

Relatedly, as a group, North Carolina prosecutors displayed more positive views of open-file discovery than did their Virginia counterparts. When describing both the advantages and the disadvantages of open-file discovery, a greater number of North Carolina prosecutors showed broad acceptance of the fairness and efficiency of the practice, and very few had concerns about its logistical burdens or effects on witness safety.[408] Again, this suggests that, while open-file discovery may attract initial opposition from the law enforcement community, the practice can gain acceptance among prosecutors once it is adopted. Over time, open-file rules may be able to bridge some differences between prosecutors and defense attorneys and reduce some (discovery-related) conflicts between the two.

Our study focuses on perceptions of defense attorneys and prosecutors and at times yields results subject to multiple interpretations. More empirical studies of the open-file discovery, particularly on the disclosure of *Brady* material and on the effects of open-file on witness intimidation, would help us better understand the true operation of different discovery rules. Despite these limitations, our findings offer the first data-driven endorsement of the idea that open-file discovery could facilitate more informed and more efficient case dispositions.

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407. *Supra* Tables 2a, 2b, 2c, 3a, 3b, 4, 5, 6.

408. *Supra* Part III.C.4.

*Appendix A: Pre-Plea Discovery Practices: A Survey of Prosecutors and Defense Attorneys*

Q1 This survey aims to determine pre-plea discovery practices in your jurisdiction. In particular, we are interested in finding out whether and under what circumstances prosecutors provide defendants with broader pre-plea discovery than either the law or office policy requires. In addition, we are interested in learning whether and under what circumstances prosecutors request waivers of discovery as part of plea negotiations.

Thank you for willingness to participate. Your answers and your time are extremely important to us and will help inform our academic study of discovery practices. Your participation in this survey is completely voluntary and confidential. No individual attorney or office will be identified in any of the analyses or papers we produce.

This survey is brief and will take 5–10 minutes to complete.

Q2 Which of the following category best describes your individual practice over the last year? (Please check all that apply to your practice.)

- ❑ Misdemeanor
- ❑ Felony
- ❑ Intake/ Charging/Grand Jury/ Probable Cause Rotation
- ❑ Appeals
- ❑ Arson
- ❑ Assault
- ❑ Capital Murder
- ❑ Child Abuse
- ❑ Drug Crimes
- ❑ Domestic Violence
- ❑ Gang Violence
- ❑ Homicide
- ❑ Immigration Offenses
- ❑ Juvenile Prosecution
- ❑ Organized Crime
- ❑ Property Crimes
- ❑ Sexual Assault
- ❑ Traffic Offenses
- ❑ White-Collar Crime
- ❑ Other (Please explain) _____

Q3 Some of the survey questions are directed solely to prosecutors who have handled felony cases at least some of the time over the last year. If you handled misdemeanors or juvenile prosecutions exclusively in the last year, you will skip those questions.

Did you handle misdemeanors or juvenile prosecutions exclusively in the last year?

- ❍ Yes
- ❍ No

Q4 Over the last year, approximately how many felony cases did you handle (please estimate the number of felony cases completed)?

Q5 Of these completed felony cases, what percentage of cases would you estimate resulted in guilty pleas (please include "no contest" pleas in the percentage)?

Q6 Does your office have an articulated policy concerning discovery to be provided to defendants before they plead guilty? Please note: Throughout this survey, questions regarding guilty pleas are intended to include "no contest" pleas.

- ❍ Yes
- ❍ No
- ❍ Not Sure

Q7 In felony cases, what types of documents do you turn over either as part of an initial discovery package or later, but before a defendant pleads guilty? Please indicate how often you disclose such documents, assuming they are present.

| | Never | Sometimes | Always |
|---|---|---|---|
| Defendant's statements | ❍ | ❍ | ❍ |
| Co-defendants' statements | ❍ | ❍ | ❍ |
| Names of witnesses | ❍ | ❍ | ❍ |
| Witness statements | ❍ | ❍ | ❍ |
| Witnesses' criminal records | ❍ | ❍ | ❍ |
| Reports or written statements of potentially testifying experts | ❍ | ❍ | ❍ |
| Reports or written statements of non-testifying experts | ❍ | ❍ | ❍ |
| Search warrant affidavits | ❍ | ❍ | ❍ |
| Defendant's criminal record | ❍ | ❍ | ❍ |
| Police report about the underlying incident | ❍ | ❍ | ❍ |
| Materials relating to identification procedures (lineups, etc.) | ❍ | ❍ | ❍ |
| Factually exculpatory evidence that is in your possession | ❍ | ❍ | ❍ |
| Information in your possession that might be used to impeach the credibility of a prosecution witness | ❍ | ❍ | ❍ |
| Exculpatory or impeachment evidence that is in the possession of another government agency, but which you are able to request | ❍ | ❍ | ❍ |
| Other (Please explain.) | ❍ | ❍ | ❍ |

Q8 Does your decision to disclose exculpatory or impeachment evidence before a guilty plea depend on whether the evidence is material to the outcome?

- ❍ Yes
- ❍ No
- ❍ Sometimes (Please explain if you wish.) _____

Q9 Does your decision to disclose evidence depend on the timing of the guilty plea?

- ❍ Yes (Please explain if you wish.) _____
- ❍ No (Please explain if you wish.) _____
- ❍ Sometimes (Please explain if you wish.) _____

Q10 Over the last year, in what percentage of felony cases resolved by a guilty plea would you estimate that you provided a defendant, before the guilty plea, with BROADER DISCOVERY than required under an articulated office policy, court order, or the law?

Q11 For which of the following reasons did you provide BROADER PRE-PLEA DISCOVERY than required under office policy, court order, or the law?

| | Yes | No |
|---|---|---|
| To encourage a guilty plea in a case | ❍ | ❍ |
| To avoid lengthy litigation around discovery motions | ❍ | ❍ |
| Out of an abundance of caution, in case any piece of evidence is later judged by a court to be exculpatory | ❍ | ❍ |
| Because the case was simple, so it was easy to disclose without worrying about privileged information or harm to the investigation | ❍ | ❍ |
| Because the evidence in the case was voluminous, so it was easier to disclose everything instead of sifting through evidence to identify documents subject to disclosure | ❍ | ❍ |
| To obtain a waiver of certain pretrial motions in exchange for broader discovery | ❍ | ❍ |
| To maintain or promote a cooperative relationship with defense counsel | ❍ | ❍ |
| In anticipation that the judge would order broader discovery anyway | ❍ | ❍ |
| To protect the conviction from appellate and post-conviction challenges | ❍ | ❍ |
| Other (Please specify): | ❍ | ❍ |

Q12 For which of the following reasons did you refrain from providing broader pre-plea discovery than required under office policy, court order, or the law?

| | Yes | No |
|---|---|---|
| No time to check with all relevant government agencies to determine whether they had discoverable evidence | ○ | ○ |
| Concern about witness safety | ○ | ○ |
| Concern about witnesses' willingness to testify | ○ | ○ |
| Concern about harm to ongoing investigations | ○ | ○ |
| Lack of time or resources to review the evidence to ensure that no privileged evidence or evidence that might harm the investigation was disclosed | ○ | ○ |
| Concern that pre-plea discovery would stand in the way of an expeditious resolution of the case | ○ | ○ |
| Evidence was so strong that there was no need to provide broader discovery; providing a few documents sufficed to convince defendant to plead guilty | ○ | ○ |
| Concern about the financial costs of discovery | ○ | ○ |
| Lack of a good working relationship with defense counsel | ○ | ○ |
| Concern that the defendant would manipulate the evidence | ○ | ○ |
| Concern about the strength of the evidence at the pre-plea stage | ○ | ○ |
| Other (Please specify): | ○ | ○ |

Q16 For which of the following reasons did you request a DISCOVERY WAIVER as part of plea negotiations?

| | Yes | No |
|---|---|---|
| Concern about the time and effort needed to obtain evidence from the police/ investigating agencies | O | O |
| Concern about witness safety | O | O |
| Concern about witnesses' willingness to testify | O | O |
| Concern about harm to ongoing investigations | O | O |
| Lack of time or resources to review evidence to ensure that no privileged evidence or evidence that might harm the prosecution was disclosed | O | O |
| Concern that pre-plea discovery would stand in the way of an expeditious resolution of the case | O | O |
| Concern about the financial costs of discovery | O | O |
| Desire to protect the conviction from post-conviction challenges | O | O |
| Lack of a good working relationship with defense counsel | O | O |
| Concern that the defendant would manipulate the evidence | O | O |
| Concern about the strength of the evidence at the pre-plea stage | O | O |
| Other (Please specify): | O | O |

Q17 Do you believe that pre-plea discovery in your jurisdiction (either by law or office policy) works well? Why or why not?

Q18 What do you think are the major advantages of "open-file" pre-plea discovery?
By "open-file" discovery, we mean a system under which the defendant has access to the entire prosecutorial file, except for attorney work product and information exempt from disclosure by a protective order.

Q19 What do you think are the major disadvantages of "open-file" pre-plea discovery?

Q20 Do you believe the defense should be required to provide broader reciprocal discovery in criminal cases? Why or why not?

Q21 Please feel free to make any other observations about pre-plea discovery that you might have.

Q22 Demographic Information (Optional):
How long have you been practicing as a prosecutor?
❍ 0–2 years
❍ 2–5 years
❍ 5–10 years
❍ 10–15 years
❍ 15–20 years
❍ 20–25 years
❍ 25–30 years
❍ More than 30 years

Q23 What is your gender?
❍ Male
❍ Female

Q24 What is your race/ethnicity? (Please check all that apply.)
❑ White
❑ African American
❑ Hispanic
❑ Asian
❑ Native American
❑ Pacific Islander/Alaska Native
❑ Other (Please specify.) _____

Q25 Thank you very much for your time and responses! We appreciate your participation.
We would also be interested in your response to three discovery-related hypothetical scenarios, which would take about another 5 minutes to answer.
If you are willing to consider them, please click YES below. Otherwise, please click NO, and thank you again for taking the time to complete the survey.
❍ Yes
❍ No

Q26 Thank you for agreeing to consider these three hypothetical scenarios. Here are the basic facts:

The defendant has been charged with armed robbery. The

incident in question occurred at 10 pm, on a well-lit street next to an ATM. The robbery was captured on a surveillance camera. The assailant's face is clearly visible on the video. The victim, who is a 22-year old man, picked out the defendant from an initial photo array and again in a subsequent lineup. You also plan to rely on an eyewitness—a woman who observed the robbery from a window located on the same side of the street as the ATM, about 20 feet away from the robbery. The eyewitness also picked out the defendant from a lineup. The defendant is detained in jail.
Please consider the following three scenarios occurring in your jurisdiction. Each scenario, while relevant to the armed robbery case, is independent from the others and should not be viewed as cumulative information.

Q27
1. One month after the defendant's arraignment (at which you provided the defense with an initial discovery packet), you obtain information from the police that your prospective eyewitness has a prior fraud conviction. The following week (two months before trial is set to begin), you plan to discuss a plea offer with the defense attorney.
Would you disclose the prior conviction either before or during plea negotiations?
*Please note*: In this and subsequent questions, we are NOT asking you whether you would disclose this information before a pretrial discovery deadline, if the case goes to trial. We are instead focusing on disclosures before and during plea negotiations occurring two months before trial is set to begin.

- ❑ Yes, I would disclose the prior conviction either before or during plea negotiations.
- ❑ No, I would not disclose the prior conviction either before or during plea negotiations.
- ❑ Please explain if you wish. _____

Q28
2. Imagine a different scenario. One month after the defendant's arraignment (at which you provided the defense with an initial discovery packet), you obtain information that the eyewitness had initially failed to pick out the defendant from a photo array, even though she was later able to pick him out in a lineup. The following week (two months before trial is set to begin), you plan to discuss a plea offer with the defense attorney.
Would you disclose this information either before or during plea negotiations?

- ❑ Yes, I would disclose to the defense, either before or during plea negotiations, that the eyewitness did not pick out the defendant in the photo array.
- ❑ No, I would not disclose to the defense, either before or during plea negotiations, that the eyewitness did not pick out the defendant in the photo array.
- ❑ Please explain if you wish. _____

Q28
3. Consider a different scenario. One month after the defendant's arraignment (at which you provided the defense with an initial discovery packet), you obtain information that a jailhouse informant is claiming that someone else committed the crime. You believe the informant is lying because, in addition to your strong eyewitness and video evidence that implicates the defendant, you know that the informant is a friend of the defendant. Nonetheless, the informant claims that another jail inmate with whom he has been sharing a cell bragged that he committed the ATM robbery alone and that the defendant was not involved.
Would you disclose this information either before or during the plea negotiations (two months before trial)?

- ❑ Yes, I would disclose the existence of the jailhouse informant, either before or during plea negotiations.
- ❑ No, I would not disclose the existence of the jailhouse informant, either before or during plea negotiations.
- ❑ Please explain if you wish. _____

Q29 Thank you again for taking the time to participate! If you wish to go back and review your answers on previous pages, please use the blue back button on the bottom of the page. Once you press the blue forward button, your answers will be recorded and you will not be able to change them.

*Appendix B: Table of Select Discovery Rules by Jurisdiction*

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Federal Rules of Criminal Procedure, R. 16; 18 U.S.C. § 3500 | None in the rules (upon request) | No | No[410] | No | Closed-File |
| Alabama Rules of Criminal Procedure, R. 16 | 14 days after request | No | No (only co-Ds', accomplices') | No | Closed-File |
| Alaska Rules of Criminal Procedure, R. 16 | No specific time limit, other than expert witness info 45 days before trial | Yes | Yes | No | Intermediate |
| Arizona Rules of Criminal Procedure, R. 15.1 | In Superior Court, no later than 30 days after arraignment; police report at arraignment or preliminary hearing | Yes | Yes | Yes | Open-File |
| Arkansas Rules of Criminal Procedure, R. 17 | Upon request | Yes | No (only co-Ds') | No | Intermediate |

409. Even when a state provides for the disclosure of witness names, statements, or police reports, rules typically provide for the withholding of such information where disclosure may pose a risk to the witness's safety. *See supra* note 50 and accompanying text (citing state rules that grant prosecuting attorneys the ability to refrain from disclosing a witness's name when doing so would put that witness at risk).

410. *But cf.* 18 U.S.C. § 3500(b) (1948):

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| California Penal Code § 1054 | At least 30 days before trial | Yes | Yes | No | Intermediate |
| Colorado Rules of Criminal Procedure, R. 16 | Recorded statements of D or co-D—not more than 21 days after first appearance; all other info—not more than 35 days before trial | Yes | Yes | Yes | Open-File |
| Connecticut Gen. Stat. § 54-86a; Connecticut Practice Book §§ 40-11, 40-13, 40-13A | No later than 45 days after D's request | Yes | Yes[411] | Yes | Open-File |
| Delaware Rules of Criminal Procedure, R. 16 (Del. Super. Ct. Crim. R. 16) | Not later than 10 days after arraignment or as ordered by the court | No | No (only co-Ds') | No | Closed-File |
| Florida Rules of Criminal Procedure, R. 3.220 | Within 15 days of request | Yes | Yes | Yes | Open-File |
| Georgia Code of Criminal Procedure, § 17-16-4 | Not later than 10 days before trial or as court orders | Yes | Yes | No | Intermediate |
| Hawaii Rules of Penal Procedure, R. 16 | 10 calendar days following arraignment & plea of D | Yes | Yes | No | Intermediate |

411. The rules were amended in 2010 to allow discovery of "all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents, including state and local law enforcement officers, which statements, reports and affidavits were prepared concerning the offense charged." CONNECTICUT PRACTICE BOOK § 40-13A (2015).

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Idaho Criminal Rules, R. 16 | Any time after filing of charges, upon request | Yes | Yes | Yes | Open-File |
| Illinois Code of Criminal Procedure § 114-9 | As soon as practicable, following motion of D | Yes | Yes | No | Intermediate |
| Indiana, no state-wide discovery rules; RCCPP, Randolph County, LR68-CR00-202 | 30 days for State to disclose; 15 days after that for D to disclose | Yes | Yes | No | Intermediate |
| Iowa Rules of Criminal Procedure, R. 2.11(12), 2.14 | Upon motion of D, as ordered by the court | Yes | No[412] (only co-D's) | No | Intermediate |
| Kansas Code of Criminal Procedure, art. 32, 22-3212 | No later than 21 days after arraignment (or later if court permits) | No | No | No | Closed-File |
| Kentucky Rules of Criminal Procedure, R. 7.24 | Upon request | No | No | Yes | Intermediate |
| Louisiana Code of Criminal Procedure, arts. 716–729 | Upon motion of D, as ordered by the court | No | Yes[413] | No | Intermediate |

412. The Rules do require, however, the prosecution to provide, when proceeding by information, "a full and fair statement of [a witness's] expected testimony" or when proceeding by indictment, "a full and fair statement" of the witness's grand jury testimony. IOWA R. CRIM. P. R. 2.4, 2.5. The Rules also allow for witness depositions. *Id.* at R. 2.13 (allowing depositions of "witnesses listed by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitations as in civil actions except as otherwise provided by statute and these rules").

413. *See* LA. CODE CRIM. P. art. 716 (stating that the "state need not provide the defendant any written or recorded statement of its witnesses until immediately before the opening statement at of trial").

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Maine Rules of Unified Criminal Procedure, R. 16 | Within 10 days of D's request | Yes | Yes | Yes[414] | Open-File |
| Maryland Rules of Procedure, R. 4-262, 4-263 | Upon request; Within 30 days after the earlier of the appearance of counsel or first appearance of D | Yes | Yes | Yes | Open-File |
| Massachusetts Criminal Procedure, R. 14 | At or before the pretrial conference | Yes | Yes | Yes | Open-File |
| Michigan Rules of Court, R. 6.201 | Within 21 days of a request | Yes | Yes | Yes | Open-File |
| Minnesota Court Rules, Criminal Procedure Rule 9, Minn. R. Crim. P. 9.01 | Upon request and before the Rule 11 Omnibus Hearing | Yes | Yes | Yes | Open-File |
| Mississippi Uniform Rules of Circuit and County Court Practice, R. 9.04 | Upon request | Yes | Yes | No | Intermediate |
| Missouri Rules of Criminal Procedure, R. 25 | Requests/motions not later than 20 days after arraignment; answer within 10 days after service of request | Yes | Yes | No | Intermediate |
| Montana Code Annotated, Art. 46-15-322 | Upon request | Yes | Yes | No | Intermediate |

414. Although the rules do not specifically mention police reports, such reports would appear to fall under the category of reports "material and relevant to the preparation of the defense." ME. R. U. CRIM. P. 16(c)(1).

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Nebraska Revised Statutes, §§ 29-1912–1919 | Upon request any time after indictment, information, or complaint | Yes | No[415] | No | Intermediate |
| Nevada Revised Statutes, Title 14, Chapter 174 | Request within 30 days after arraignment; comply not less than 30 days before trial (witness list not less than 5 judicial days before trial) | Yes | Yes | No | Intermediate |
| New Hampshire Super. Ct. R. 98 | Not less than 20 calendar days before final pretrial conference or not less than 3 days before a pretrial evidentiary hearing | Yes | Yes | Yes | Open-File |
| New Jersey Rules Governing the Courts of the State of New Jersey, Part 3:13-3 | Within 7 days of the return or unsealing of indictment | Yes | Yes | Yes | Open-File |
| New Mexico Rules of Criminal Procedure for the District Courts, 5-501, 5-502 | Within 10 days after arraignment | Yes | Yes | Yes[416] | Open-File |

415. The Rules do allow witness depositions, however. *See* NEB. REV. STAT. § 29-1917 (1969) (allowing witness depositions where witness testimony "may be material or relevant to the issue to be determined at the trial of the offense; or may be of assistance to the parties in the preparation of their respective cases").

416. Although the rules do not specifically mention police reports, such reports would appear to fall under the category of reports "material to the preparation of the defense." N.M. R. ANN. 5-501(A)(3).

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| New York, Laws of New York, Criminal Procedure, Title J, art. 240 | Written demand within 30 days after arraignment or initial appearance, whichever is later; compliance within 15 days after service of demand | No | No (only co-D)[417] | No | Closed-File |
| North Carolina Gen. Stat. § 15A-903 | Within a reasonable time before trial, as specified by the court | Yes | Yes | Yes | Open-File |
| North Dakota Rules of Criminal Procedure, R. 16 | Upon D's written request | Yes | Yes | No[418] | Intermediate |
| Ohio Rules of Criminal Procedure, R. 16 | Demand within 21 days after arraignment or 7 days before trial, whichever is earlier; motion to compel compliance no later than 7 days before trial or 3 days after opposing party provides discovery, whichever is later | Yes | Yes | Yes | Open-File |

417. *But cf.* N.Y. CRIM. PROC. LAW §§ 240.44–45 (providing for disclosure of witness statements at the conclusion of pretrial hearing at which witness has testified or at trial, after jury has been sworn in).

418. The rule does provide for the disclosure of reports "material to preparing the defense," which may include police reports. N.D. R.CRIM.P. 16(a)(1)(D)(i). On occasion, however, police reports may be excluded from discovery under the "work product" exemption of Rule 16. See State v. Shipton, 339 N.W.2d 87, 89 (N.D.1983) (noting that "[w]hile some police reports might qualify as prosecution work products, we are not prepared to hold that all arresting officer reports automatically fall into that category").

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Oklahoma, Title 22 OK Statute §22-2002 | Motions may be made at arraignment or later; discovery should be complete at least 10 days before trial | Yes | Yes | Yes | Open-File |
| Oregon State Statute, §§ 135.805–.865 | Brady material before guilty plea; everything else as soon as practicable after indictment or information | Yes | Yes | No | Intermediate |
| Pennsylvania Rules of Criminal Procedure, R. 573 | Motion shall be made within 14 days after arraignment, unless extended by the court | Court has discretion to order | Court has discretion to order | No | Intermediate |
| Rhode Island, R.I. Gen. Laws § 12-17-16 | Upon D's written request | Yes | Yes | No | Intermediate |
| South Carolina Rules of Criminal Procedure R. 5 | No later than 30 days after request | No | No[419] | No[420] | Closed-File |

419. While Rule 5(a)(2) excludes witness statements from disclosure pretrial, it also provides that "after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness before the time such witness testifies." S.C. R. CRIM. P. 5(a)(2).

420. Although the Rules appear to provide for disclosure of reports material to the defense, they also exclude from disclosure "reports . . . made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case." *Id.*

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| South Dakota Code, Chapter 23A-13 | Upon D's written request | No | No[421] | No | Closed-File |
| Tennessee Rules of Criminal Procedure, R. 16 | Upon D's request | No | No (only co-D)[422] | No | Closed-File |
| Texas Code of Criminal Procedure, Chapter 39 | As soon as practicable after request; expert witness info not later than 20 days before trial | Yes | Yes | Yes | Open-File |
| Utah Rules of Criminal Procedure, R. 16 | Before D is required to plead; D disclosures at least 10 days before trial | No | No | No | Closed-File |
| Vermont Rules of Criminal Procedure, R. 16 | As soon as practicable after request of D in writing or in open court | Yes | Yes | No[423] | Intermediate |
| Virginia, Rules of Supreme Court of Virginia 3A:11 | Motion by D at least 10 days before trial | No | No | No | Closed-File |

421. *But see* S.D. CODIFIED LAWS § 23A-13-6 (2015) (stating that no witness statement "shall be the subject of subpoena, discovery, or inspection until such witness has testified on direct examination in the preliminary hearing or in the trial of the case").

422. *But see* TENN. R. CRIM. P. 26.2(a) (providing that a state is not required to produce a witness statement until after the conclusion of witness testimony at trial).

423. Although the Rules provide for disclosure of reports material to the defense, they exclude from disclosure "reports . . . to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney . . . or other agents of the prosecution, including investigators and police officers." VT. R. CRIM. P. 16(d)(1).

| Jurisdiction | Timing | Witness Names[409] | Witness Statements | Police Reports | Model |
|---|---|---|---|---|---|
| Washington Superior Court Criminal Rules, R. 4.7 | No later than omnibus hearing | Yes | Yes | No[424] | Intermediate |
| West Virginia Rules of Criminal Procedure, R. 16 | Upon the request of D | Yes | No[425] | No | Intermediate |
| Wisconsin Code § 971.23 | Within a reasonable time before trial | Yes | Yes | No | Intermediate |
| Wyoming Rules of Criminal Procedure, R. 16 | Upon D's request | No | No[426] | No[427] | Closed-File |

424. Police reports may be introduced if the prosecutor intends to use them at a hearing or trial so they can be classified as "books, papers, documents . . . which the prosecuting attorney intends to use in the hearing or trial." WASH. SUPER. CT. CRIM. R. 4.7(a)(1)(v). *See also generally* State v. Linden, 947 P.2d 1284 (Wash. Ct. App. 1997).

425. *But see* W. VA. R. CRIM. P. 26.2 (allowing for the provision of witness statements after a witness has testified on direct examination).

426. *But see* WYO. R. CRIM. P. 26.2 (allowing for the court to order production of written witness statements).

427. Although the Rules appear to provide for disclosure of reports material to the defense, they also exclude from disclosure "reports, memoranda, or other internal state documents made by the attorney for the state or other state agents in connection with the investigation or prosecution of the case." *Id.* at R. 16(a)(2).

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