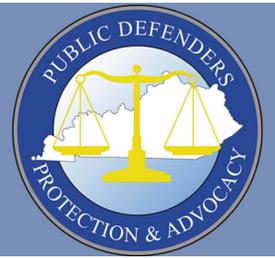


# The Advocate



dpa.ky.gov

November 2015

## DISCOVERY REFORM IN CRIMINAL CASES IN KENTUCKY: A REPORT FROM THE FIELD AND THE NEED FOR STATUTORY OPEN FILE DISCOVERY by Glenn McClister



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Where money is involved, all parties receive all relevant information from their adversaries upon request; but where individual liberty is at stake, such information can either be withheld by the prosecutor or parceled out at a time when it produces the least benefit to the accused.<sup>1</sup>

**Summary:** After reviewing the importance of discovery in constitutional context, the article reports on a survey of public defenders conducted across the Commonwealth which indicates that prosecutors and law enforcement too often fail to follow up on the delivery of initial discovery to the defense. Too often, prosecutors do not monitor the additional discovery which should be provided to the defense and law enforcement does not automatically provide it. One simple solution to the problem is statutorily required timely, full open file discovery which would require automatic compliance by the prosecutor and all agents of the prosecution.

### Discovery in Constitutional Context

Full, timely, enforceable open file discovery is one of the keys to the proper functioning of our justice system and to the achievement of our highest constitutional ideals.

Two great constitutional principles are supposed to function to ensure the administration of justice in our system. The first principle is that the worst event which can occur in our criminal justice system is the wrongful conviction of an innocent man. William Blackstone (1723-1780), the famous British jurist, said, "It is better that ten guilty persons escape than that one innocent suffer."<sup>2</sup> Our Supreme Court has interpreted the United States Constitution to recognize this preference. In *In re Winship*, Justice Harlan stressed the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go

free."<sup>3</sup> In that same case, the majority also wrote that, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."<sup>4</sup> This is a settled constitutional doctrine: "Constitutional criminal procedure...should assume for its premises the preference for avoiding unjust conviction..."<sup>5</sup>

The second constitutional principle is that the greatest safeguard against wrongful conviction is thorough adversarial development and testing of all the facts relevant to the case. The presumption that truth is revealed through a process of adversarial examination is the basis of the right to effective assistance of counsel. The primary purpose of the right to counsel is "to require the prosecution's case to survive the crucible of meaningful adversarial testing."<sup>6</sup>

1. Hon. H. Lee Sarokin & William E. Zuckerman, Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption, 43 Rutgers L. Rev. 1089, 1089 (1991).
2. William Blackstone, 4 Commentaries \*358.
3. *In re Winship*, 397 U.S. 358, 372 (1970).
4. *Id.* at 364.
5. Donald A. Dripps, Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure, 23 U. Mich. J. L. Reform 591, 593 (1990). See also Katherine Goldwasser, Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence, 85 Geo. L. J. 621 (January, 1998).
6. *United State v. Cronin*, 466 U.S. 648, 656 (1984).

This is the way wrongful convictions are supposed to be avoided in our system. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”<sup>7</sup>

**“The problem is that the discovery is still in the hands of the officers and has not been turned over to the prosecutors.”** - 2015 DPA Survey Response

This “ultimate objective” of “meaningful adversarial testing” is jeopardized when the defense is hindered from discovering the whole of the prosecution’s case and from doing a thorough defense investigation of that case. In *United States v. Nixon*, the Supreme Court said:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.<sup>8</sup>

The ability to “develop all relevant facts” is so fundamental that many of the safeguards designed to assure “meaningful adversarial testing” fail to do so when discovery and fact investigation are inadequate. Cross-examination is supposed to act as a safeguard against wrongful convictions. Supposedly the “greatest engine for truth,”<sup>9</sup> cross-examination is rarely very effective when defense counsel is unprepared – especially if the lack of preparation is chiefly a lack of independent defense investigation.

**“The bigger problem is often the officer not getting it [to] the prosecutor.”** - 2015 DPA Survey Response

Trials do not reliably determine factual truth when an investigation’s results are weak in particular respects. Confrontation, for example, is a weak tool against confident eyewitnesses who went through suggestive identification processes or against lab technicians whose routine practices increased the risk of base-rate errors. At best, confrontation raises doubts about such evidence, when **what we really want is better evidence**. ... Many familiar tools of impeachment often can only raise doubts about evidence. Aside from creating weak incentives for better evidence, they do nothing to affirmatively aid in the production of more reliable evidence.<sup>10</sup>

The requirement of proof beyond a reasonable doubt is also considered to be a powerful procedural safeguard against wrongful conviction.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock ‘axiomatic and elementary’ principle whose enforcement lies at the foundation of the administration of our criminal law.<sup>11</sup>

Yet the problem with the requirement of proof beyond a reasonable doubt is that it is a subjective *jury certainty* standard that does not necessarily have anything to do with the accuracy of the information the jury has heard. It is, therefore, a kind of *non sequitur* to describe the standard as “a prime instrument for reducing the risk of convictions resting on factual error.” In actual fact, jurors have no

7. *Herring v. New York*, 422 U.S. 853, 862 (1975).

8. *United States v. Nixon*, 418 U.S. 683, 709 (1974); see also *Taylor v. Illinois*, 484 U.S. 400, 408-409 (1988).

9. John Henry Wigmore, *Evidence in Trials at Common Law* §1367 (James H. Chadbourne ed., Little, Brown & Co. 1974)(1940).

10. Daryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1606-1607 (December, 2005) (emphasis mine).

11. *Winship*, *supra*, note 6, at 362.

practical way to know whether they are hearing all of the facts in any given case. Like a mistaken eyewitness who can have a high degree of confidence in her identification of a suspect but still be absolutely mistaken, juries can likewise have a high degree of confidence in the correctness of their verdict and still be entirely wrong - when they are not given all the facts.<sup>12</sup>

The importance of factually accurate fact-determinations at trial is accentuated by the fact that, in our system, appellate courts do not re-litigate fact determinations reached on the trial level. A criminal trial is virtually the only moment in the entire justice process in which an accurate factual determination can take place. Our appellate courts confine themselves, for the most part, to review of preserved procedural error. Except in the rarest of circumstances, a claim of actual innocence is not an appealable issue. This may be understood as one of the primary tensions in our criminal justice system.

One of the most startling revelations to newcomers to the justice system is that appeals have almost nothing to do with guilt or innocence. Appellate courts, as a matter of principle, decide legal questions and focus on process, not the accuracy of factual determinations. Trial courts, not appellate courts, decide facts.<sup>13</sup>

Full and timely open file discovery, and a subsequently robust and comprehensive defense investigation of the prosecution's case, are the practical, every-day pillars of "meaningful adversarial testing." When discovery is provided too late for meaningful defense investigation, when exculpatory material is withheld from the defense, the fact-determination process at trial breaks down at its most crucial juncture.

Defense council is obligated to seek discovery in preparation of a case. The Performance Guidelines of the National Legal Aide & Defender Association set out some minimum objectives.

#### **NLADA Performance Guideline for Criminal Defense Representation 4.2**

- a. Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.
- b. Counsel should consider seeking discovery of the following items:
  - potential exculpatory information;
  - the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  - all oral and/ or written statements by the accused, and the details of the circumstances under which the statements were made;
  - the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
  - all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
  - all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
  - statements of co-defendants;
  - statements the government may intend to use against the accused.

12. Indeed, juries tend to assume they have heard and been shown all the evidence there is to see and hear. They assume the case has been fully investigated by both sides. If, for example, there is no meaningful impeachment of prosecution witnesses, they assume it is because no impeachment evidence exists.

13. Keith A. Findlay, Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 348 (2006)

## The Discovery System in Kentucky: On the Books and in the Caselaw <sup>14</sup>

Discovery in Kentucky is controlled by the Rules of Criminal Procedure promulgated by the Kentucky Court of Justice. What follows is a review of what these rules entail.

**RCr 5.16(3)** provides that, “any person indicted by the grand jury shall have a right to procure a transcript of any stenographic report or a duplicate of any mechanical recording relating to his or her indictment...” This includes transcripts of testimony concerning co-defendants.<sup>15</sup>

**RCr 6.22** provides for a Bill of Particulars. If the indictment does not name the time, place, or alleged victim, or if it is scanty with regards to the facts alleged by the Commonwealth, then the court should grant a Bill of Particulars under RCr 6.22.<sup>16</sup> Since indictments are no longer fact pleadings but merely abbreviated notice pleadings, when a defendant requests a Bill of Particulars, he should be supplied freely with the details of the charges so he can prepare his defense.<sup>17</sup> A request for a Bill of Particulars can be waived once the motion has been made, if the case goes forward and the defense does not object to the failure of the Commonwealth to respond to the request.<sup>18</sup>

**RCr 7.24** is really four different rules. Rule one is triggered by a *written request* by the defense. It results in the production of oral incriminating statements made by the defendant, results and reports of tests and examinations, and a written summary of any expert testimony the prosecution intends to present at trial. Rule two is triggered by a *motion* made by the defendant and results in permission for the defense to inspect books, papers, documents and tangible objects in custody of the Commonwealth, including police reports. Rule three is

triggered by a *written request* from the Commonwealth and results in defense disclosure of results, reports, summaries of defense expert witness testimony. Rule four is triggered by a *motion* by the Commonwealth and results in defense disclosure of books, papers, documents and tangible objects in the control or custody of the defense.

**“I have to remind the Commonwealth Attorney on a regular basis about what discovery I am missing and what has not been provided.”** - 2015 DPA Survey Response

Rules three and four, requiring defense reciprocal discovery, are only available *once the Commonwealth has complied with the defense request*. In spite of this, many courts routinely enter blanket discovery orders imposing *automatic* reciprocal discovery. Such a form order, “impinges on the election given the defendant under RCr 7.24(2).”<sup>19</sup>

The purpose of RCr 7.24(1) is not to inform the defendant that he made a statement but to inform the defendant, in order to plan defense strategy, whether the prosecution has knowledge of a defendant’s statements which the prosecution may introduce into evidence or use to impeach.<sup>20</sup>

**RCr 7.26**, which requires the Commonwealth to provide witness statements at least 48 hours prior to trial, is not reciprocal. The Commonwealth’s failure to disclose under RCr 7.26 an officer’s assault report was reversible error which “prejudiced the [defendant’s] ability to prepare a defense.”<sup>21</sup> There is no defense obligation to turn

14. For a comprehensive discussion of the spectrum of discovery rules and statutes throughout the United States, see Wayne R. LaFave et al., *Criminal Procedure*, §20 2(b) (3d ed. 2000). LaFave groups Kentucky in with the most conservative states regarding discovery. See LaFave, footnotes 31-33. Kentucky still more or less follows Federal Rule 16 while other states have adopted the broader discovery provisions of the 1996 Third Edition of the ABA Standards. These Standards include provisions for the discovery of prosecution witness lists, deals made with informants or other prosecution witnesses, prior convictions to be used to impeach any witness of any party, and an obligation to turn over any evidence which tends to negate the guilt of the defendant or would tend to reduce his punishment. See the Federal Rules of Criminal Procedure, Rule 16 and ABA Standards for Criminal Justice, *Discovery*, Stan. 11-2.1 (3d ed. 1996). Adopting more of the broader ABA standards is not the focus of this article.

15. See, *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky.2000).

16. *Thomas v. Commonwealth*, 931 S.W.2d 446, 450 (Ky.1996), *Fitzgerald v. Commonwealth*, 403 S.W.2d 21 (Ky.1966), *Parker v. Commonwealth*, 291 S.W.3d 647 (Ky.2009).

17. *Finch v. Commonwealth*, 429 S.W.2d 146 (Ky.1967).

18. *Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky.1984), *Dunn v. Commonwealth*, 360 S.W.3d 751 (Ky.2012).

19. *Penman v. Commonwealth*, 194 S.W.3d 237, 249 (Ky.2006).

20. *Grant v. Commonwealth*, 244 S.W.3d 39 (Ky.2008).

21. *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky.2005).

22. *Commonwealth v. Stambaugh*, 327 S.W.3d 435 (Ky.2010).

over witness statements.<sup>22</sup> The RCr 7.24(2) provision prohibiting the disclosure of the notes and work product of investigating officers does not apply under RCr 7.26 once the witness has testified.<sup>23</sup> Audiotaped statements of witnesses are discoverable.<sup>24</sup>

Officers and investigators are agents of the Commonwealth and any statements taken by them are in the possession of the Commonwealth, regardless of whether the Commonwealth's Attorney is personally aware of them.<sup>25</sup> The prosecutor's duty of disclosure extends to evidence in the possession of the prosecutor, his investigators, and other state agencies as well.<sup>26</sup> The prosecution's failure to prepare is no defense for failure to disclose exculpatory statements.<sup>27</sup>

Neither party in a criminal action is required to disclose a witness list in pre-trial discovery.<sup>28</sup> Nevertheless, a court may require a defendant to provide a witness list at trial, at the outset of voir dire, for the purpose of inquiring of the jurors if any of them were close personal friends or related by blood or marriage to any of the named witnesses.<sup>29</sup> Failure to name a witness in voir dire may result in the exclusion of that surprise witness.<sup>30</sup>

The government has an informant identity privilege under KRE 508, but when an informant will be a testifying witness, or his identity and communications are relevant and helpful to the accused or essential to a fair trial, the privilege is overcome by constitutional requirements.<sup>31</sup> This includes any deals made between the prosecution and the informant.<sup>32</sup> This also includes past consideration paid to the informant in other cases and based on the expectation of help from the informant in the future.<sup>33</sup> Disclosure must be made "promptly" under RCr 7.24(8).

RCr 7.26, requiring disclosure only 48 hours before trial, does not apply.

**Notice Requirements:** RCr 8.07, sets out defense notice requirements of mental issues the defense intends to raise at trial.<sup>34</sup> RCr 8.27, sets out a defense obligation to produce witness statements at least 48 hours before a suppression hearing. KRE 404 also places notice requirements on the prosecution regarding introduction of evidence of prior bad acts and KRE 412 places notice requirements on the defense regarding the introduction of evidence concerning specific prior instances of the sexual behavior of an alleged victim.

**Abuse of Discretion Examples:** It was an abuse of discretion for the court to allow the admission of evidence never turned over to the defense at all and which essentially gutted the defense.<sup>35</sup> It was an abuse of discretion to allow the admission of withheld evidence when the withheld evidence prevented the defense from making an informed decision as to appropriate trial strategy; specifically, whether the defendant should testify.<sup>36</sup>

**Dismissal with Prejudice:** RCr 7.24(9) provides the remedies available to a court when the prosecution has failed in its discovery obligations. Subject to rare exceptions, a trial court has no authority to dismiss an indictment over the objection of the Commonwealth. Exceptions include violations of the right to a speedy trial, mistrials after jeopardy has attached, and misleading a grand jury.<sup>37</sup> Another exception is when the Commonwealth's refusal to comply with discovery obligations results in severe prejudice to the defendant.<sup>38</sup>

23. *LeGrande v. Commonwealth*, 494 S.W.2d 726 (Ky.1973).

24. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky.2006).

25. *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky.1993).

26. *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky.1995), overruled on other grounds.

27. *Lynn v. Commonwealth*, \_\_\_ S.W.3d \_\_\_, 2008 WL 4530901, Ky.App., October, 2008, unpublished. See also *Trigg v. Commonwealth*, \_\_\_ S.W.3d \_\_\_, 2015 WL 2340355 (Ky. 2015), in which the court reversed the conviction when the Commonwealth failed to disclose to the defense the defendant's oral incriminating statement, stating that "the prejudicial effect on the defendant of a sudden, mid-trial revelation of what is tantamount to a confession is manifest. Its propensity to undermine his prospects for a fair trial cannot be casually regarded or summarily dismissed."

28. *King v. Venters*, 596 S.W.2d 721 (Ky.1980), *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky.1996). "It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty." *King*, at 721. See also *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky.2009), for a full discussion.

29. *Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky.1986).

30. *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky.2008).

31. *Roviaro v. United States*, 353 U.S. 53 (1957).

32. *Giglio v. United States*, 405 U.S. 150 (1972).

33. *McBeath v. Commonwealth*, 244 S.W.3d 22 (Ky.2007).

34. Compare KRS 504.070.

35. *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky.2008).

36. *Grant v. Commonwealth*, 244 S.W.3d 39 (Ky.2008). See also *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky.2005), in which discovery violations impaired the defense ability to prepare a defense.

37. *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky.App.2000).

38. RCr 7.24(9); *Commonwealth v. Grider*, 390 S.W.3d 803 (Ky.App.2012).

## The Kentucky System in Actual Practice

While the rules above allow for adequate discovery in criminal cases, we are not seeing full and timely disclosure of prosecution evidence in practice. In September, 2015, the Department of Public Advocacy (DPA) sent out a survey of discovery practices in the Commonwealth to all DPA attorneys. There were over 50 immediate responses. What follows is a summation of major areas of agreement between the respondents.

**Form orders requiring automatic reciprocal defense discovery are routine.** 43% of responding DPA attorneys said form orders imposing automatic reciprocal discovery were routine in at least one of the jurisdictions he or she covered.

**For the most part, prosecutors are good about providing the discovery they have.** Few DPA respondents pointed to a practice of intentionally withholding discovery or fighting over whether to turn it over.

**Prosecutors too often do not monitor supplemental discovery still owed to the defense.** For the most part, defense counsel still has to analyze discovery to identify outstanding tape recordings, lab reports, incident reports, communications logs, photos, etc. While citations,

indictments, grand jury transcripts and plea offers are often provided in discovery at arraignment, any additional discoverable material usually has to be brought to the attention of the prosecution.

**Law enforcement too often does not turn over supplemental evidence without being requested to do so.** DPA respondents all agreed that the root of the problem with supplemental discovery is that too many prosecutors have no mechanisms in place to identify outstanding discovery or to require police to provide it.

**The defense too often receives huge amounts of discovery at the last minute when a case is going to trial.** It is common for prosecutors to be unaware of the additional discovery still available in a case until they themselves begin to prepare it for trial. The result is large “discovery dumps” on the defense in the days leading immediately to trial. The implication of this, of course, is that defense counsel and clients are making decisions whether to go to trial without having all the discovery in hand. This practice may often result in defense requests for continuance, leading to the inefficiency of the system as a whole.

### Here are some typical remarks summing up these points:

- [It] varies by circuit, but it is not unusual to find at or close to trial that the police have items that haven't been furnished to us per arraignment. Usually it is the officer's fault but the prosecutors don't ask diligently of them.
- The prosecutor has no idea that their duty may go beyond copying whatever the presenting officer brought to them at the grand jury. Despite a professed policy of open discovery and agreed orders that appear favorable, they do not appear to have their own discovery review policy that could avoid us having to request the CI information, lab results, photos, results of collected evidence... things that are listed in the report if anyone read [it] before stating they were providing “all of the discovery.”
- We have not uncovered any instances of intentional withholding of discovery by prosecutors, but we regularly encounter incomplete discovery in our cases. Officers are not turning over the complete file to prosecutors at the beginning of the case. A regular occurrence is for us to be bombarded with additional discovery in the weeks leading up to trial.
- The Commonwealth does not request things from the police or make sure they have everything in their file until right before trial. We then often end up getting surprise discovery at the last minute.
- I have to remind the Commonwealth Attorney on a regular basis about what discovery I am missing and what has not been provided.

**When asked to identify the biggest problems they have with getting discovery from the prosecution, here are some of the typical responses:**

- To the extent there are any concerns about information, the concerns extend to law enforcement only. I am not always confident that the officers are turning everything over to the prosecution.
- The officers provide minimal discovery to the prosecution and do not have a set practice of what should be required of their agency to deliver. Supplemental investigatory state agencies rarely provide the prosecution with their records.
- [T]he problem is that the discovery is still in the hands of the officers and has not been turned over to the prosecutors.
- The bigger problem is often the officer not getting it [to] the prosecutor.
- The prosecutors don't have it all and don't try to get it.

These survey responses show an obvious problem with routine discovery practice in Kentucky. It is obvious that the problem is not that prosecutors withhold discovery in their possession, the problem is that after an initial offering of discovery including routine charging documents and grand jury transcripts, the remaining discovery is never sought by prosecutors and law enforcement routinely does not offer it until and unless it is requested prior to going to trial.

## Recommendations

One answer to the problem is to ask judges to do more aggressive judicial monitoring of discovery compliance. Problems with discovery compliance in Kentucky are presently a huge source of inefficiency. Defense counsel request continuances they should not have to request, motions regarding the suppression of evidence supplied in an untimely manner are being made that should not have to be made. Pre-trial conferences have to be re-set when there has been no discovery provided to the defense.

The Kentucky Rules of Criminal Procedure as they stand *clearly* give judges this authority. Defense attorneys need to expedite this process by making a habit of routinely analyzing initial discovery and making early motions for supplemental discovery which the initial discovery indicates might be outstanding. In this way the matter can be brought to the attention of the court early in each case.

Moreover, the scheduling of trials and even pretrial conferences must be made with an eye to the procedural posture of the discovery in a case. Defendants and defense attorneys should not be pressured to make decisions about going to trial when the record reflects that all of the

discovery has yet to be turned over.<sup>39</sup> Likewise, deadlines for full prosecutorial compliance with discovery should be set and met prior to the scheduling of pretrial conferences and discussion of whether to take a plea offer.

In addition, judges should issue orders in every case placing the prosecution under an automatic obligation to promptly obtain all relevant and exculpatory evidence from all of its agents and to disclose such evidence in a timely manner, including impeachment evidence pertinent to prosecution witnesses. Unlike RCr 7.24, which requires a request or motion from the defense before the prosecution is obligated to disclose, the prosecution is obligated to disclose exculpatory material whether the defense requests it or not.<sup>40</sup>

Judges in Kentucky have the authority to make this streamlining possible. Yet there is a much simpler way to make this process much more automatic without requiring judges to enter into the minutiae of supervising the prompt and complete provision of discovery in every case.

39. For the constitutional right to discovery during plea bargaining, see Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, *NYU Rev. of L & Soc. Change*, vol. 38, no. 407, 2014.

40. *Commonwealth v. Bussell*, 226 S.W.3rd 96 (Ky. 2007), citing *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976). For a discussion of moving the court for an order based on the state Rule of Professional Conduct requiring the prosecution to provide exculpatory information, see Barry Scheck and Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, *The Champion*, May 2013, pp. 40ff.

## Informal Open File Discovery

Prosecutors sometimes inform the court and the defense that they have adopted a policy of “open file” discovery. There are published cases in Kentucky which suggest that when prosecutors do so, they may be held to discovery obligations broader than those imposed under the Kentucky Rules of Criminal Procedure.<sup>41</sup> Usually, though, adoption of an informal policy of open file discovery does nothing more than offer free access to only the evidence already in the personal possession of the prosecutor.

**“Though an open-file policy grants access to all material contained in the prosecution’s file, information must actually be in the file for the policy to have value.”** - 2015 DPA Survey Response

### Here are the main difficulties:

**It doesn’t solve the problem.** Informal open file discovery usually does not address the prosecutor’s obligation to identify and secure outstanding discovery which should be provided to the defense. It does not resolve the problem of the late provision of discovery just prior to trial. Many prosecutors adopting a policy of open file discovery act as if securing further discovery is no longer their obligation.<sup>42</sup>

**It shifts the burden to the defense.** Open file discovery usually operates to relieve the prosecutor of his or her obligation to provide prompt notification of the receipt of supplemental discovery under RCr 7.24(8). Instead, the burden often falls to the defense to monitor the file for any material added to it. For example, in *Berry v. Commonwealth*, the court seemed clearly to place the burden on the defense to monitor any additions to the prosecution’s file:

The record indicates that the prosecution provided Berry with open file discovery. The testimony showed that the photographs were in the file provided to Berry. There is no evidence that the Commonwealth deliberately withheld the photos and thus the discovery order was not violated.<sup>43</sup>

Open file discovery might even extend to requiring the defense to make its own copies of the contents of the files. The result is wasteful inefficiency. The defense attorney has to file and re-file numerous discovery inventories. The attorney has to send investigators or other staff to take the inventories so as to avoid making the attorney a witness should an issue arise. The defense never knows before making the trip to check the prosecution files whether the trip will be worthwhile.<sup>44</sup>

**“If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know?”**

- Hon. Alex Kozinski, “Preface: Criminal Law 2.0”

**It may deprive a defendant of options otherwise open to him in the Rules of Criminal Procedure.** For instance, does adoption of open file discovery mean the defense may not be entitled to a Bill of Particulars?<sup>45</sup> Can adoption of open file discovery affect whether the defendant might deserve a continuance of the trial? Can a policy of open file discovery affect whether a defendant can make a claim of “newly discovered evidence” in a postconviction claim?

41. *Barnett v. Commonwealth*, 763 S.W.3d 119, 123 (Ky. 1988). *Hicks v. Commonwealth*, 805 S.W.2d 144, 149 (Ky.App. 1980).

42. From the DPA survey: “Prosecutors who have ‘open file’ tend to rely on that and do little else, believing they have no affirmative duty to provide discovery.”

43. *Berry v. Commonwealth*, 782 S.W.2d 625, 627 (Ky. 1990), *overruled on other grounds*. From the DPA survey: “It puts the onus on the defense to constantly check the prosecutor’s file as new information may come in, rather than putting the onus on the prosecution, upon receipt of new information, to inform the defense.”

44. From the DPA survey: “It would be extremely time consuming, given our caseloads, to have to comb through a prosecutor’s file and copy pertinent information.”

45. *Williams v. Commonwealth*, \_\_\_ S.W.3d \_\_\_, 2003 WL 21511954 (Ky.App. 2003).

## Statutory Open File Discovery

What discovery reform advocates are usually talking about when they discuss open file discovery is a more uniform and formal type of open file discovery, codified in a statute, thus standardizing the process throughout the state. The salient features of this type of open-file discovery are the following:

- The statute or rule does not place the burden on the defense to monitor the progress of the prosecution file.
- The statute imposes a positive obligation on the prosecutor to collect all discoverable materials in each case and turn them over to the defense.
- This obligation is automatic. It is not triggered by any request or motion by the defendant.
- The obligation to turn over discoverable materials is statutorily extended to law enforcement and all other investigative agencies connected to each case. Law enforcement cannot wait to be asked for discovery from the prosecutor.
- A pre-existing ethical obligation to disclose exculpatory information becomes an explicit legal obligation. The prosecutor does not pick and choose what to disclose or withhold as exculpatory evidence.
- There are sanctions for omitting or misrepresenting discovery materials handed over to the prosecutor.

Obligating law enforcement as well as the prosecutor is important because informal open file discovery does nothing to address the real problem. As the Justice Project noted in 2007:

Though an open-file policy grants access to all material contained in the prosecution's file, information must actually be in the file for the policy to have value. As such, additional best practices should accompany an open-file policy, including but not limited to: explicitly requiring police officers to provide all investigative materials to prosecutors; requiring certain mandatory disclosures of particular items of central importance; and clearly defining the obligations of both parties in the discovery process.<sup>49</sup>

The ABA Model Rules of Professional Conduct, an ABA Formal Ethics Opinion, the National District Attorneys' Association National Prosecution Standards, and most importantly, the Kentucky Rules of Professional Conduct, all already hold prosecutors to automatic discovery of information which "tends to negate the guilt of the accused or mitigates the offense."<sup>50</sup> Nevertheless, there have always been two main problems with relying on the prosecution to voluntarily disclose exculpatory evidence. The first problem is that it is virtually impossible for either the defense or the courts to identify when the evidence exists and is being withheld.

Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it – and in most cases it will never be discovered.<sup>51</sup>

The second problem is that expecting prosecutors to decide what is exculpatory and should be turned over places prosecutors in conflicting positions. On the one hand they are expected to be zealous advocates, on the other they are expected to be truth seekers.

It is through the role of truth seeker that a prosecutor must relinquish his role as a zealous advocate and review the evidence in criminal cases with a mindset directed at identifying materials that will ultimately undermine his own case. Engaging in this type of mental gymnastics and role reversal is entirely counterintuitive to the role as advocate.<sup>52</sup>

46. *Abbott v. Commonwealth*, 882 S.W.2d 417 (Ky. 1992).

47. *McQueen v. Commonwealth*, 948 S.W.2d 415 (Ky. 1997).

48. Brady material is already automatically discoverable under Kentucky law. See Bussell, footnote 40, *supra*.

49. The Justice Project, *supra*, p. 4.

50. The language is virtually identical in each of these sources. See ABA Model Rules of Professional Conduct, Rule 3.8(d); ABA Formal Ethics Opinion 09-454; National District Attorney's Association, National Prosecution Standards § 53.5 (2nd ed. 1991) and § 2-8.4 (3rd ed. 2009); Kentucky Rule of Professional Conduct, Rule 3.8(c).

51. Hon. Alex Kozinski, "Preface: Criminal Law 2.0," 44 Geo. L. J. Ann. Rev. Crim. Proc. (2015), p. xxiii

Certainly this lies at the root of most prosecution failures to disclose exculpatory information. Perhaps, in an adversarial context such as ours, it is unrealistic to expect prosecutors to not be tempted in such a way. Statutory open file discovery not only legalizes the pre-existing ethical obligation to disclose but also solves the problem of relying on prosecutorial discretion. Open file discovery means automatic access to everything discoverable under the statute.

**“The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment.”** - Robert P. Mosteller, *Exculpatory Evidence*

The sanctions for failure to provide discovery are also an important part of statutory open file discovery: they provide the basis for legislative action. Discovery in Kentucky is currently controlled by rules of procedure promulgated by the Court of Justice. Procedural law is clearly and exclusively within the province of the judiciary. How, then, may the legislature adopt a statute governing discovery procedure without violating the separation of powers?<sup>53</sup> The fact that the statutes impose criminal sanctions for

noncompliance is what gives the legislature the authority to pass them. The creation of new criminal offenses is clearly substantive, rather than procedural, law – and the province of the legislature. Without the sanctions, the statute could possibly violate the separation of powers.

### The North Carolina Statute

North Carolina has an open file discovery statute that seems to be working well. Ninth Circuit Judge Hon. Alex Kozinski explains:

Require open file discovery. If the prosecution has evidence bearing on the crime with which a defendant is being charged, it must promptly turn it over to the defense. North Carolina adopted such a rule by statute after Alan Gell was convicted of murder and sentenced to death, even though the prosecution had statements of 17 witnesses who reported to have seen the victim alive after Gell was incarcerated – evidence that the prosecution failed to disclose until long after trial. Three years after its passage, the law forced disclosure of evidence

that eventually exonerated three Duke lacrosse players who were falsely accused of rape – and led to the defeat, disbarment and criminal contempt conviction of Durham District Attorney Mike Nifong. Prosecutors were none too happy with the law and tried hard to roll it back in 2007 and again in 2012, but the result was an even stronger law that applies not only to prosecutors but to police and forensic experts, as well it should.<sup>54</sup>

Robert Mosteller, commenting on the North Carolina experience, says, “The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment.”<sup>55</sup>

### The relevant North Carolina discovery statute, N.C. Gen. Stat. § 15A-903 (2010), reads:

- (a) Upon motion of the defendant, the court must order:
- (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.
    - a. The term “file” includes the defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall

52. Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, *The Champion*, May 2013, pp. 26 ff.

53. A ‘...constitutional violation of separation of powers occurs when the Legislature promulgates rules of practice and procedure for the Court of Justice or rules governing the appellate jurisdiction off this court.’ *Elk Horn Coal Corporation v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 423 (Ky. 2005).

54. Hon. Alex Kozinski, *supra*, p. xxvii.

55. Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, *Duke Law School Legal Studies Research Paper*, series no. 182, January 2008.

be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

b. The term “prosecutor’s office” refers to the office of the prosecuting attorney.

b1. The term “investigatory agency” includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor’s office in connection with the investigation of the crimes committed or the prosecution of the defendant.

c. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatory assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness.

d. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert’s curriculum vitae, the expert’s opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court. Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds.

(3) The prosecuting attorney to give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the prosecuting attorney certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(b) If the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.

(c) On a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor’s office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a). Investigatory agencies that obtain information and materials listed in subdivision (1) of subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor’s office on a timely basis for disclosure to the defendant.

(d) Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to subdivision (1) of subsection (a) of this section, or required to be provided to the prosecutor’s office pursuant to subsection (c) of this section, shall be guilty of a Class H felony. Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to any other provision of this section shall be guilty of a Class 1 misdemeanor.

(1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 759, ss. 1-3; 1983, Ex. Sess., c. 6, s. 1; 2001-282, s. 5; 2004-154, s. 4; 2007-183, s. 1; 2007-377, s. 1; 2007-393, s. 1; 2011-19, s. 9; 2011-250, s. 1.)

### **The North Carolina Statute Compared to the Kentucky Rules**

What is made discoverable by the statute does not substantially differ from the items already discoverable under the existing Kentucky Rules of Criminal Procedure. However, the minor differences could have a large impact on the efficiency and fairness of actual discovery practice. These differences include:

- Explicitly require automatic discovery of the complete files of any agent of the Commonwealth in any given case, including all law enforcement and investigative agencies;
- Explicitly impose an obligation on law enforcement and investigative agencies to turn over complete copies of all files to the prosecutor without having first being requested to do so;
- Provide for a consequence for omission or misrepresentation of the evidence.

Adoption of those provisions will go a long way in addressing the current, chronic problems with discovery in Kentucky.



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by Glenn McClister

Including Sections on:

Discovery in Constitutional Context

The Discovery System in Kentucky: On the Books and in the Caselaw

The Kentucky System in Actual Practice

Recommendations for Discovery Reform