

## Comments on Proposed Rules Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters

### CRIMINAL JUSTICE SECTION

CJS #3

June 5, 2017

To: John W. McConnell, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street - 11<sup>th</sup> Floor  
New York, New York 10004

The Criminal Justice Section of the New York State Bar Association submits the following comments with respect to the Proposed Rules Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters.

While criminal discovery is strictly regulated by statute CPL 240.20 and case law, the proposed Order will go a long way in establishing a reminder to prosecutors as to the “best practices” relating to timely disclosure of discovery, and their obligation to provide Brady material as soon as they become aware of it. The Order will also alert defense counsel as to their obligation to provide effective assistance to their clients. The Orders should not be used to sanction any counsel unless their conduct results in a deliberate and intentional violation of their discovery obligations, or their obligation to their clients.

The New York State Bar Association has longstanding policies in support of reform of the criminal discovery process and the establishment of effective assistance of counsel standards. NYSBA’s Reports on Wrongful Convictions and Discovery Reform clearly establish the rationale for these policies. In addition, the Committee on Mandated Representation has set forth minimum standards for defense counsel to follow in order to afford their clients effective representation. The Proposed Rules by establishing “best practices” in these areas should improve the practice of criminal law, and result in a fairer and more just criminal justice system.

The Criminal Justice Section, while generally supportive of the intent of the Proposed Rules, nonetheless specifically objects to the “presumptive” time periods set forth in the Proposed Rules. *Brady* material must be turned over immediately by prosecutors. Getting *Brady* 30 days before trial may very well prevent effective use of the material. Additionally, plea negotiations are conducted well before this time period and the prosecutor must turn over *Brady* when it becomes known and not rely on the “presumptive” date in the Proposed Rules. As all practitioners are aware, “trial dates” are moving targets and should not be the “measuring stick” for when discovery or statutory

notices are presumed to be “timely.” The one “known” date is the arraignment on the Information or Indictment. Any time periods should be measured from that date. The Excellence Initiative, which has been put in place in some counties, has caused trial dates to be advanced rather than delayed. Thus compliance with the 30 day presumptive period will be impossible. By measuring the “presumptive” time period from arraignment, all counsel will have guidance as to when to comply with their obligations.

The Criminal Justice Section would like to thank the Chief Judge and the Justice Task Force for undertaking a review of the issues relating to discovery and the role of counsel in criminal matters. As a Section composed of Judges, prosecutors and defense counsel, we are keenly aware of the difficulty in forming a consensus on such a complex issue.

Chair, Criminal Justice Section: Tucker Stanclift, Esq.

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**COMMITTEE ON CRIMINAL LAW**

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June 5, 2017

**By Email**

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New York, NY 10004

**RE: Comment by the Criminal Law Committee of the New York City Bar Association  
on the Proposed Model Orders Regarding Disclosure in Criminal Matters**

Dear Mr. McConnell:

The New York City Bar Association's Criminal Law Committee (the "Committee") recognizes and applauds the Administration's effort to create uniform minimum obligations and standards with respect to pre-trial disclosure. However, upon review, one provision in particular is troubling and the Committee urges modification.

Proposed Rule VII (9), while recognizing the statutory and constitutional obligation of a prosecutor to "timely disclose" favorable information (emphasis in the original), proceeds to declare that "disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case."

It is the opinion of practitioners in the Criminal Law Committee that this provision will have the unfortunate and unintended consequence of delaying disclosure of important favorable information beyond a time when it would be useful. (*Compare People v. Goins*, 73 NY2d 989 (1989), in discussing Rosario disclosures: "[A] witness's prior statement must be furnished to the defendant at a time when it can be useful to the defense.") See also *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (noting the importance of disclosure when "the defense [is] in a reasonable pre-trial position to evaluate carefully all the implications of that information" quoting *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974)).

Further, there is no authority for the proposition that a court must find delayed Brady disclosures "presumptively timely" when withheld until some days before commencement of

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Further, there is no authority for the proposition that a court must find delayed Brady disclosures "presumptively timely" when withheld until some days before commencement of

trial. A trial court, and a reviewing court, can and should be permitted to assess whether a Brady disclosure is timely based upon the individual factors in the case before it. The determination of timeliness cannot be stripped of judicial scrutiny by an administrative rule.

Rule 3.8 of the Rules of Professional Conduct requires timely disclosure. Nothing in that Rule authorizes delay to 30 days before trial and, more importantly, nothing in the Rule presumptively blesses such a delay.

To the contrary, the discovery statute, CPL 240.20 (1)(h); 240.20.80 (3), requires Brady disclosures within 15 days of demand...far in advance of trial. *See, People v. DeGata*, 86 NY2d 40 (1995) (describing the timeline for demanded materials under the statute).

Finally, as a practical matter, delay may well result in harsh and unjust results. As just one example, why should a defendant languish in jail for a year while the prosecutor is in knowing possession of exculpatory information only to be told that delayed disclosure was presumptively timely when given just 30 days before commencement of trial?

For all of the above reasons, the Committee recommends that proposed Rule VII (9) be modified to eliminate any reference to presumptiveness.

Respectfully submitted,

Monica Hickey-Martin  
Chair, Criminal Law Committee

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*By email and first class mail*

May 31, 2017

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New York, NY 10004

It is with great pleasure that the Innocence Project submits this letter in strong support of the proposed Model Standing Orders set forth in the recent Report on Attorney Responsibility in Criminal Cases issued by the New York State Justice Task Force.

The Innocence Project is a national legal services and criminal justice reform organization based in New York and affiliated with Cardozo Law School. While, the Innocence Project is not a formal, voting member of the Task Force, at the request of former Chief Judge Lippman and the initial co-chairs (including now-Chief Judge DiFiore), we have worked closely with the Chairs and members since its inception. Our work exonerating more than 100 wrongly convicted persons in New York and around the nation over the last twenty-five years has helped guide the Task Force's review of the underlying causes of wrongful convictions, and we have worked with the Task Force's members to propose workable, consensus-based solutions to prevent and rectify the systemic errors that contribute to the wrongful conviction of the innocent.

The proposed order at pages 15-16 of the Task Force's report (Model Order Directed to the Prosecution) is the result of one such effort. Nearly two years ago, the Innocence Project asked the Task Force to consider drafting and adopting such an order for use in New York Courts statewide. The proposal was grounded in our experience representing citizens wrongly convicted of serious crimes, in New York and nationally, whose wrongful convictions were caused in whole or in part by the failure of one or more state officials to timely disclose

exculpatory evidence to the defense. Some of these cases involved deliberate, knowing failures to disclose favorable evidence, in violation of the prosecution's legal obligations under *Brady* and the applicable ethics rules. In other cases, however, nondisclosures resulted from unintentional but nonetheless serious "system failure" – in which prosecutors were unaware of exculpatory material known to (or contained within the files of) other law enforcement agencies. In either case, we came to the conclusion that intentional wrongdoing might be effectively deterred and sanctioned – and, equally if not more important, unintentional failures to disclose could be prevented – by adoption of standing orders in the criminal trial courts that put prosecutors on detailed, specific notice of their obligations to seek out and timely disclose favorable evidence, and authorize sanctions in rare cases of intentional noncompliance.

The resulting Proposed Standing Order is the result of more than a year's worth of serious and thoughtful discussions by over a dozen core Task Force Members (including countless hours spent by certain members who comprised a subcommittee devoted to this issue). The result is a consensus-based proposal that incorporates the concerns and recommendations of experienced stakeholders from across New York State's criminal justice system.

Should the Administrative Board adopt the proposed order, it is no understatement to say that New York will not only make enormous strides towards ensuring the full and fair disclosure of exculpatory evidence, but will serve as a model for the rest of the nation. Indeed, while a handful of state and federal judges nationwide have adopted their own pretrial *Brady* orders, if this proposal is adopted, New York will become the first jurisdiction in the nation to adopt it across the board.

A few specific aspects of the proposed standing order are worth emphasizing. First, while the proposed order will permit a court to impose sanctions or take other appropriate action for willful and deliberate violations, the primary purpose and effect will be prophylactic. That is, the Order's detailed provisions put prosecutors on notice of exactly the types of favorable material they have a duty to seek out and disclose in a timely fashion under current law; the law on what constitutes favorable evidence can be difficult for less experienced prosecutors to master and retain, and several judges on the Task Force who are themselves former prosecutors commented that they wished they had the benefit of such a detailed "road map" for their legal and ethical obligations when they began their own careers. Second, it is also our hope that the issuance of this order will give judges and defenders a tool to keep the required discovery and disclosures on track as a case proceeds, and to ensure that prosecutors prioritize this critical task as they prepare a case. Third, the Task Force was careful to write the order in such a way that it does not change existing law, either as to the substance or timing of disclosures. Each of the specific requirements cited and procedures invoked are directly rooted in case law from the United States Supreme Court, the courts of the Second Circuit, and/or the New York Court of Appeals. Fourth, the proposed standing order contemplates that judges may also order the prosecutor to inspect relevant law enforcement files, not just the prosecutor's file. This is an extremely important protection. In many of our exoneration cases the most important and

obvious Brady material was in homicide, robbery, or narcotics police files that were not in the possession of the prosecutor. Timely inspection of such files will surely prevent wrongful convictions and help apprehend the guilty.

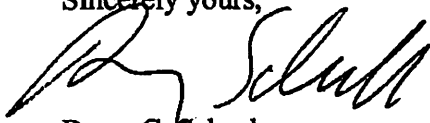
For these reasons, we strongly urge the Administrative Board to adopt the proposed order as written and submitted by the Task Force. The precise language chosen for each of its provisions was the result of many months of extensive discussion, negotiation, and compromise. During that time, a number of provisions that the Innocence Project and defender representatives had pushed to include were deleted or modified, and the same holds true for other members. As a result of this give and take, many Task Force members who expressed initial concerns about the scope and impact of the proposed order have come to support the proposal in the form adopted by the full Task Force. *See, e.g.,* Jeff Storey, *Comments Sought on Model Orders for Disclosure in Criminal Cases*, New York Law Journal, May 10, 2017 (quoting statement of Thomas Zugibe, president of the New York State District Attorneys Association, that the Association had initial concerns about the proposed order early in the process, but “‘fully embraced’ its final product.”)

Finally, the Innocence Project wishes to add our voice to those included in the broad consensus on the Task Force in favor of adoption of the proposed model order directed to the defense community (page 17 of the report). Like the model order directed to the prosecution, this new standing order will not in any way change existing law, but will serve as a useful and detailed reminder to defense counsel about their most fundamental constitutional obligations to provide effective representation for their clients. It will also aid defenders in ensuring their compliance with notice and discovery obligations, which, in tandem with the standing order directed to prosecutors, will result in a more robust and effective exchange of information by both sides at all stages of a criminal case.

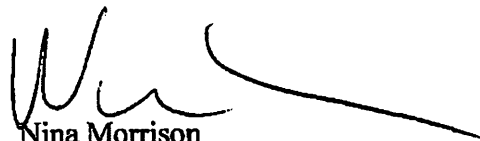
As educators who have taught students who became prosecutors and defense lawyers for decades, and as participants in training programs run by both district attorney and defender offices, we are certain that the proposed model orders directed at both prosecutors and defense counsel will have an immediate and beneficial impact. Fair trials arise not just from good intentions, but good habits and practical systems that promote compliance.

Thank you in advance for your consideration.

Sincerely yours,



Barry C. Scheck  
Co-Founder and Co-Director



Nina Morrison  
Senior Staff Attorney





MEMORANDUM

April 6, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Model Orders Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters

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The Administrative Board of the Courts is seeking public comment on two proposed model standing orders, proffered by the New York State Justice Task Force in its recent Report on Attorney Responsibility in Criminal Cases (Exh. A), addressing disclosure obligations of prosecutors and defense counsel in criminal matters.

1. The proposed order addressing prosecutorial obligations, to be issued after defense counsel makes a written demand pursuant to CPL 240.10(1) and 240.20 (unless the prosecution waives the need for such a demand), would direct prosecutors to make timely disclosure of information known to the government and favorable to the defense as required by federal and state law and attorney rules of conduct. Among its provisions, the draft order specifies several (nonexclusive) categories of favorable information subject to disclosure. It also addresses the timing of disclosure and provides that only "willful and deliberate conduct" may constitute a violation of the order "or be eligible to result in personal sanctions against a prosecutor" (Exh. A, pp. 7-8; 15-16).
2. The proposed standing order addressing defense obligations directs defense counsel "to comply with the defendant's statutory notice obligations" and is designed to "ensure constitutionally effective representation." It sets forth a number of specific disclosure and representation obligations required under state and federal law (Exh. A, pp. 8-9, 17).

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Persons wishing to comment on the proposed model standing orders should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 5, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

**EXHIBIT A**



New York State Justice Task Force

# Report on Attorney Responsibility in Criminal Cases

February 2017

## **Justice Task Force Recommendations**

February 2017

### **Background on New York State Justice Task Force**

The New York State Justice Task Force (the “Task Force”) was convened on May 1, 2009 by former Chief Judge Jonathan Lippman of the New York Court of Appeals and was continued by current Chief Judge Janet DiFiore after her confirmation by the New York State Senate on January 21, 2016. The Task Force’s mission is to eradicate the systemic and individual harms caused by wrongful convictions, to promote public safety by examining the causes of wrongful convictions, and to recommend reforms to safeguard against any such convictions in the future.

The Task Force is chaired by Carmen Beauchamp Ciparick, former New York Court of Appeals Senior Associate Judge, and Mark Dwyer, Acting Justice of the New York Supreme Court, Criminal Term, and Judge of the New York Court of Claims. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts, and victims’ advocates. The differing institutional perspectives of the Task Force members allow for thorough consideration of the complex challenges presented by wrongful convictions and the evaluation of recommendations to prevent them in the future, while also remaining mindful of the need to maintain public safety.

Since its inception, the Task Force has focused its efforts on identifying and eliminating the principal causes of wrongful convictions. Its recommendations have included expansion of the New York State DNA databank, expansion of post-conviction access to DNA testing and databank information, the electronic recording of custodial interrogations, the implementation of best practices for identification procedures, greater access to forensic case file materials, criminal discovery reform, and the use of root cause analysis of prior incidents to prevent future wrongful convictions. Individual Task Force members also have been proactive in their respective roles in the criminal justice system in implementing new measures to safeguard against wrongful convictions.

### **Executive Summary of Report Regarding Attorney Responsibility in Criminal Cases**

Over the past 15 months, the Task Force has turned its attention to the issue of attorney responsibility in the criminal context. Specifically, the Task Force considered the extent to which attorney misconduct may lead to wrongful convictions, along with possible recommendations that the Task Force might make to address such misconduct or the perception (whether right or wrong) of such misconduct. From the outset, the Task Force focused on how to address misconduct by both prosecutors and defense counsel, as both parties’ conduct can lead to wrongful convictions.

A component of attorney responsibility is attorney discipline, which has been addressed in New York State in various capacities by a number of different entities in recent years. In 2009, for example, the New York State Bar Association’s Task Force on Wrongful Convictions published a report that addressed one component of attorney discipline in the criminal context: prosecutorial misconduct.<sup>1</sup> Most recently, former Chief Judge Lippman created the Commission on Statewide Attorney Discipline, which conducted a comprehensive review of New York’s attorney disciplinary system. The Commission issued a report in September 2015 offering recommendations to enhance the efficiency and effectiveness of the attorney discipline process.<sup>2</sup>

Though the topic of attorney discipline has been studied, the Task Force recognized that there continues to be a dearth of statistics and raw data on the prevalence of attorney misconduct in the criminal context and on the potential contribution of such misconduct to wrongful convictions.<sup>3</sup> Nonetheless, the Task Force discussed the fact that there may be a public perception that attorney misconduct—particularly prosecutorial misconduct—is, in fact, a significant contributor to wrongful convictions.

Beginning in October 2015, the Task Force hosted presentations from academics, representatives of the Appellate Division of the Supreme Court, and representatives of the Commission on Statewide Attorney Discipline on the subject of attorney responsibility and discipline in the criminal context. In December 2015, the Task Force created a subcommittee to examine the issue in greater depth. The subcommittee discussed a number of possible reforms, taking into account existing reports on attorney misconduct, including the Commission’s September 2015 report, proposed legislation, and proposals from the Legal Aid Society, the Innocence Project, the District Attorneys’ Association of the State of New York (“DAASNY”), individual New York State judges, and various other entities and individuals. The subcommittee also reviewed case law, news articles, and commentary for additional context on the issue.

After four full Task Force meetings,<sup>4</sup> six subcommittee meetings,<sup>5</sup> and a number of additional meetings of a smaller subgroup, the 21 voting members of the Task Force achieved consensus on the majority of the recommendations considered, in many cases reaching

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<sup>1</sup> New York State Commission on Statewide Attorney Discipline, “Enhancing Fairness and Consistency[,] Fostering Efficiency and Transparency,” September 2015, *available at* <https://www.nycourts.gov/attorneys/discipline/> (hereinafter, “Commission on Statewide Attorney Discipline Report”).

<sup>2</sup> As a result of those recommendations, the four Departments of the New York State Supreme Court, Appellate Division, adopted new, uniform, statewide rules to govern New York’s attorney disciplinary process, which provide for a harmonized approach to the investigation, adjudication, and post-proceeding administration of attorney disciplinary matters. *See* Part 1240 of the Rules of the Appellate Division (22 NYCRR Part 1240) (effective July 2016).

<sup>3</sup> While the Commission on Statewide Attorney Discipline did not focus specifically on criminal matters, it did briefly address the issue of “prosecutorial misconduct,” including the possibility of having a separate disciplinary mechanism specifically dedicated to such matters. *See* Commission on Statewide Attorney Discipline Report, at 75. Ultimately, the Commission recommended that judicial determinations of prosecutorial misconduct be promptly referred to disciplinary committees and that each Department should track and record such matters “with a view toward generating annual statistical reports.” *Id.* The Commission also noted that a distinction should be made between good-faith error and any “unethical or malicious” behavior. *Id.*

<sup>4</sup> The Task Force meetings occurred on October 19, 2015, November 13, 2015, October 21, 2016, and November 4, 2016.

<sup>5</sup> The subcommittee meetings occurred on December 14, 2015, January 28, 2016, April 7, 2016, June 13, 2016, June 21, 2016, and July 16, 2016.

unanimous or near-unanimous agreement. The diverse perspectives and relevant backgrounds of the subgroup, subcommittee, and Task Force members proved critical to these recommendations.

As discussed in greater detail below, and as enumerated at Appendix A, the Task Force agreed on a series of recommendations concerning: (1) use of the term “misconduct,” (2) reporting of attorney “misconduct,” (3) the grievance process, (4) data collection and statistics, (5) the role of the judiciary in making referrals for disciplinary review, and (6) training. In addition, the Task Force recognized that prosecutorial error in the *Brady* context, as well as failure of defense counsel to adhere to their professional obligations, has the potential to contribute to incidents of wrongful convictions. After a great deal of discussion, the Task Force agreed to the groundbreaking recommendation that all New York State trial court judges should issue an order at the outset of criminal cases regarding the obligation of prosecutors to make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 (1963), *Giglio v United States*, 405 US 150 (1972), *People v Geaslen*, 54 NY2d 510 (1981), and their progeny under the United States and New York State constitutions, and under Rule 3.8(b) of the New York Rules of Professional Conduct. The Task Force similarly recommended that all New York State trial court judges issue an order directing criminal defense counsel to comply with the defendant’s statutory notice obligations and help ensure constitutionally effective representation.

## **Recommendations Relating to Attorney Responsibility in Criminal Cases**

### **I. Use of the Term Misconduct**

At the outset, the Task Force spent significant time discussing its view that the terms “misconduct” and, in particular, “prosecutorial misconduct,” are too often used without sufficient regard to their meaning and connotations. The overbroad use of the term “misconduct” can create the perception that any time an error is made, regardless of whether that error was intentional or a mistake made in good faith, there has been malfeasance. Accordingly, the Task Force recommended that when discussing attorney misconduct, courts, the press, and academics be conscious of the distinction between good-faith error and intentional wrongdoing. In particular, the Task Force recommended that the terms “prosecutorial misconduct” and “defense counsel misconduct” be reserved for instances where a prosecutor or defense attorney engages in conduct—including a pattern or practice of behavior—that violates a law, ethical rule, or standard, either with the intent to do so or with a conscious disregard of doing so, and where there is no good-faith reason for having done so. In a similar vein, trial and appellate courts, wherever possible, should distinguish between good-faith error and prosecutorial or defense counsel misconduct in written opinions and provide clear guidance regarding the specific attorney conduct that has been deemed improper, in order to enable practitioners to avoid such conduct in the future.

## **II. Encouraging Reporting of Attorney Misconduct**

The Task Force identified an apparent perception in the literature and in the media that misconduct—particularly by prosecutors—is underreported. In order to address this perception, the Task Force discussed ways to encourage both practitioners and judges to report potential misconduct with greater frequency, and ultimately, made recommendations to achieve that end.

Currently, New York State Rule of Professional Conduct 8.3(a) only requires a lawyer to report misconduct where that lawyer “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer. . . .” (emphasis added). The Task Force discussed that many attorneys use this standard as a threshold, only reporting potential misconduct if they firmly “know” that there has been a violation. This has the potential to result in underreporting, as it is difficult to “know” for certain that a violation has occurred. Instead of basing the decision regarding whether to report solely on Rule 8.3(a), the Task Force recommended that lawyers (including District Attorneys’ offices and institutional defense providers) and judges be encouraged to report misconduct, regardless of whether it is required, in situations where a lawyer or judge knows or is aware of a high probability based on credible evidence that another lawyer has engaged in misconduct.

Further, to the extent that they have not already done so, it is recommended that District Attorneys’ offices and institutional defense providers develop clear, written internal procedures regarding how allegations of error and misconduct against lawyers on their respective staffs will be processed and reviewed. Moreover, these institutions should develop such procedures explaining how corrective actions (whether individual or office-wide), if appropriate, will be implemented. The Task Force also recommended that District Attorneys’ offices and institutional defense providers maintain internal procedures regarding when to refer or report misconduct (whether that of their own lawyers or other lawyers) to the appropriate disciplinary authorities. District Attorneys’ offices and institutional defense providers also are encouraged to make these written procedures publicly available.

Finally, the Task Force believes that it is important that members of the public understand the role of Grievance Committees and how to report misconduct. The Task Force therefore recommended that Grievance Committees disseminate information to the public explaining their function and practice, and the procedures for filing a complaint.

## **III. Grievance Process**

A question that has been the subject of much discussion and study, including by the Commission on Statewide Attorney Discipline, is whether there should be a separate body (either within or apart from the established Grievance Committees) specifically designated to consider allegations of prosecutorial or defense counsel misconduct. Proponents of a separate body argue that investigating potential misconduct in the criminal context requires specialized knowledge

that the current Grievance Committees lack. However, others believe that a separate body is unnecessary and that it would be more efficient and achievable to make improvements within the already-established grievance process. The Task Force ultimately agreed with the latter view, determining that the existing Grievance Committees should take certain steps to ensure that they are equipped to handle criminal justice matters.<sup>6</sup>

In particular, the Task Force recommended that Grievance Committees include active practitioners from both the prosecution and defense bars who have substantial experience and expertise in the criminal justice system. Moreover, all Grievance Committee members should be provided with specialized training on the standards relating to criminal matters. It is also important that investigations be undertaken where a finding of attorney misconduct has been made in a court decision. Such findings may include prosecutorial misconduct or ineffective assistance of counsel. Accordingly, to the extent that they are not currently doing so, the Grievance Committees should proactively review available court decisions where such a finding has been made. Additional dedicated funding and staff should be allocated to undertake this effort as needed.

#### **IV. Data Collection and Statistics**

As indicated, there currently is a public perception that misconduct (particularly prosecutorial misconduct) is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined. However, there is a dearth of statistics in support of such propositions. Recognizing the work already being done by the Office of Court Administration and the Grievance Committees to collect data and statistics about attorney discipline generally, the Task Force made recommendations regarding data collection in the criminal context that would fit within and improve upon the existing framework.

First, it is important that the data collected by the Office of Court Administration and Grievance Committees include details that allow prosecutors, defense lawyers, and the public to better understand the nature of the matters being reported and whether there are discernable trends that should be addressed through training or otherwise. This data should include the type (e.g., prosecutorial or defense counsel misconduct), nature (e.g., discovery-related), and number of complaints received and reviewed, and resulting determination, if any. Data should be aggregated and analyzed, and statistics should be published.

Further, the Grievance Committees should publish annual reports that aggregate data about the number of grievances filed against prosecutors and criminal defense attorneys and the outcomes of those allegations. These reports should provide information about the types of allegations that have been substantiated and should include recommendations, where appropriate, for new or additional training, supervision, or practices based on the Grievance Committees' review of these matters.

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<sup>6</sup> See *supra* note 2.



The Task Force also discussed how to ensure that District Attorneys' offices and institutional defense providers are made aware when someone on their staff has been referred to the Grievance Committee for potential misconduct. In considering this issue, Task Force members determined that it was important to distinguish between requiring notification of an allegation (which may be frivolous or unsubstantiated) and requiring notification of actual Grievance Committee investigations. To this end, the Task Force recommended that, to the extent that they do not already do so, District Attorneys' offices and institutional defense providers require staff to notify their supervisors when they become aware that a Grievance Committee has commenced an investigation into their conduct. Staff should also notify their supervisors when they become aware that a Grievance Committee has made a determination following an investigation.

#### **V. Role of Judiciary in Making Referrals**

As discussed, the Task Force focused on the perception that attorney misconduct is underreported. Recognizing that the judiciary can play an important role in the referral of prosecutors or criminal defense lawyers for disciplinary review, the Task Force recommended that judges receive training on the standards and processes for referring attorneys for disciplinary review. Further, judges should be encouraged to promptly refer to the appropriate Grievance Committee all matters in which a judicial finding of prosecutorial or criminal defense counsel misconduct has been made.

#### **VI. Training**

The Task Force concluded that education and training are fundamental to achieving compliance with applicable rules and standards. To the extent that they do not already do so, prosecutors and institutional defense provider attorneys should receive training, both at the outset of employment and periodically thereafter, with respect to their ethical and other obligations. The content of these training programs should be updated as needed to reflect recent case law, ethical opinions, new technology and research, as well as to address any areas of needed improvement identified by internal supervision, courts, or the Grievance Committees. The New York Prosecutors Training Institute ("NYPTI") should receive and review any report issued by the Grievance Committees and incorporate the recommendations into NYPTI's various educational programs and statewide bulletins. Furthermore, solo practitioners should be given the opportunity to receive similar training through free Continuing Legal Education ("CLE") courses.

District Attorneys' offices and institutional defense providers should also work together to foster a culture of openness, transparency, and shared learning. They should meet on a regular basis to discuss issues and concerns regarding the Rules of Professional Conduct, best practices on difficult practice points, lessons learned from internal and external allegations/investigations,

and when referrals should be made. In addition, offices should be encouraged to share their internal protocols with each other.

Finally, the Grievance Committees should meet periodically with representatives of the local prosecution and the criminal defense bar to provide an overview of the types of allegations they are receiving and alert these representatives to areas of law or practice where additional training or supervision is needed.

## **VII. Order Regarding Disclosure Obligations for Prosecutors**

Building from its recommendations regarding education and training, the Task Force also considered whether it would be helpful for trial courts to issue a standing order in criminal cases regarding the prosecution's obligation to make timely disclosures of favorable information to the defense pursuant to federal and state constitutional and ethical rules. As noted, *Brady* violations can lead to wrongful convictions. The Task Force has discussed this link between *Brady* violations and wrongful convictions in the past, including in its July 2014 Report on Recommendations Regarding Criminal Discovery Reform. That report noted that additional recommendations relating to *Brady*, including with respect to the training of prosecutors, should be considered.

To this end, Task Force members generally agreed that a form document issued by trial courts regarding prosecutors' disclosure obligations would serve as a useful educational tool; however, there was significant debate regarding whether such document should be framed as an order or instead as a notice or reminder. Proponents of an order contended that an order would create a culture of disclosure, educate inexperienced prosecutors, serve as a reminder for more experienced prosecutors regarding their disclosure obligations, and ensure that judges have an ability to enforce compliance with disclosure requirements. Proponents of a notice or reminder (rather than an order) expressed concern that adopting an order had the potential to criminalize disclosure mistakes by prosecutors and undermine the existing attorney disciplinary structure.

Ultimately, the Task Force recommended that courts issue an order directing the prosecuting authority to disclose all covered materials and that such order should be directed to the District Attorney and the Assistant responsible for the case. The order should be issued by trial courts upon defendant's demand at arraignment on an indictment, prosecutor's information, information, or simplified information (or, where either the People or counsel for the defendant is not present at the arraignment, at the next scheduled court date with counsel present).

The Task Force drafted a model order for use by trial courts, attached hereto as Appendix B. This model contains certain key features that the Task Force agreed are necessary to ensure both that the order serves an educational purpose and that it encourages a culture of compliance, as intended. Its key provisions include the following:



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Seymour W. James, Jr.  
*Attorney-in-Chief*

June 5, 2017

*By e-mail to John W. McConnell, Esq., Counsel, Office of Court Administration  
rulecomments@nycourts.gov*

**Comment By The Legal Aid Society on Proposed Model Orders Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters**

The Legal Aid Society supports the Administration's proposal to establish uniform model standing orders with respect to pre-trial disclosure obligations of prosecutors and professional obligations of defense attorneys. These orders would be helpful for educating and reminding lawyers about their responsibilities, they would give judges a useful tool to ensure compliance, and they would encourage disclosure of favorable information to defendants.

But we urge modification of one key provision in the proposed model order for prosecutors. That order currently states in relevant part: "Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. *Disclosures are presumptively 'timely' if they are completed no later than 30 days before commencement of trial* in a felony case and 15 days before commencement of trial in a misdemeanor case . . ." (emphasis added).

As phrased, this "presumption of timeliness" improperly conveys to prosecutors that it would be proper to delay disclosing known favorable information until 30 days before the trial, rather than turning it over more expeditiously. That will perversely help to bring about the very kinds of constitutional, statutory and ethical violations that the model order seeks to avert.

As you are aware, under *constitutional* standards, *Brady* information must be disclosed "in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously." See *U.S. v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007); *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987). Under *statutory* standards, given that materially exculpatory information is required to be disclosed "prior to trial" pursuant to the constitution, the statutory scheme directs that the prosecutor must disclose it within 15 days of the defense's discovery demand or as soon thereafter as practicable. See C.P.L. §§240.20(1)(h), 240.80(3). Under *ethical* standards, according to the leading New York State ethics opinion interpreting R.P.C. Rule 3.8(b), favorable information known to a prosecutor must be turned over "as soon as reasonably practicable." See New York City Bar Association, Professional Ethics



Committee, “Formal Opinion 2016-3.” None of these standards is consistent with a “presumption of timeliness” when favorable information is withheld until 30 days before trial.

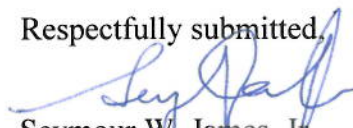
Our experience as New York City’s primary public defender has been that frequently it takes longer than 30 days to reasonably investigate exculpatory leads in *Brady* disclosures. These investigations often include time-consuming steps such as searching for a witness; finding an expert witness and obtaining a report; and even arranging to meet with our own incarcerated clients to obtain their input on *Brady* information and investigations can take days – all while the defense attorney simultaneously juggles the demands of a large case load. In this context, for judges to tell prosecutors that normally it will be acceptable and safe for them to wait until 30 days before the trial to turn over even known *Brady* information is both inaccurate and dangerous. It will encourage violations of constitutional *Brady* standards, which, again, guarantee that defendants must be given enough time to perform reasonable investigations. *See Leka v. Portuondo*, 257 F.3d 89, 100-03 (2d Cir. 2001). Likewise, it will perniciously mislead prosecutors into thinking that it is proper to violate the statutory (15 days from demand) and ethical (as soon as reasonably practicable) time frames.

We recognize, of course, that the proposed model order simply establishes a “presumption,” and it allows defendants to argue that the presumption was rebutted because constitutional and statutory standards were violated. But it is unwise for the courts to promote needless violations and litigation. Even when the defense is able to rebut the presumption, the disclosure error still will have occurred and the result may be more delays. For defendants languishing in jail while exculpatory information known to a prosecutor needlessly is withheld due to a miscalculation, it is no comfort that the court will permit additional adjournments.

We believe the best response to the problem is *not* to simply strike out the presumption language, so that the order only generically direct prosecutors to “comply with constitutional and statutory standards.” That would provide no guidance on this crucial issue, vitiating the principal purpose and benefit of having a model disclosure order. Instead, we suggest that the order be modified to direct that prosecutors must complete their disclosures “*as soon as is reasonably practicable and no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case.*” Alternatively, at minimum, the order should be modified to create a *presumption of untimeliness if information is disclosed less than 30 days before trial* (rather than a presumption of timeliness if information is disclosed more than 30 days before trial). That would at least stress the risks that a prosecutor takes by delaying, rather than providing an affirmative invitation to delay.

Thank you for inviting and considering our input on this important matter.

Respectfully submitted,



Seymour W. James, Jr.  
Attorney-In-Chief



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June 2, 2017

John W. McConnell, Esq.  
Counsel  
Office of Court Administration  
25 Beaver St., 11th Floor  
New York, NY 10004

Re: *Model Orders*

Dear Mr. McConnell:

I am the Director of The Reinvestigation Project at the Office of the Appellate Defender, a provider of post-conviction representation for indigent individuals convicted of felonies in Manhattan and the Bronx. I am writing to express support for the two model standing orders recently proposed by the New York State Justice Task Force. These orders address two extremely serious problems that can undermine the legitimacy and fairness of criminal prosecutions in New York: *Brady* violations by prosecutors, and ineffective representation by defense counsel.

Especially commendable is the model order's expansive definition of what constitutes favorable information under *Brady* and its progeny. The model order specifies that is not just clearly exculpatory information that *must* be disclosed, but also, information that would impeach the credibility of a prosecution witness or would undermine evidence of the defendant's identity as a perpetrator.

Critical too is the model order's explicit instruction that favorable information must be disclosed even when it is not written down or otherwise recorded, and whether or not the prosecutor credits the information. This emphasizes that a prosecutor's *Brady* obligations are distinct and separate from their obligations under *People v. Rosario*. In other words, the order makes clear the prosecutor's disclosure obligations do not hinge on whether the information is recorded in tangible form.

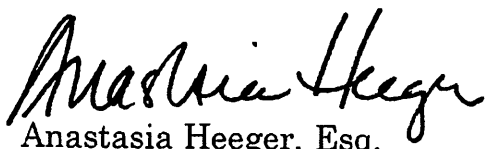
Finally, the model order's timeliness guidelines will give some structure to what is now an inconsistent discovery process that can often rest on an individual prosecutor's personal practice and discretion.

Also, the model order as to defense counsel's obligations is an important step to improving legal representation in criminal proceedings. In particular, the order's explanation of what "reasonable investigation of both the facts and the law pertinent to the case" is an important reminder that effective representation begins long before *voir dire*. Likewise, the model order's guidance on attorney conflicts, and an attorney's need to be sufficiently familiar with criminal procedural and evidentiary law, is worth emphasis.

At bottom, the beauty and genius of these orders is that they distill the holdings and standards of decades of case-law into practical and clear direction to prosecutors and defense attorneys. Frequent and consistent reminders of the obligations of *all* the parties in the criminal justice system should go a long way in helping to ensure that criminal proceedings are fair and just. That should be a goal that we all agree on.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Anastasia Heeger". The signature is written in black ink and is positioned above the typed name.

Anastasia Heeger, Esq.  
Director, The Reinvestigation Project



# **New York State Defenders Association, Inc.**

## ***Public Defense Backup Center***

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To: John W. McConnell, Counsel, Office of Court Administration  
From: Jonathan E. Gradess, Executive Director  
Re: Comments on Proposed Model Orders Regarding Disclosure Obligations  
of Prosecutors and Defense Counsel in Criminal Matters  
Date: June 5, 2017

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Please accept these comments by the New York State Defenders Association<sup>1</sup> (NYSDA) on the Proposed Model Orders Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters.

**Introduction: NYSDA supports efforts to ensure compliance with ethical and legal obligations by lawyers in the judicial system to help prevent wrongful convictions and other harm.**

While directing its comments solely to the two proposed model orders, NYSDA notes that they were first proffered in the "Report on Attorney Responsibility in Criminal Cases" issued in February 2017 by the New York State Justice Task Force (JTF). The JTF's "mission is to eradicate the systemic and individual harms caused by wrongful convictions, to promote public safety by examining the causes of wrongful convictions, and to recommend reforms to safeguard against any such convictions in the future." These comments assume that the proposed model orders are to be read with that mission in mind.<sup>2</sup>

NYSDA, on behalf of all criminal defense clients and their lawyers, has an interest in the courts taking action to ensure prosecutors timely divulge all information necessary to providing a proper defense. Prosecutors, unlike most litigators, have a duty to seek justice, as is reflected in standards<sup>3</sup> and caselaw.<sup>4</sup> Their job is not merely to pursue victory against an accused. Even without these proposed orders, courts should rightly act to enforce that duty. The proposed model order directed to the prosecution may constitute a laudable step in ensuring prosecutorial compliance once certain language is changed to conform to existing law.

**I. Disclosure obligations imposed on prosecutors are vital to preventing wrongful convictions and ensuring due process; the model order directed to the prosecution should underline, not undermine, those obligations.**

***I.A. The order should issue when disclosure obligations begin.***

Prosecution responsibilities under Rule of Professional Conduct (RPC) 3.8(b) apply from the commencement of the criminal action,<sup>5</sup> not just upon the "indictment, prosecutor's information, information, or simplified information" referred to in the proposed model order. Prosecutors must make "timely disclosure ... of the existence of evidence or information" tending to negate guilt or mitigate the offense.<sup>6</sup> Therefore, the order should be issued at the earliest point possible after the action is commenced, which in many New York State jurisdictions is at arraignment on the initial

accusatory instrument. If no attorney is present, or if defense counsel but not the prosecution is present at the arraignment on the initial accusatory instrument,<sup>7</sup> the order directed to the prosecution should be issued by the court and directed to the District Attorney or the prosecuting agency and later updated to include the specific attorney responsible for prosecuting the case when that attorney makes an appearance.

Prosecutorial disclosure obligations begin before a written demand for discovery is made under Criminal Procedure Law (CPL) 240.20 and 240.80. Prosecutors are constitutionally required to disclose evidence even without a specific defense request when "omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."<sup>8</sup> Therefore, issuance of the model order directed to the prosecution should not be conditioned on a demand by defense counsel for statutory discovery.

Many defense decisions must be made at arraignment—what plea to enter, how to expend finite resources if choices must be made about securing pretrial release, and which investigative or other steps to take next. The perceived strength of the prosecution's case affects these decisions, so constitutionally required disclosure of favorable information known at arraignment must be made then. And certainly, as others commenting on these orders have noted, disclosure of CPL 240.20 and *Brady* material should come before a court can accept a guilty plea, to ensure knowing and voluntary pleas and prevent wrongful convictions.

***I.B. The model order directed to the prosecution should not curtail existing disclosure obligations.*** Like others commenting on the proposed orders, NYSDA strongly objects to this language in the proposed prosecution order: "[d]isclosures are presumptively 'timely' if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case." This can actually countenance greater delay in disclosure, as it directly conflicts with the disclosure timing set forth in CPL article 240, which requires disclosure of some discovery—*Brady* material—within 15 days of the defense demand.<sup>9</sup>

***I.C. Sanctions for violating the order directed to the prosecution do not replace nor restrict other existing sanctions.***

The proposed model order states that "[o]nly willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor." This should not be read to limit the range of other sanctions for failure to comply with disclosure requirements, such as those in CPL 240.70. And sanctions are always available to the courts for violation of the Rules of Professional Conduct. Implementation of the model order should not be viewed as affecting the right of defense counsel to seek, and the court to consider, sanctions related to nondisclosure of specific information in a given case.

***I.D. The proposed model order directed to the prosecution is but one of many steps necessary to ensure the defense receives necessary information.***

Issuing and enforcing the model order directed to the prosecution, with the changes noted above, can be an important step in ensuring justice. It will not, alone, be sufficient. Broader reforms discussed later in these comments are also needed. Furthermore, unless the model order is given actual effect, with courts requiring prosecutors to meet its requirements, this order will be no more than another citation in the string cite of authority with which offending prosecutors repeatedly fail to comply.



**II. The proposed model order directed to defense counsel could lead to improper judicial interference in the client-attorney relationship; contains a list of obligations that is not comprehensive; and contains disclosure obligations that raise constitutional questions.**

***II.A. Efforts to enforce the proposed model order directed to defense counsel would involve improper judicial interference in the client-attorney relationship.***

The model order directed to defense counsel is intended to call attention to certain obligations but does not, as set out in Appendix C of the JTF report, order counsel to take specific action. However, Section VIII of that report, at pages 13-14, *does* say that the model order "should be phrased as an order, which should direct the defense counsel to comply with defendant's statutory notice obligations and to help ensure constitutionally effective representation." The scope of the proposed order is thus unclear. If it seeks to remind defense counsel of their professional obligations, it misses the mark. If it is envisioned as actually enforceable, rather than a reminder to counsel, then it is improper. For a judge to seek to impose sanctions *sua sponte* or, perhaps even worse, at the behest of a prosecutor, for perceived violation of any of the obligations set out in the order would be to improperly insert the court into the client-attorney relationship.

Threatened with sanctions for failing to meet certain requirements, counsel could be thrust into choosing between defending against sanctions and maintaining client confidentiality. Did counsel adequately "keep the client informed," timely communicate plea offers, and competently advise or cause the client to be competently advised by others about possible immigration consequences of the case? These questions, raised by subparagraphs a) through d) of the model order, cannot be adequately answered without delving into privileged and confidential client-attorney communications.

Defending against alleged failure to comply with the statutory notice obligations of CPL 250.10, 250.20, and 250.30 would likely involve confidential client communications as well. For example, did the client withhold from counsel information about the existence of a potential alibi until after notice of alibi was due?

At least absent allegations by the *client* that counsel failed to meet one or more of the obligations listed, the model order directed to defense counsel should not be enforceable by sanctions that risk inserting the court into the client-attorney relationship. While, subject to limitations in the Rules of Professional Conduct, defense counsel may choose to divulge otherwise confidential information in the context of explaining why a deadline could not be met, courts should not otherwise probe into it.

***II.B. The list of general obligations contained in the proposed model order directed to defense counsel is not comprehensive and may cause confusion; the underlying goals of the proposed document could be satisfied in other ways.***

NYSDA strongly supports creation and enforcement of standards for public defense representation<sup>10</sup> and agrees with the requirements that are included in the model order directed to defense counsel. NYSDA also encourages client-centered representation that empowers clients to participate meaningfully in their own defense. See, for example, the *Client-Centered Representation Standards* created by NYSDA's Client Advisory Board and adopted by the NYSDA Board of Directors in 2005. NYSDA therefore supports the idea of providing information to clients about their attorneys' role. However, the proposed model order is not the proper vehicle for doing that.<sup>11</sup>

The proposed model order includes a list of important obligations of attorneys representing clients in criminal matters. The list overlaps with but does not encompass all of the obligations noted in already-existing standards, including those issued by the New York State Indigent Legal Services Office (ILS).<sup>12</sup> ILS was created in 2010 "to ... make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law."<sup>13</sup> While the proposed model order is directed to criminal defense counsel generally, not just attorneys paid with public funds to represent clients unable to afford a lawyer, a high percentage of people accused of crime are in fact represented by public defenders, legal aid lawyers, or assigned counsel attorneys. ILS has since been chosen to implement the historic settlement of the *Hurrell-Harring* class action against the State and, eventually, five counties for public defense deficiencies. ILS was directed in April 2017 by the State, through legislation signed by the Governor, to create plans to extend to every county in the state the public defense improvements embodied in the settlement.<sup>14</sup>

In light of ILS's growing importance in improving the quality of public defense representation—and therefore a high percentage of all criminal defense representation—across the state, issuing a model order that outlines certain obligations but does not incorporate or even reference ILS standards may confuse many while undermining ILS's statutory authority. Among the major requirements established by ILS (as well as other standards) but omitted from the model order are the duties to "[p]rovide well-prepared sentencing advocacy in criminal cases, including cases in which a plea bargain exists" and "[i]nvestigate potential consequences that can arise from cases, advise each client about those consequences, and advocate for case dispositions that limit negative consequences as much as possible."<sup>15</sup> While not directly a means to prevent wrongful convictions, such standards are vital to justice in today's guilty-plea-driven system.

***II.C. Strict construction of the statutory disclosure obligations included in the proposed model order directed to defense counsel would raise constitutional issues.***

Including compliance with CPL 250.10 and 250.20 in the model order directed to defense counsel raises constitutional questions. Other comments have noted that good-faith challenges can be made to the legality of those overly restrictive requirements for providing notice of alibi and psychiatric defenses.<sup>16</sup> Requiring (or allowing) courts to issue model orders directed to defense counsel that state, "Defense counsel has the obligation to ... comply with the statutory notice obligations" in question, would discourage counsel from challenging before the same courts any unfair restrictions posed by the statutes in question on their ability to investigate potential defenses before committing to them. Furthermore, the time limits in question may be expanded for good cause as the statutes themselves note.<sup>17</sup> Failure to comply with the stated limits does not necessarily constitute failure to comply with a professional obligation.

***II.D. Proposing a model order directed to the prosecution regarding disclosure obligations does not require a concomitant proposal for an order directed to defense counsel.***

The call for comment on the two proposed model orders being addressed here was issued as a "Request for Public Comment on Proposed Model Orders Regarding *Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters*" (emphasis supplied). The model order directed to the prosecution orders the prosecutors responsible for a case "to make timely disclosures of information favorable to the defense" and describes the information and disclosure requirements in detail. Only disclosure obligations are set forth.

The model order directed to defense counsel, on the other hand, addresses several professional obligations of defense counsel. Only one disclosure requirement is addressed—the need to comply

with the statutory notice obligations specified in CPL 250.10, 250.20, and 250.30, discussed above. Complying with such statutory disclosure obligations is unquestionably important, but not, absent more, of the same constitutional dimension as the prosecution's *Brady* obligations. To the extent that the joint issuance of the orders and certain content of the JTF report that generated them could be read to reflect a view that the prosecution and defense bear equal disclosure burdens, NYSDA demurs.

As for including obligations other than disclosure requirements in the defense order, NYSDA recognizes that wrongful convictions can arise from failure of criminal defense counsel to meet the constitutional obligations that stem from their clients' rights to effective assistance of counsel, due process, etc. Seeking to end such failures is a great part of NYSDA's work. But decades of experience in evaluating public defense representation leads to the conclusion that the proposed model order will not serve the purpose. What is needed is to ensure that defense counsel have the resources and time necessary to comply with those obligations, as discussed below.

### **III. Efforts to address the systemic causes of failure to comply with disclosure obligations and other ethical responsibilities should continue; public defense reform must be included.**

Concerns about wrongful convictions, mass incarceration, racism, efficient use of tax dollars, social justice, and other issues have created conversations across New York and the nation about criminal justice reforms. The judiciary is commended for seeking ways to ensure there is *justice* in the criminal justice system, including efforts to address the failure of prosecutors to comply with disclosure obligations. At the same time, NYSDA notes the need to observe and maintain distinctions among the roles of not only prosecution and defense but also the courts in criminal proceedings, to pursue reform in many different ways, and to be vigilant about unintended negative consequences.

#### ***III.A. Efforts to address the systemic causes of prosecutorial failure to comply with disclosure obligations should continue, and without imposing improper reciprocal obligations on the defense.***

The well-documented problem of continuing violations of the constitutional and statutory strictures on prosecutors—*Brady* obligations—is both a singular problem and a part of broader questions.

One complication, alluded to in the comments above, is the tendency to treat failures to meet disclosure obligations by prosecutors and defense counsel as equal problems. But due to the differences in the prosecution and defense functions, constitutional *Brady* requirements have no defense counterpart.

Prosecutors have a duty to "seek justice" while defense lawyers owe their duty to each individual client. That prosecutors have special responsibilities unique among lawyers is reflected in Rule 3.8 of the New York Rules of Professional Conduct, referenced in the proposed model order directed to prosecutors. No separate rule governs the duties or responsibilities of criminal defense counsel, but the constitutional underpinnings of criminal defense work are reflected in certain provisions of the Rules. Criminal defense counsel "may ... so defend the proceeding as to require that every element of the case be established" in even the least defensible matter without running afoul of the ban on lawyers defending proceedings or arguing issues that lack non-frivolous bases in law and fact.<sup>18</sup> And the tenet that lawyers may refuse to offer evidence they reasonably believe to be false has a caveat as well: "other than the testimony of a defendant in a criminal matter."<sup>19</sup> These provisions, as well as more broadly applicable rules like those protecting confidential information,<sup>20</sup> illustrate the

importance in the judicial system of ensuring that defense counsel can act on behalf of a client suspected of crime without fear of reprisal.

NYSDA welcomes efforts to end the injustices brought about by governmental nondisclosure of information favorable to the defense. NYSDA supports creation of a State Commission on Prosecutorial Conduct. Finding ways to encourage courts and grievance committees to hold prosecutors to their statutory and constitutional disclosure obligations would also be welcome, as would other short-term and long-term solutions to the debilitating lack of disclosure of information, from encouragement of full, early, open-file discovery by the prosecution to formal legislative changes in New York's unfair discovery rules.

***III.B. Continuing public defense reform is crucial to assuring that lawyers representing the vast majority of defendants are able to meet their obligations as defense counsel.***

Public defense budgetary and oversight deficiencies contribute to failures to meet professional obligations to clients. NYSDA has long supported systemic reform that is key to making compliance possible. And a few weeks after the Justice Task Force issued its report, a big step was taken in that direction. Included in the 2017-2018 New York State budget was legislation, noted above, mandating the development of plans and incremental state funding for extension of the *Hurrell-Harring* settlement conditions to all counties in the state.

As courts have recognized, it is through the right to (effective) counsel that all other rights are protected.<sup>21</sup> While incremental improvements to public defense in New York continue, there is much left to do. Courts should be encouraged to take positive action when public defense attorneys seek additional time or resources to avoid a failure to meet professional obligations like those set out in the proposed model order.

Improving public defense services cannot solve the problem of *Brady* violations. But it can do much to ensure that defense counsel can meet their own obligations, including conducting effective investigations that will uncover noncompliance with *Brady*. That should empower courts to enforce *Brady* as well as encourage prosecutors to fully comply.

## **Endnotes**

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<sup>1</sup> NYSDA is a not-for-profit membership association; its mission is to improve the quality and scope of publicly supported legal representation to low income people. Most of NYSDA's over 1,700 members are public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state, along with others who support the right to counsel, including client members. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center (Backup Center), which offers legal consultation, research, and training to nearly 6,000 lawyers who represent individuals who cannot afford to retain counsel in criminal and Family Court cases. The Backup Center also provides technical assistance to counties considering changes and improvements in their public defense systems. NYSDA reviews, assesses, and analyzes the public defense system in the state, identifies problem areas and proposes solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary, and other appropriate instrumentalities. Client-centered representation lies at the heart of NYSDA's work.

<sup>2</sup> All accused persons are presumed innocent and are entitled to due process; best practices designed to avoid wrongful convictions are important but not co-extensive with defendants' full rights. All convicted persons, wrongfully convicted and not, are also entitled to due process as to sentencing, appeals, post-conviction proceedings, and any other matters relating to their cases. Implementation of the model orders here should be viewed as a crucial part, but only a part, of needed criminal justice reforms.

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<sup>3</sup> See, e.g., NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (3rd ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> ("[Standard] 1-1.1: Primary Responsibility[:] The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.")

<sup>4</sup> See, e.g., *United States v Berger*, 295 US 78, 88 (1935); *People v Galloway*, 54 NY2d 396, 405 (1981).

<sup>5</sup> "A criminal action is commenced by the filing of an accusatory instrument with a criminal court ...." CPL 100.05. This includes complaints. CPL 100.10(4) and 100.10(5).

<sup>6</sup> See AMERICAN BAR ASSOCIATION (ABA) Comm. On Ethics & Prof'l Responsibility, *Formal Op. 09-454* (2009) (addressing scope of Model Rule 3.8(d), which is substantially similar to New York's Rule 3.8(b)).

<sup>7</sup> This may routinely occur in counties where the Indigent Legal Services Office (ILS) has awarded counsel at first appearance grants and other counties that are making efforts to comply with the *Hurrell-Harring* settlement, as discussed later.

<sup>8</sup> *United States v Agurs*, 427 US 97 (1976).

<sup>9</sup> CPL 240.20(1)(h); 240.80(3).

<sup>10</sup> Many national and state standards are posted on NYSDA's website for easy reference, including NYSDA's own STANDARDS FOR PROVIDING CONSTITUTIONALLY AND STATUTORILY MANDATED LEGAL REPRESENTATION IN NEW YORK STATE (2004), available at <http://www.nysda.org/?page=PDStandards>.

<sup>11</sup> One option is to direct defense counsel to provide clients with a copy of the Statement of Client's Rights, which must be posted in attorney offices. Many clients, particularly public defense clients, never see the inside of their attorney's office and are not aware of the Statement. The judiciary should make the Statement available in various languages.

<sup>12</sup> The ILS standards, which can be found at [www.ils.ny.gov/content/standards-and-performance-criteria](http://www.ils.ny.gov/content/standards-and-performance-criteria) (last visited 5/24/2017), draw from other standards, especially the NEW YORK STATE BAR ASSOCIATION, STANDARDS FOR PROVIDING MANDATED REPRESENTATION (most recently revised 2015). Other standards include: ABA, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION (4th ed. 2015); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995); and NYSDA's own standards including CLIENT-CENTERED REPRESENTATION STANDARDS (2005). Links to these standards can be found at <http://www.nysda.org/?page=PDStandards>.

<sup>13</sup> Executive Law 832(1).

<sup>14</sup> L 2017, ch 59, part VVV.

<sup>15</sup> ILS, STANDARDS AND CRITERIA FOR THE PROVISION OF MANDATED REPRESENTATION IN CASES INVOLVING A CONFLICT OF INTEREST, Standards 8 and 9.

<sup>16</sup> See Letter from David B. Weisfuse, Chief Counsel, Criminal Division, Legal Aid Society of Westchester County, to John W. McConnell, Counsel, Office of Court Administration (June 2, 2017).

<sup>17</sup> CPL 25010(2); 250.20(2); CPL 250.30(1).

<sup>18</sup> RPC 3.1(a)

<sup>19</sup> RPC 3.3(a)(3).

<sup>20</sup> RPC 1.6.

<sup>21</sup> *Penon v Ohio*, 488 US 75, 84 (1988) ("As a general matter, it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'") *Penon* is cited in *Matter of Giovanni S. v Jasmin A.*, 89 AD3d 252, 254 (2nd Dept 2011).

# THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY

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CLARE J. DEGNAN  
EXECUTIVE DIRECTOR

June 2, 2017

John W. McConnell, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street  
New York, New York 10004

Re: Comments on Proposed Prosecution and Defense Disclosure Obligations  
Model Orders

Dear Mr. McConnell:

I respectfully submit that it is wrong for the task force to equate the requirement of the prosecutor to provide *Brady* material under the statute, the constitution, and the rules of professional conduct to that of the defense compliance with the notice provisions under Article 250 of the Criminal Procedure Law. The notice provisions under Article 250 of the Criminal Procedure Law are not based on the Rules of Professional Conduct and have good cause exceptions.

Moreover, the Second Circuit in *Escalera v. Coombe*, 852 F.2d 45 (2<sup>nd</sup> Cir. 1988) has held that “good cause” under CPL Section 250.10 is not the equivalent of “willfulness to obtain a tactical advantage” to impose a sanction of preclusion of testimony on the defendant. In addition, the time frame in CPL Sections 250.10 and 250.20 are overly restrictive under the dicta in *Michigan v. Lucas*, 500 U.S. 145 (1991). Due to these constitutional issues, it would be improper for O.C.A. or the court to issue an order to the defense counsel to comply with these statutes for the reasons more fully discussed below in Point III.

DAVID B. WEISFUSE  
CHIEF COUNSEL



KAREN R. NEEDLEMAN  
CHIEF ADMINISTRATOR  
ASSIGNED COUNSEL

## POINT I

O.C.A AND THE TRIAL COURT DO NOT HAVE THE POWER TO EXTEND THE PROSECUTOR'S TIME TO COMPLY WITH *BRADY* BEYOND THE STATUTE. THE PRESUMPTIVE COMPLIANCE TIMES IN THE MODEL ORDER EFFECTIVELY ELIMINATES THE REQUIREMENT OF *BRADY* IN PLEA CASES

The model order for the prosecutor makes the prosecutor's compliance with its Brady obligation presumptively timely if it is provided within 30 days prior to the trial of a felony case and 15 days prior to the trial of a misdemeanor case. This is contrary to CPL Section 240.20(1)(h) which includes the *Brady* requirement. The material required to be disclosed pursuant to CPL Section 240.20 must be disclosed within 15 days of the defense demand. CPL Section 240.80(3).

Neither the Office of Court Administration or the trial court have the power through these model orders to enlarge the statutory period for the District Attorney to comply with its *Brady* obligation. In *Veloz v. Rothwax*, 65 N.Y.2d 902 (1985), the Court of Appeals unanimously held that a trial court can not alter the minimum 45 day period by decreasing the time the defense has to file the omnibus motion. The presumptive compliance period for prosecutors is contrary to the statute. It has the practical effect of relieving the prosecutor of its *Brady* obligation during the plea negotiation stage and making it apply only for the trial cases.

Furthermore, it ignores the fact that the failure to timely provide Brady material during plea negotiations, when the prosecutor may dangle its best plea offer, leads to the fact that innocent people plead guilty out of fear of a much harsher sentence if they turn down the plea offer. These are also wrongful convictions. Since 95 percent of the cases that are not dismissed involve guilty pleas in state courts, this model order has the effect of making *Brady* irrelevant for 95 percent of the cases. See attached "Why Do Innocent People Plead Guilty" by Jed S. Rakoff, New York Review of Books.

In addition, the order for the prosecutor, states that only willful and deliberate conduct will constitute a violation of the order. Again, the Office of Court Administration and the trial court do not have authority to require a higher standard to impose a discovery sanction on the prosecutor than provided under CPL Section 240.70.

## POINT II

THE LEGISLATURE AND THE GOVERNOR HAVE DELEGATED THE MONITORING OF INDIGENT DEFENSE PROVIDERS AND STANDARDS TO THE INDIGENT LEGAL SERVICES OFFICE. THEREFORE, ITEMS A-E ARE UNNECESSARY FOR INDIGENT DEFENSE PROVIDERS

It is not necessary to have a-f in the model order for the indigent defense providers. The legislature and the governor have delegated the duty to set standards, monitor, study, and make efforts to improve the quality of services provided pursuant to 18-B of the County Law to the Indigent Legal Services Office. Executive Law Section 822. see standards on the website, [ils.ny.gov](http://ils.ny.gov).

## POINT III

THE COURT SHOULD NOT ISSUE THE ORDER IN “G” DIRECTING COMPLIANCE BY THE DEFENSE ATTORNEY WITH THE STATUTORY NOTICE REQUIREMENT IN CPL SECTIONS 250.10 AND 250.20 BECAUSE THESE STATUTES ARE OVERLY RESTRICTIVE AND TO STRICTLY CONSTRUE THEM WILL RAISE CONSTITUTIONAL ISSUES

The defense model order should not include item “g” that the defense comply with the statutory notice requirements in CPL Sections 250.10 and 250.20. The time deadlines in CPL Section 250.10 of eight days for the notice of alibi and in CPL Section 250.20 of thirty days for the psychiatric notice after the prosecutor’s demand attached to the indictment have not been rigidly enforced nor should they be.



In practice, the District Attorney in Westchester County, files with the indictment the demand for the alibi notice but does not file its bill of particulars as to the time and place of the crime until the conference which is held two to three weeks after the arraignment. Likewise, the defense does not receive copies of the defendant's statements and other consent discovery items until two to three weeks after the arraignment at the conference. Defense counsel needs time to investigate the alibi. In addition, defense counsel needs time to obtain psychiatric records on the client, investigate the case, and have an examination by a defense psychiatrist.

The purpose of these notice statutes are that there should not be trial by ambush. At the same time, the defense should not have to risk an ambush by including witnesses in an alibi notice that they have not been able to investigate within 8 days of arraignment. In addition, the defense should not be forced to prematurely file a psychiatric notice that leads to an examination of his or her client where the prosecutor learns about the client's background that leads to other evidence of the crime unless his expert after a review of records and an examination has already concluded that the client has a bona fide psychiatric defense.

In *Michigan v. Lucas*, 500 U.S. 145, 150 and the dissent at 155 (1991), the Supreme Court expressed its concerns as to the Michigan rape shield law. The majority in dicta stated:

“It is not inconceivable that Michigan's notice requirement, which demands a written motion and an offer of proof to be filed within ten days after arraignment, is overly restrictive.”

However, the majority noted that they did not have to decide this issue because it was not the basis of the lower court's finding of the unconstitutionality of the statute. Meanwhile, the dissent would hold the statute unconstitutional as overly restrictive when used to preclude testimony.

Meanwhile, the Supreme Court upheld the notice of alibi statute in *Williams v. Florida*, 399 U.S. 78 (1970) which required the defense to file the alibi notice ten days before the trial.

I respectfully submit that the reason New York's alibi and psychiatric notice statutes have not been held unconstitutional as overly restrictive to preclude testimony under the sixth amendment is that they have not been rigidly enforced. The Second Circuit in reviewing New York's alibi notice statute has held that the absence of good cause for the delay is not sufficient to sanction the defendant by the preclusion of testimony. It has to be willful by the defense attorney to obtain a tactical advantage to impose a sanction on the defendant. *Escalera v. Coombe*, 852 F.2d 45 (2<sup>nd</sup> Cir. 1988). Therefore, it would be improper to order the defense counsel to comply with these statutes.

Meanwhile, the model order by specifically requiring the defense attorney to comply with the statutory notice requirements in CPL Sections 250.10 and 250.20 fails to recognize that they are overly restrictive in their time limits. In addition, the task force excuses the prosecutor's *Brady* violation if his failure to comply is not willful when willfulness is not a requirement for a *Brady* violation. In comparison, the model order for the defense attorney does not have a similar requirement of willfulness for the defense attorney's failure to comply with these notice provisions despite the interpretation of New York's statute in *Escalera v. Coombe*, *supra*.

I respectfully submit that the Office of Court Administration by the use of the model orders cannot usurp the power of the trial judges to decide the legal issues in the cases that are assigned to the judges. *Balough v. H.R.P. Caterers, Inc.*, 88 A.D.2d 136 (2<sup>nd</sup> Dept. 1982).

In addition, the use of the model order could cause ethical and conflict problems for the defense attorney. One of the potential problems exists when a defendant tells the attorney of the alibi after the statutory period has expired. The attorney can not disclose the reason for this lateness since it could then be used to undermine the defense by the prosecutor. Meanwhile, the attorney could be subject to contempt for not complying with the court order or a grievance.

## POINT IV

### THE DISTRICT ATTORNEY SHOULD DISCLOSE BRADY AND THE CPL SECTION 240.20 MATERIAL BEFORE A COURT ACCEPTS A GUILTY PLEA

The Justice Task Force report and the proposed model orders are being disclosed at a time that there are proposals for discovery reform legislation and a prosecutorial misconduct commission. See attached *Will New York Follow Texas in Criminal Justice Reform?* Meanwhile, the ABA Criminal Justice Standard for the Defense Function, 4-4.1 Duty to Investigate, requires the defense attorney to investigate the District Attorney's case before entering any guilty plea on behalf of the client.

Unlike New York City where most felonies are prosecuted by indictment and there is a right to discovery under CPL Section 240.20, about 80 per cent of our felony guilty pleas in Westchester County occur on superior court informations. In this situation, the District Attorney requires our clients to waive their right to a preliminary hearing and grand jury presentation to obtain what the prosecutor considers its best plea offer on a felony case. A client who is charged with a felony that mandates state prison is in an awful dilemma when offered a superior court information of a reduced felony that permits probation or local jail time. The District Attorney does not provide us with open file discovery and we have to depend upon the information that their office is willing to provide to us on an ad hoc basis.

There is no discovery required under the statute and the proposed model order for the defense in this circumstance. Judge Rakoff's article as to "Why Innocent People Plead Guilty" demonstrates that ten percent of all exonerations involve people who pled guilty to murder and rape. There cannot be any fair justice for our clients consistent with the American Bar Association Criminal Justice Standards unless as a minimum the District Attorney is required to disclose the *Brady* material and the CPL Section 240.20 material in sufficient time to review with the client prior to any guilty plea.

POINT V

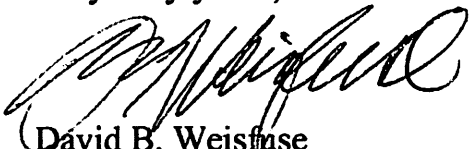
THERE SHOULD BE A STATEWIDE OFFICE THAT SETS STANDARDS FOR PROSECUTORS AND MONITORS THEIR OFFICES FOLLOWING THE MODEL OF THE INDIGENT LEGAL SERVICES OFFICE THAT SETS STANDARDS AND MONITORS INDIGENT DEFENSE PROVIDERS.

The recommendation of the task force to encourage reporting of attorney misconduct to the grievance committee is not a method that encourages District Attorney and institutional defense providers to work together. Instead, it could very much lead to retaliation where grievances are then filed by one office against the other concerning various attorneys. It also does not address systemic problems.

An example of such a problem is when it is clear that a felony should be dismissed on CPL Section 30.30 grounds and the District Attorney offers a misdemeanor plea with time served to a defendant who is jail. Otherwise, the defendant has to stay in jail pending the resolution of the motion. Another example is when there is a guilty plea to a federal conspiracy charge in federal court and the District Attorney wants the defendant who is in jail to plead guilty in state court to a crime which would be barred by CPL Section 40.20 (statutory double jeopardy).

Indigent defense providers are regulated and have to follow standards set by an independent statewide agency, the Indigent Legal Services Office. The same type of office can be established for prosecutors and set statewide standards.

Very truly yours,



David B. Weisfuse  
Chief Counsel  
Criminal Division

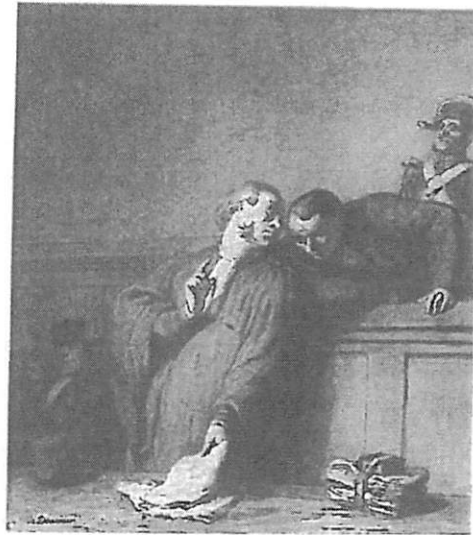
# Why Innocent People Plead Guilty

**Jed S. Rakoff**  
NOVEMBER 20, 2014 ISSUE

The criminal justice system in the United States today bears little relationship to what the Founding Fathers contemplated, what the movies and television portray, or what the average American believes.

To the Founding Fathers, the critical element in the system was the jury trial, which served not only as a truth-seeking mechanism and a means of achieving fairness, but also as a shield against tyranny. As Thomas Jefferson famously said, “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”

The Sixth Amendment guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” The Constitution further guarantees that at the trial, the accused will have the assistance of counsel, who can confront and cross-examine his accusers and present evidence on the accused’s behalf. He may be convicted only if an impartial jury of his peers is unanimously of the view that he is guilty beyond a reasonable doubt and so states, publicly, in its verdict.



*Honoré Daumier: A Criminal Case*

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The drama inherent in these guarantees is regularly portrayed in movies and television programs as an open battle played out in public before a judge and jury. But this is all a mirage. In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.

In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.

While corresponding statistics for the fifty states combined are not available, it is a rare state where plea bargains do not similarly account for the resolution of at least 95 percent of the felony cases that are not dismissed; and again, the plea bargains usually determine the sentences, sometimes as a matter of law and otherwise as a matter of practice. Furthermore, in both the state and federal systems, the power to determine the terms of the plea bargain is, as a practical matter, lodged largely in the prosecutor, with the defense counsel having little say and the judge even less.

It was not always so. Until roughly the end of the Civil War, plea bargains were exceedingly rare. A criminal defendant would either go to trial or confess and plead guilty. If the defendant was convicted, the judge would have wide discretion to impose sentence; and that decision, made with little input from the parties, was subject only to the most modest appellate review.

After the Civil War, this began to change, chiefly because, as a result of the disruptions and dislocations that followed the war, as well as greatly increased immigration, crime rates rose considerably, and a way had to be found to dispose of cases without imposing an impossible burden on the criminal justice system.

Plea bargains offered a way out: by pleading guilty to lesser charges in return for dismissal of the more serious charges, defendants could reduce their prison time, while the prosecution could resolve the case without burdening the system with more trials.

The practice of plea bargaining never really took hold in most other countries, where it was viewed as a kind of “devil’s pact” that allowed guilty defendants to avoid the full force of the law. But in the United States it became commonplace. And while the Supreme Court initially expressed reservations about the system of plea bargaining, eventually the Court came to approve of it, as an exercise in contractual negotiation between independent agents (the prosecutor and the defense counsel) that was helpful in making the system work. Similarly, academics, though somewhat bothered by the reduced role of judges, came to approve of plea bargaining as a system somewhat akin to a regulatory regime.

Thus, plea bargains came to account, in the years immediately following World War II, for the resolution of over 80 percent of all criminal cases. But even then, perhaps, there were enough cases still going to trial, and enough power remaining with defense counsel and with judges, to “keep the system honest.” By this I mean that a genuinely innocent defendant could still choose to go to trial without fearing that she might thereby subject herself to an extremely long prison term effectively dictated by the prosecutor.

All this changed in the 1970s and 1980s, and once again it was in reaction to rising crime rates. While the 1950s were a period of relatively low crime rates in the US, rates began to rise substantially in the 1960s, and by 1980 or so, serious crime in the US, much of it drug-related, was occurring at a frequency not seen for many decades. As a result, state and federal legislatures hugely increased the penalties for criminal violations. In New York, for example, the so-called “Rockefeller Laws,” enacted in 1973, dictated a mandatory minimum sentence of fifteen years’ imprisonment for selling just two ounces (or possessing four ounces) of heroin, cocaine, or marijuana. In addition, in response to what was perceived as a tendency of too many judges to impose too lenient sentences, the new, enhanced sentences were frequently made mandatory and, in those thirty-seven states where judges were elected, many “soft” judges were defeated and “tough on crime” judges elected in their place.

At the federal level, Congress imposed mandatory minimum sentences for narcotics offenses, gun offenses, child pornography offenses, and much else besides. Sometimes, moreover, these mandatory sentences were required to be imposed consecutively. For example, federal law prescribes a mandatory minimum of ten years' imprisonment, and a maximum of life imprisonment, for participating in a conspiracy that distributes five kilograms or more of cocaine. But if the use of a weapon is involved in the conspiracy, the defendant, even if she had a low-level role in the conspiracy, must be sentenced to a mandatory minimum of fifteen years' imprisonment, i.e., ten years on the drug count and five years on the weapons count. And if two weapons are involved, the mandatory minimum rises to forty years, i.e., ten years on the drug count, five years on the first weapons count, and twenty-five years on the second weapons count—all of these sentences being mandatory, with the judge having no power to reduce them.

In addition to mandatory minimums, Congress in 1984 introduced—with bipartisan support—a regime of mandatory sentencing guidelines designed to avoid “irrational” sentencing disparities. Since these guidelines were not as draconian as the mandatory minimum sentences, and since they left judges with some limited discretion, it was not perceived at first how, perhaps even more than mandatory minimums, such a guidelines regime (which was enacted in many states as well) transferred power over sentencing away from judges and into the hands of prosecutors.

One thing that did become quickly apparent, however, was that these guidelines, along with mandatory minimums, were causing the virtual extinction of jury trials in federal criminal cases. Thus, whereas in 1980, 19 percent of all federal defendants went to trial, by 2000 the number had decreased to less than 6 percent and by 2010 to less than 3 percent, where it has remained ever since.

The reason for this is that the guidelines, like the mandatory minimums, provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains. In the majority of criminal cases, a defense lawyer only meets her client when or shortly after the client is arrested, so that, at the outset, she is at a considerable informational disadvantage to the prosecutor. If, as is very often the case (despite the constitutional prohibition of “excessive bail”), bail is set so high that the client is detained, the defense lawyer has only modest opportunities, within the limited visiting hours and other arduous restrictions imposed by most jails, to interview her client and find out his version of the facts.



The prosecutor, by contrast, will typically have a full police report, complete with witness interviews and other evidence, shortly followed by grand jury testimony, forensic test reports, and follow-up investigations. While much of this may be one-sided and inaccurate—the National Academy of Science’s recently released report on the unreliability of eyewitness identification well illustrates the danger—it not only gives the prosecutor a huge advantage over the defense counsel but also makes the prosecutor confident, maybe overconfident, of the strength of his case.

**A**gainst this background, the information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove. Indeed, until late last year, federal prosecutors were under orders from a series of attorney generals to charge the defendant with the most serious charges that could be proved—unless, of course, the defendant was willing to enter into a plea bargain. If, however, the defendant wants to plead guilty, the prosecutor will offer him a considerably reduced charge—but only if the plea is agreed to promptly (thus saving the prosecutor valuable resources). Otherwise, he will charge the maximum, and, while he will not close the door to any later plea bargain, it will be to a higher-level offense than the one offered at the outset of the case.

In this typical situation, the prosecutor has all the advantages. He knows a lot about the case (and, as noted, probably feels more confident about it than he should, since he has only heard from one side), whereas the defense lawyer knows very little. Furthermore, the prosecutor controls the decision to charge the defendant with a crime. Indeed, the law of every US jurisdiction leaves this to the prosecutor’s unfettered discretion; and both the prosecutor and the defense lawyer know that the grand jury, which typically will hear from one side only, is highly likely to approve any charge the prosecutor recommends.

But what really puts the prosecutor in the driver’s seat is the fact that he—because of mandatory minimums, sentencing guidelines (which, though no longer mandatory in the federal system, are still widely followed by most judges), and simply his ability to shape whatever charges are brought—can effectively dictate the sentence by how he publicly describes the offense. For example, the prosecutor can agree with the defense counsel in a federal narcotics case that, if there is a plea bargain, the defendant will only have to plead guilty to the personal

sale of a few ounces of heroin, which carries no mandatory minimum and a guidelines range of less than two years; but if the defendant does not plead guilty, he will be charged with the drug conspiracy of which his sale was a small part, a conspiracy involving many kilograms of heroin, which could mean a ten-year mandatory minimum and a guidelines range of twenty years or more. Put another way, it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision.

The defense lawyer understands this fully, and so she recognizes that the best outcome for her client is likely to be an early plea bargain, while the prosecutor is still willing to accept a plea to a relatively low-level offense. Indeed, in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years.

Although under pressure to agree to the first plea bargain offered, prudent defense counsel will try to convince the prosecutor to give her some time to explore legal and factual defenses; but the prosecutor, often overworked and understaffed, may not agree. Defense counsel, moreover, is in no position to abruptly refuse the prosecutor's proposal, since, under recent Supreme Court decisions, she will face a claim of "ineffective assistance of counsel" if, without consulting her client, she summarily rejects a plea bargain simply as a negotiating ploy.

Defense counsel also recognizes that, even if she thinks the plea bargain being offered is unfair compared to those offered by other, similarly situated prosecutors, she has little or no recourse. An appeal to the prosecutor's superior will rarely succeed, since the superiors feel the need to support their troops and since, once again, the prosecutor can shape the facts so as to make his superior find his proposed plea acceptable. And there is no way defense counsel can appeal to a neutral third party, the judge, since in all but a few jurisdictions, the



*Brittany Murray/Long Beach Press-Telegram/AP Images*

*Brian Banks and his lawyer from the Innocence Project at the dismissal of his wrongful conviction on rape and kidnapping charges, Long Beach, California, May 2012. Banks, who had been a high school football star with a scholarship to USC at the time of his arrest, served five years in prison for a crime he never committed after accepting a plea bargain under the advisement of his original lawyer.*

judiciary is precluded from participating in plea bargain negotiations. In a word, she and her client are stuck.

**T**hough there are many variations on this theme, they all prove the same basic point: the prosecutor has all the power. The Supreme Court's suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth: it is much more like a "contract of adhesion" in which one party can effectively force its will on the other party.

As for the suggestion from some academics that this is the equivalent of a regulatory process, that too is a myth: for, quite aside from the imbalance of power, there are no written regulations controlling the prosecutor's exercise of his charging power and no established or meaningful process for appealing his exercise of that power. The result is that, of the 2.2 million Americans now in prison—an appalling number in its own right—well over two million are there as a result of plea bargains dictated by the government's prosecutors, who effectively dictate the sentences as well.

A cynic might ask: What's wrong with that? After all, crime rates have declined over the past twenty years to levels not seen since the early 1960s, and it is difficult to escape the conclusion that our criminal justice system, by giving prosecutors the power to force criminals to accept significant jail terms, has played a major part in this reduction. Most Americans feel a lot safer today than they did just a few decades ago, and that feeling has contributed substantially to their enjoyment of life. Why should we cavil at the empowering of prosecutors that has brought us this result?

The answer may be found in Jefferson's perception that a criminal justice system that is secret and government-dictated ultimately invites abuse and even tyranny. Specifically, I would suggest that the current system of prosecutor-determined plea bargaining invites the following objections.

First, it is one-sided. Our criminal justice system is premised on the notion that, before we deprive a person of his liberty, he will have his "day in court," i.e., he will be able to put the government to its proof and present his own facts and arguments, following which a jury of his peers will determine whether or not he is guilty of a crime and a neutral judge will, if he is found guilty, determine his sentence. As noted, numerous guarantees of this fair-minded approach are embodied in our Constitution, and were put there because of the Founding

Fathers' experience with the rigged British system of colonial justice. Is not the plea bargain system we have now substituted for our constitutional ideal similarly rigged?

Second, and closely related, the system of plea bargains dictated by prosecutors is the product of largely secret negotiations behind closed doors in the prosecutor's office, and is subject to almost no review, either internally or by the courts. Such a secretive system inevitably invites arbitrary results. Indeed, there is a great irony in the fact that legislative measures that were designed to rectify the perceived evils of disparity and arbitrariness in sentencing have empowered prosecutors to preside over a plea-bargaining system that is so secretive and without rules that we do not even know whether or not it operates in an arbitrary manner.

Third, and possibly the gravest objection of all, the prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed. For example, of the approximately three hundred people that the Innocence Project and its affiliated lawyers have proven were wrongfully convicted of crimes of rape or murder that they did not in fact commit, at least thirty, or about 10 percent, pleaded guilty to those crimes. Presumably they did so because, even though they were innocent, they faced the likelihood of being convicted of capital offenses and sought to avoid the death penalty, even at the price of life imprisonment. But other publicized cases, arising with disturbing frequency, suggest that this self-protective psychology operates in noncapital cases as well, and recent studies suggest that this is a widespread problem. For example, the National Registry of Exonerations (a joint project of Michigan Law School and Northwestern Law School) records that of 1,428 legally acknowledged exonerations that have occurred since 1989 involving the full range of felony charges, 151 (or, again, about 10 percent) involved false guilty pleas.

**I**t is not difficult to perceive why this should be so. After all, the typical person accused of a crime combines a troubled past with limited resources: he thus recognizes that, even if he is innocent, his chances of mounting an effective defense at trial may be modest at best. If his lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it "rational" to take the plea.

Every criminal defense lawyer (and I was both a federal prosecutor and a criminal defense lawyer before going on the bench) has had the experience of a client who first tells his lawyer he is innocent and then, when confronted with a preview of the government's proof, says he is guilty. Usually, he is in fact guilty and was previously lying to his lawyer (despite the protections of the attorney-client privilege, which many defendants, suspicious even of their court-appointed lawyers, do not appreciate). But sometimes the situation is reversed, and the client now lies to his lawyer by saying he is guilty when in fact he is not, because he has decided to "take the fall."

In theory, this charade should be exposed at the time the defendant enters his plea, since the judge is supposed to question the defendant about the facts underlying his confession of guilt. But in practice, most judges, happy for their own reasons to avoid a time-consuming trial, will barely question the defendant beyond the bare bones of his assertion of guilt, relying instead on the prosecutor's statement (untested by any cross-examination) of what the underlying facts are. Indeed, in situations in which the prosecutor and defense counsel themselves recognize that the guilty plea is somewhat artificial, they will have jointly arrived at a written statement of guilt for the defendant to read that cleverly covers all the bases without providing much detail. The Supreme Court, for its part, has gone so far (with the Alford plea of 1970) as to allow a defendant to enter a guilty plea while factually maintaining his innocence.

While, moreover, a defendant's decision to plead guilty to a crime he did not commit may represent a "rational," if cynical, cost-benefit analysis of his situation, in fact there is some evidence that the pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so. Research indicates that young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot "take the heat" of an interrogation. Although research into false guilty pleas is far less developed, it may be hypothesized that similar pressures, less immediate but more prolonged, may be in effect when a defendant is told, often by his own lawyer, that there is a strong case against him, that his likelihood of acquittal is low, and that he faces a mandatory minimum of five or ten years in prison if convicted and a guidelines range of considerably more—but that, if he acts swiftly, he can get a plea bargain to a lesser offense that will reduce his prison time by many years.

How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. The size of that range suggests the imperfection of the data; but let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit.

What can we do about it? If there were the political will to do so, we could eliminate mandatory minimums, eliminate sentencing guidelines, and dramatically reduce the severity of our sentencing regimes in general. But even during the second Obama administration, the very modest steps taken by Attorney General Eric Holder to moderate sentences have been met by stiff opposition, some from within his own department. For example, the attorney general's public support for a bipartisan bill that would reduce mandatory minimums for certain narcotics offenses prompted the National Association of Assistant US Attorneys to send an "open letter" of opposition, while a similar letter denouncing the bill was signed by two former attorney generals, three former chiefs of the Drug Enforcement Administration, and eighteen former US attorneys.

Reflecting, perhaps, the religious origins of our country, Americans are notoriously prone to making moral judgments. Often this serves salutary purposes; but a by-product of this moralizing tendency is a punitiveness that I think is not likely to change in the near future. Indeed, on those occasions when Americans read that someone accused of a very serious crime has been permitted to plea bargain to a considerably reduced offense, their typical reaction is one of suspicion or outrage, and sometimes not without reason. Rarely, however, do they contemplate the possibility that the defendant may be totally innocent of any charge but is being coerced into pleading to a lesser offense because the consequences of going to trial and losing are too severe to take the risk.

I am driven, in the end, to advocate what a few jurisdictions, notably Connecticut and Florida, have begun experimenting with: involving judges in the plea-bargaining process. At present, this is forbidden in the federal courts, and with good reason: for a judge to involve herself runs the risk of compromising her objectivity if no bargain is reached. For similar reasons, many federal judges (including this one) refuse to involve themselves in settlement negotiations in

civil cases, even though, unlike the criminal plea bargain situation, there is no legal impediment to doing so. But the problem is solved in civil cases by referring the settlement negotiations to magistrates or special masters who do not report the results to the judges who handle the subsequent proceedings. If the federal rule were changed, the same could be done in the criminal plea bargain situation.

As I envision it, shortly after an indictment is returned (or perhaps even earlier if an arrest has occurred and the defendant is jailed), a magistrate would meet separately with the prosecutor and the defense counsel, in proceedings that would be recorded but placed under seal, and all present would be provided with the particulars regarding the evidence and issues in the case. In certain circumstances, the magistrate might interview witnesses or examine other evidence, again under seal so as not to compromise any party's strategy. He might even interview the defendant, under an arrangement where it would not constitute a waiver of the defendant's Fifth Amendment privilege against self-incrimination.

The prosecutor would, in the meantime, be precluded from making any plea bargain offer (or threat) while the magistrate was studying the case. Once the magistrate was ready, he would then meet separately with both sides and, if appropriate, make a recommendation, such as to dismiss the case (if he thought the proof was weak), to proceed to trial (if he thought there was no reasonable plea bargain available), or to enter into a plea bargain along lines the magistrate might suggest. No party would be required to follow the magistrate's suggestions. Their force, if any, would come from the fact that they were being suggested by a neutral third party, who, moreover, was a judicial officer that the prosecutors and the defense lawyers would have to appear before in many other cases.

Would a plan structured along these lines wholly eliminate false guilty pleas? Probably not, but it likely would reduce their number. Would it present new, unforeseeable problems of its own? Undoubtedly, which is why I would recommend that it first be tried as a pilot program. Even given the current federal rules prohibiting judges from involving themselves in the plea-bargaining process, I think something like this could be undertaken, since most such rules can be waived and the relevant parties could here agree to waive them for the limited purposes of a pilot program.

I am under no illusions that this suggested involvement of judges in the plea-bargaining process is a panacea. But would not any program that helps to reduce the shame of sending innocent people to prison be worth trying?

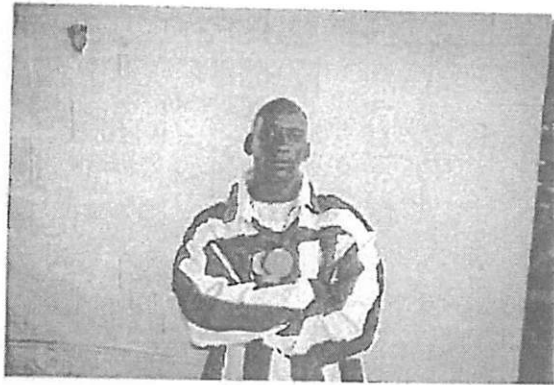
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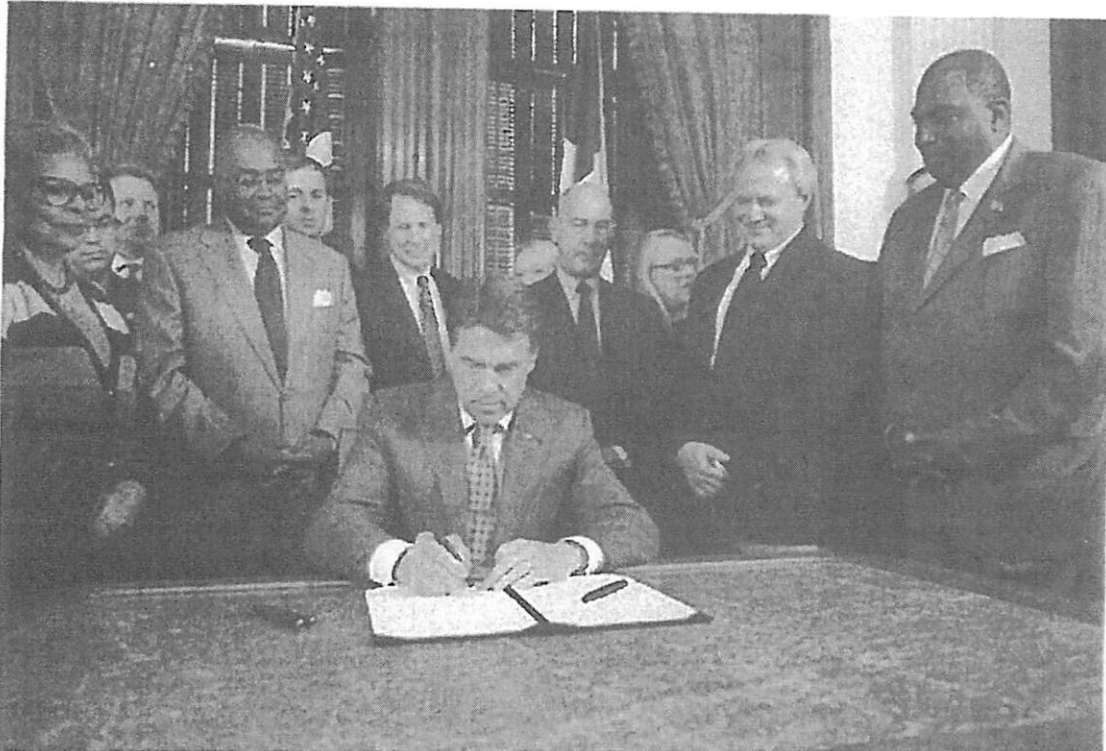
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## Will New York Follow Texas In Criminal Justice Reform?

By Kate Pastor | April 2, 2014



*Photo by: Texas governor's office*

*Gov. Rick Perry in May 2013 signed the Michael Morton Act, which made Texas an "open file" discovery state. New York legislators are wrestling with several versions of discovery reform.*

Alberto Ramos was a 21-year-old college student and part-time substitute teacher's aide, aspiring to be a teacher, when he was accused and then convicted in 1985 of raping a five-year-old in the Bronx day-care center where he worked.

In a case based largely on the child's sworn testimony, Ramos was accused of taking a girl into the Concourse Day Care bathroom during nap time. She was found to have vaginal bruising and her grandmother testified that when she picked her up from school, the child was crying. Amid media-fueled hysteria over a wave of child sex abuse in day-care centers, Ramos was found guilty.

Joel Rudin, who laid out Ramos' case in *The Fordham Law Review* in 2011, writes that when Ramos was convicted of two counts of rape in the first degree "He screamed in agony, 'Kill me.'"

In 1992, the conviction was overturned after the alleged victim's mother filed a civil suit against both the New York City-funded day-care center and Ramos. The city's insurance settled, but a civil defense attorney—who was able to obtain evidence that Ramos did not have access to for his criminal case—believed Ramos was innocent. The lawyer got permission to share the information with Ramos, who had been suffering severe abuse in prison for seven years on an 8-and-1/3 to 25-year sentence as a child rapist.

Among the omissions that could have aided in Ramos' defense was a log showing that the grandmother who testified against him had not, in fact, picked the girl up from day-care that day in 1984. There was evidence showing other reasons for the child's vaginal irritation and an interview in which the girl had initially denied Ramos raped her.

None of it had been turned over.

In 1963, the Supreme Court decided in *Brady v. Maryland* that, in criminal cases, prosecutors must disclose all evidence that could be "material" to the defense.

Yet when a criminal case is brought in New York State, evidence is not shared automatically with the defense. Instead, defense attorneys must file motions for evidence, and prosecutors are left to decide what constitutes "Brady material" that they must show the other side. Some argue that judges have discretion to force prosecutors to turn over more, but most don't interpret the statute that way, according to Susannah Karlsson, a special litigation attorney for Brooklyn Defender Services.

Defense attorneys have long pointed to the role of New York's restrictive discovery statute, Article 240 of the Criminal Procedure Law, in laying the groundwork for wrongful convictions by providing cover for prosecutors to withhold Brady material and allowing them to railroad defendants before trial.

But as DNA evidence has led to a mass of exonerations in recent years and stories like Ramos' have surfaced, the movement to replace Article 240 has been taken up by a growing coalition of stakeholders lobbying lawmakers and rallying grassroots support. The calls to fix New York's discovery statute include law enforcement and corrections officers, as well as lawyers, judges and the wrongfully accused—all echoing what Judge John P. Collins said in his opinion overturning the Ramos conviction, that an "unjust" conviction "reflects unfavorably on all participants in the criminal justice system."

They're pushing to replace or amend the state's discovery statute by the end of this legislative session and they are cautiously optimistic that they're gaining ground.

### **A history of concern**

It is no wonder that Ramos' innocence only emerged through an action in civil court, where a policy of showing the defense the entire prosecutor's file prevails.

New York's discovery law is considered one of the most restrictive in the country.

Justine Olderman, managing attorney of the criminal defense practice at the Bronx Defenders, which represents indigent clients facing charges, explained that most district attorneys interpret Article 240 to mean that the only evidence they must make available early on are statements made by the defendant and scientific texts or reports.

"Otherwise, that's it," she said, adding, "Most evidence is witnesses, most evidence is witness statements, most evidence is witness testimony." Most evidence, that is, is the kind that defendants "don't get access to until trial."

The concerns date back decades. James Yates, now counsel to Assembly Speaker Sheldon Silver, as a judge in 1979 helped amend the discovery provision in New York, which he calls "the worst in the country." The reforms required that certain basic pieces of evidence be shared, including police reports, which had previously been barred from discovery.

The reform passed, but the problem remained. What was laid out in 1979 "was supposed to be a floor," Yates says. But "most judges read it as a ceiling. That's been the big problem in the law."

He recounts the fictional courtroom comedy *My Cousin Vinny*, in which justice is served when the title character, an amateur lawyer played by Joe Pesci, saves two young men locked up in an Alabama jail for a murder they didn't commit. Vinny uncovers evidence showing that the only witness to the crime had trees blocking her view and was looking through a dirty window. He gets police records revealing that people matching the description of the perpetrators had been arrested in the neighboring country.

### **Out-reformed by the Lone Star State**

Had the trial taken place in Albany rather than Alabama, Yates says, Pesci's character wouldn't have had access to the information about other arrests, the witness's name or statements, and maybe not even the name of the accuser. They were lucky to have been arrested in Alabama. "The kids in *My Cousin Vinny* would still be in jail in New York," he says.

If they had to be arrested in New York City, they might be wise to choose getting nabbed in Brooklyn. Former Brooklyn District Attorney Charles Hynes voluntarily introduced a discovery-by-stipulation policy that eliminates some of the process and wait time for defendants to receive Brady material. There's nothing in current New York law that says prosecutors *can't* turn over their files early in the process—just that they're *not required to do so* without the defendants motioning the court.

Still, Brooklyn is no panacea. Prosecutors are only required to turn over "Brady" material as it's read under the current law—meaning they may still omit interviews with witnesses whom they will not call to testify, so long as prosecutors believe the information is not exculpatory, meaning that could lead to the exoneration of the defendant.

Both Rudin and Karlsson say the Brooklyn DA (the office, now led by Kenneth Thompson, did not return a call for comment) still whites out names of witnesses. And Rudin says there is a policy of instructing prosecutors not to take notes, "so if witnesses make contradictory statements they're not written anywhere so there's nothing to turn over."

But compare New York to Texas, where last May, Gov. Rick Perry signed the Michael Morton Act, which expanded the state's discovery law to an "open file" policy, following a prosecutorial misconduct case in which a Texas DA was sent to prison. The bill was named after a man the DA had wrongfully convicted of beating his wife to death in 1987 and who was released in 2011, after being exonerated by DNA evidence.

"Texas is a law-and-order state, and with that tradition comes a responsibility to make our judicial process as transparent and open as possible," Perry said in a statement released upon signage, writing that it "helps serve that cause, making our system fairer and helping prevent wrongful convictions and penalties harsher than what is warranted by the facts."

### Claims of misconduct

Whatever rules a state imposes on sharing evidence, the system depends to some degree on prosecutors following them, and that doesn't always happen. More than a third of the known DNA exonerations nationwide involved multiple claims of prosecutorial misconduct, according to the Innocence Project. A New York State Bar Association Task Force on Wrongful Convictions established in 2008 put out a report that looked at 53 wrongful conviction cases in the state; government practices involving evidentiary material accounted for 31 of the cases.

And according to Rudin, who has sued local officials over alleged prosecutorial misconduct, New York's DA offices are doing little to stop prosecutors from breaking the rules.

"What my lawsuits have shown that there is a history of all the DA's office in New York City doing nothing to prosecutors found guilty of Brady violations," he says, and if there is no serious discipline meted out for such offenses, it sends the message "that we don't really care about it all that much and that encourages more violations."

In the Ramos case, Rudin sued the city and obtained discovery material showing "the Bronx prosecutor's office, employing nearly 400 prosecutors and hundreds of support staff, has no published code or rules of behavior for prosecutors, no potential sanctions for misbehavior, no formal procedure for investigating or disciplining prosecutors, and no record-keeping of prosecutors with a history of improper behavior," according to the *Law Review* article.

"Officials could identify just one prosecutor since 1975 who, according to the Office's records, has been disciplined in any respect for misbehavior while prosecuting a criminal case. Officials claim that several prosecutors have been verbally chastised, or temporarily denied raises in compensation, but there is no apparent record of it," Rudin wrote.

Ramos won a \$5 million civil rights settlement in 2003, the largest wrongful conviction settlement at the time in New York State, according to Rudin. The Bronx DA would not comment on the Ramos case, but Robert Dreher, Bronx executive assistant district attorney says, "We have an extensive comprehensive training and ethical education of our attorneys." He would not say how many people times prosecutors had been disciplined or how.

The problem, say critics, is the vast leeway prosecutors in New York are given in determining which evidence is relevant to a defendant's case. In the case of Bill Bastuk, a former legislator and former Irondequoit councilman who was falsely accused in 2008 of raping a girl who took junior sailing lessons with his son, prosecutors tried to withhold the diaries of his young accuser.

Though the case was built on the father's discovery of a diary entry accusing Bastuk of raping his daughter at the Rochester Yacht Club, Bastuk and his lawyer were only given a copy of that single entry at arraignment. The trial was delayed four times over the course of a year while they made motions to see more, he said. Finally, Bastuk's lawyer got the diaries. One page, dated a month before the alleged incident, predicted that Bastuk would rape the girl, including the exact date and time of her attack. Another entry that said "I wish I could make this all go away, but my parents won't let me," Bastuk recalls.

The judge reviewed the diaries to determine whether they were discoverable and found an entry accusing another man of climbing through the girl's window and raping her on a separate occasion. By the time trial began, the defense also had medical records showing she was in treatment for self-mutilation.

The jury met for only two hours, he said. Not guilty.

"These diary entries totally destroyed her credibility," Bastuk says, adding "this was really a classic case of how discovery can impact a process."

But Bastuk had a private lawyer—and stature. He did not await the trial from jail, as defendants who are deemed a severe flight risk or can't afford bail must do. If his lawyer had not requested the material and a judge had not agreed to review the diaries and override the prosecution, he wouldn't have had any right to them.

"This was really a classic case of how discovery can impact a process," Bastuk says. "Without automatic discovery at arraignment, a defense attorney really can't make the best decision on how to defend a client."

### **Timing is everything**

Indeed, the problem is often not just what information is available, but when.

In crowded jurisdictions like New York City, there aren't enough resources to bring most cases to trial. Ninety-seven percent of federal and 94 percent of state cases pleaded out before trial, according to *The New York Times*. While pleas often render justice, innocent defendants can end up pleading guilty for fear of a longer sentence if they lose at trial, and guilty defendants may cop to more severe crimes than ones they committed—in part because defendants are often asked to take a plea often before any Brady information is made available to them.

In February, at a \$50-per-plate Discovery for Justice fundraiser at Joe's Place on Westchester Avenue in the Bronx, actors sought to put a face on the kind of pre-trial injustice rarely depicted on prosecutor-friendly television dramas.

A teenager, who claims to have fallen asleep watching a basketball game when the crime he's been accused of occurred, is offered a plea in court. He has to decide whether to take it and avoid the possibility of jail time, or choose to go to trial without seeing any of the evidence against him. He screams at his helpless lawyer: "I want to prove my innocence but I don't want to risk going to jail for — you're saying five to 25 years — for something I didn't do!"

Scene two takes place around the kitchen table, where his family agonizes over what they will tell the judge in the morning. And then it ends with a question: "How would you respond if that were your son?" Asking is Judge Fernando Tapia, who has worked in both Bronx civil and criminal courts and is a sitting judge, who has seen the statute in action.

"That's no way to deal justice when you say: 'You want to role the dice?'" he told the audience.

### **Witnesses in danger?**

District attorneys in New York take advantage of the narrow discovery statute by holding on to information related to testifying witnesses until right before they take the stand—arguing that the current New York law protects witnesses from retaliation.

In a statement, the New York District Attorney's Association says it is "committed to justice and fairness," and is participating in the Justice Task Force convened by the state's top judge, Jonathan Lippman, which is looking at the discovery issue. The DA's Association does, however, point to the need for a "delicate balancing of a defendant's right to informed representation and a fair trial with critical public safety and witness protection considerations."

A spokesman for the DA's Association pointed to Manhattan District Attorney Cy Vance's June 2012 Op-Ed in the *New York Law Journal*, in which he writes that "for every witness that comes forward, many would not think of giving information to authorities because they know that their identities and the substance of their testimony will be disclosed during the process of criminal discovery." He points to the case of Daniel Everret, who while awaiting trial in jail for the 2008 murder of 13 year-old Scotty Scott in Harlem, was recorded on the phone instructing fellow gang members how to intimidate a witness.

However, the idea that more open discovery would put witnesses at risk was addressed in the Legal Aid Society's most recent proposal to replace Article 240, which notes that similar reforms have worked in states with big cities like Los Angeles, Chicago, Detroit, Philadelphia, Miami, San Diego and Newark, where studies have shown defense lawyers and prosecutors approve of the discovery practices and find them efficient and fair.

"The streets are not bathed in blood," Karlsson says.

Yates points out that alarmist scenarios like the one laid out in Vance's Op-Ed would only apply to a very small number of serious crimes like rape and murder. In those cases, prosecutors can move for a protective order to shield some material from discovery—they'd just have to justify each concealment.

As it stands, not only are witnesses' names concealed until right before they testify, prosecutors are not obligated to provide information obtained from witnesses whom they will not call. If witness A fingers the accused and witness B casts doubt on A's story, he says, prosecutors don't have to turn over B's statement unless they plan to discuss it in court, which is highly unlikely. A legislative fix could eliminate the specification that only what will be introduced at trial must be turned over. "But the DAs oppose that because they don't want the world to know about witness B," Yates says.

### Several reform proposals

Momentum has been slowly building for legislative change to the discovery law.

Two 2012 U.S. Supreme Court decisions established defendants' rights to effective counsel during pre-trial plea bargaining. Interpretation of the rulings differ, but the dual decisions have given extra weight to the argument that pre-trial evidence is part of the right to a pre-trial defense.

Judges have increasingly spoken out about injustices they have helplessly witnessed — such as defendants forced to accept or reject a plea without knowledge of the evidence against them. And advocates have argued that New York's discovery law strains already overburdened courts and jails by forcing defense lawyers to file motions for evidence they should be entitled to as a matter of course. As their lawyers fight for material that other states would require prosecutors to turn over automatically, defendants often sit behind bars, with taxpayers footing the bill. The longer they wait, data has shown, the more likely they are to plead guilty.

People who have seen first-hand some of the problems with the justice system are among those on the front lines pushing for change.

Jeffrey Deskovic, who served 16 years in prison for murder and rape until DNA evidence exonerated him, is using his multi-million-dollar settlement against Westchester County to start the Jeffrey Deskovic Foundation for Justice, which is speaking out on the issue.

Meanwhile, Bastuk and his wife lead a grassroots coalition to prevent wrongful indictments and convictions called It Could Happen to You, which has been working with New York State Chaplain's Association chapters around the state to push for legislation that would require what Bastuk calls the Triple A: "All the evidence, automatically, at arraignment."

Discovery for Justice was founded by retired NYPD Detective Carlton Berkley, who is leading the push to rally support in the criminal justice community to replace Article 240, with unofficial but unmistakable support from Tapia. The flaws in the system might be obvious to lawyers, but it's news to many cops, Berkley notes. "A lot of police officers don't know that," he says. "We always thought that the system was fair."

Activists are not unified around a bill, but are making frequent trips to Albany. They have begun leaning heavily on their state senators, lobbying in particular state Sen. Jeff Klein, whose district covers parts of the Bronx and Westchester and leads small but powerful Independent Democratic Conference that shares power with senate Republicans.

Apart from the "triple A bill," there's one drafted by Legal Aid, which has been introduced before and would replace Article 240 with an open file policy. Another, more recent, Legal Aid bill, taken up by State Sen. Diane Savino, an IDC member, calls for evidence to be turned over in phases.

John Schoeffel, an attorney with Legal Aid's special litigation unit, says the Savino bill takes into account concerns of the District Attorneys Association by giving more time for certain disclosures, and is aimed at avoiding the fate of earlier bids to fix Article 240, which wilted under prosecutors' opposition.

There are two other bills that don't replace article 240, but mend it— one that would give judges discretion over what to turn over and another "Brady fix" that would force prosecutors to turn over everything favorable to the defense.

Neither Klein nor the IDC responded to repeated requests for comment. But an advocacy day on Feb. 11 brought grassroots lobbyists to his office, and a group of community leaders including Tapia plan to meet with Klein on April 3.

At the same time, the New York State Justice Task Force has also been focusing on discovery reform and has come to a point of action. According to the 2014 State of the Judiciary delivered by Lippman, the task force is "recommending that the prosecution disclose — well in advance of the scheduled trial date — the identity and any prior statements of all witnesses who have relevant information, whether the prosecution intends to call those witnesses at trial or not." Also, before trial, the task force recommends that both sides exchange written reports or summaries of their anticipated testimony by expert witnesses.

"We will shortly be submitting legislation proposing these and other significant changes," Lippman said in the speech.

Nancy Ludmerer, counsel and a member of the task force, says members are in the process of voting on their specific recommendations and that the results will be released within the next several weeks. Then Lippman will decide how to effect those reforms.

Rudin, for his part, said "open file discovery is only the beginning," and that the law must also cover unrecorded interviews, and create consequences for prosecutors who conceal evidence.

Stakeholders disagree about the best remedy. But there seems to be consensus that a long-awaited tipping point is within reach for changing New York's antiquated discovery law.

"There is no truth-seeking justification to hide this material," Karlsson says.



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June 5, 2017

John W. McConnell, Esq, Counsel  
Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, NY 10004  
rulecomments@nycourts.gov

Dear Mr. McConnell:

As you are aware, the District Attorneys Association of the State of New York (DAASNY) participated in the Justice Task Force (JTF) deliberations that led to the recommendations for which the Office of Court Administration now seeks comments. There was both spirited debate and compromise in the JTF, and the resulting proposals are a distillation of those deliberations.

We write only to express a concern that has in part guided DAASNY throughout these discussions -- allowing numerous judges and justices, many of them not attorneys, to draft and enforce orders in a patchwork manner. Therefore, we make the following two recommendations.

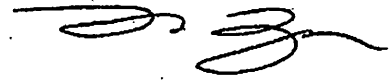
First, the language in these orders must be promulgated by the Chief Judge of the Court of Appeals or the Office of Court Administration (OCA) and judges issuing the orders shall not be permitted to vary the language absent specific written permission from the appropriate administrative judge. This will limit statewide variances and foster uniformity.

Second, as proposed, the orders require a finding that any violation was "willful and deliberate." Some written materials, and perhaps continuing legal education, should instruct judges and justices on the definition of these terms. Additionally, some procedure should be formulated before a judge or justice may make a finding, in order to provide prosecutors and defense attorneys with appropriate due process.

DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

DAASNY is ready to assist further should OCA seek its counsel.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Zugibe', with a stylized flourish at the end.

Thomas P. Zugibe  
President, DAASNY  
District Attorney, Rockland County

**From:** Shields, William B. <WShields@BlankRome.com>  
**Sent:** Monday, June 05, 2017 7:59 PM  
**To:** rulecomments  
**Subject:** comments on the NYS Justice Task Force "Model Order Directed to the Prosecution"  
**Attachments:** Judge E Sullivan DDC Standing Brady Order from court's website last visited June 4 2017.pdf

Categories:

Dear Mr. McConnell and the NYS Justice Task Force:

Thank you for your efforts to improve New York's criminal justice system and for soliciting comments on the "Model Order Directed to the Prosecution".

The Model Order has a significant defect which will render it completely ineffective in the vast majority of criminal prosecutions in New York. The proposed Order does not require any disclosure of "information favorable to the defense" until 30 days before felony trials and 15 days before misdemeanor trials. New York State Justice Task Force, *Report on Attorney Responsibility in Criminal Cases*, Feb. 2017, Appendix B, pp. 15 & 16. That timetable practically ensures that there will be no *Brady* disclosures in the vast majority of prosecutions.

Trials are conducted in a very small percentage of criminal cases. Almost all criminal prosecutions in New York, and throughout the country, end in plea bargains. The Supreme Court has described plea bargaining as "the criminal justice system" and "the critical point for a defendant":

Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . Because ours "is for the most part a system of pleas, not a system of trials," *Lafler, post*, at 170, 132 S. Ct. 1376, 182 L. Ed. 2d 398, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 *Yale L. J.* 1909, 1912 (1992). See also Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

*Missouri v Frye*, 132 S. Ct. 1399, 1407 (2012)(first ellipsis added; brackets in original).

See also Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times, Aug. 7, 2016 ("New York State Court data also shows a striking decline in felony jury trials. In 1984, there were over 4,000 jury verdicts; in 2015, there were fewer than half of that.").

The failure of the Model Order to require disclosure of information helpful to the defense upon or shortly after the commencement of the criminal prosecution means that the defendant will be deprived of that vital information during critical plea negotiations which resolve the great majority of prosecutions in New York. The defendant's ability to bargain with the prosecutor will be hobbled and the defendant will be placed at a designedly unfair disadvantage because only the prosecutor will know the weaknesses in and the worth of her

case. Prosecutors will bargain without having ever to show their cards, or even a single card, until a trial which will most likely never happen.

This deficiency in the Model Order is more glaring when it is compared to the standing order used by U.S. District Judge Emmet T. Sullivan in the District of Columbia. Judge Sullivan presided over the trial of U.S. Senator Ted Stevens in 2008 and set the guilty verdict aside and dismissed the indictment in 2009 when the prosecutors' pervasive *Brady* violations came to light after trial. Judge Sullivan's Standing Order adopted after that prosecution, requires the government to provide exculpatory evidence to the defendant in a "timely manner", "including during plea negotiations", and despite "the fact that such evidence need not be produced according to Rule 16" of the Federal Rules of Criminal Procedure. *Standing Order* at 2 (attached).

Similar standing orders are widely used by U.S. District Judges. *See* Federal Judicial Center, 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, III. Analysis of District Court Local Rules and Orders with Broader Disclosure Requirements than Rule 16 for Disclosing Brady Material, February 2011, at 11 ("More specifically, thirty-eight districts have a local rule or standing order that codifies the government's obligations to disclose exculpatory and/or impeachment material in either very general or specific terms, and/or provides timing requirements for the disclosure of exculpatory and/or impeachment material. In addition to requiring 'broader' disclosure than Rule 16 provides for, several of these local rules and orders require 'broader' disclosure than what is required by *Brady* and its progeny case law by eliminating the *Brady* 'materiality' requirement and/or adding a time frame within which exculpatory and/or impeachment evidence must be disclosed.") (footnote omitted). In the accompanying footnote, the Federal Judicial Center observes that "Neither *Brady* nor any of its progeny cases establish timing requirements for disclosure of exculpatory or impeachment evidence." *Id.*, n. 30.

Unlike Judge Sullivan's Standing Order, the Model Order does not require or permit the prosecutor to disclose information during plea negotiations that could be used by the defendant to impeach the government's witnesses. The Model Order appears to rely on *United States v. Ruiz*, 122 S. Ct. 2450, 2457 (2002) where the Supreme Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."). Of course, a prosecutor has the discretion to disclose impeachment information to a defendant prior to trial, during plea bargaining and a court has the authority to require its disclosure. *See* Judge Sullivan's Standing Order, n.1; *see also* *Buffey v. Ballard*, 782 S.E.2d 204, 220 (W. Va. 2015) ("Permitting a prosecutor to withhold exculpatory evidence during a defendant's evaluation of a plea offer would essentially 'cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.' *Brady*, 373 U.S. at 88."); *United States v. Nelson*, 979 F. Supp. 2d 123, 135-136 (D.D.C. 2013), reconsideration denied, 59 F. Supp. 3d 15 (D.D.C. 2014), and appeal dismissed, No. 13-3108, 2014 WL 3013970 (D.C. Cir. June 17, 2014) (conviction vacated where government suppressed exculpatory evidence before defendant pleaded guilty).

Assistant District Attorneys meet and interview witnesses and police on the day of the arrest and start compiling the facts of the case, always with a professional, attentive eye out for its strengths and weaknesses. No legitimate reason exists to delay the constitutionally obligatory disclosure to the defendant of the *Brady* material inevitably collected in that process while plea bargaining is conducted or to the eve of trial which may be months and years away, if it occurs at all.

Judge Friendly's description of the complexities of habeas comes to mind:

Judge Friendly observed in his seminal essay on habeas corpus that, "[a] remedy that produces no result in the overwhelming majority of cases, . . . an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely, would seem to need consideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process." *See*

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgements*, 38 U. Chi. L. Rev. 142, 148 (1970) (footnote omitted).

*Friedman v. Rehal*, 618 F.3d 142, 159 (2d Cir. 2010)(bracket and ellipsis in original).

*C.P.L.* § 710.30 provides that the District Attorney must notify the defendant of statements and identifications within 15 days of arraignment and no more, and failure to meet that deadline and provide those important notices results in the loss to the People of that evidence. *Brady* information is more important to the defense and to the government than statements and identifications. Consideration ought to be given to expediting the delivery of exculpatory evidence that belongs to the accused citizen under the Constitution instead of concealing, delaying and risking its loss for months and years for no legitimate reason.

The views presented here are mine alone and do not necessarily represent the views of Blank Rome.

Thank you.

Bill Shields

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. XX-XX (EGS)
	)	
[PARTY NAME],	)	
	)	
Defendant.	)	
_____	)	

ORDER

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the government has a continuing obligation to produce all evidence required by the law and the Federal Rules of Criminal Procedure. See *id.* at 87 (holding that due process requires disclosure of "evidence [that] is material either to guilt or to punishment" upon request); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (holding that the obligation to disclose includes evidence "known only to police investigators and not to the prosecutor," and that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf ..., including the police."); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that the duty to disclose exculpatory evidence applies even when there has been no request by the accused); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (holding that *Brady* encompasses impeachment evidence); see also Fed. R. Crim. P. 16(a) (outlining information

subject to government disclosure); *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998) (holding that the disclosure requirements of Fed. R. Crim. P. 16(a)(1)(C) apply to inculpatory, as well as exculpatory, evidence).

The government's obligation to provide exculpatory evidence pursuant to *Brady* in a timely manner is not diminished either by the fact that such evidence also constitutes evidence that must be produced later pursuant to the Jencks Act, 18 U.S.C. § 3500, or by the fact that such evidence need not be produced according to Rule 16. See *United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988); see also Advisory Committee Note to Fed. R. Crim. P. 16 (1974) ("The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled."). Where doubt exists as to the usefulness of the evidence to the defendant, the government must resolve all such doubts in favor of full disclosure. See *United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988).

Accordingly, the Court, *sua sponte*, directs the government to produce to defendant in a timely manner - including during plea negotiations<sup>1</sup> - any evidence in its possession that is

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<sup>1</sup>See *United States v. Ohiri*, 133 Fed.Appx. 555, 562 (10<sup>th</sup> Cir. 2005); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9<sup>th</sup> Cir. 1995); *White v. United States*, 858 F.2d 416, 422 (8<sup>th</sup> Cir. 1988) *Campbell v. Marshall*, 769 F.2d 314, 322-24 (6<sup>th</sup> Cir. 1985); *U.S. v. Nelson*, 979 F.Supp. 2d 123, 135-136 (D.D.C. 2013); *Buffey v. Ballard*, 782 S.E. 2d 204 (W.Va. 2015).

favorable to defendant and material either to defendant's guilt or punishment. The government is further directed to produce all discoverable evidence in a readily usable form. For example, the government must produce documents as they are kept in the usual course of business or must organize and label them clearly. The government must also produce electronically stored information in a form in which it is ordinarily maintained unless the form is not readily usable, in which case the government is directed to produce it in a readily usable form. If the information already exists or was memorialized in a tangible format, such as a document or recording, the information shall be produced in that format. If the information does not exist in such a format and, as a result, the government is providing the information in a summary format, the summary must include sufficient detail and specificity to enable the defense to assess its relevance and potential usefulness.

Finally, if the government has identified any information which is favorable to the defendant but which the government believes not to be material, the government shall submit such information to the Court for *in camera* review.

**SO ORDERED.**

**Signed: Emmet G. Sullivan  
United States District Judge  
Month, Day, Year**



Haydee Marrero

---

**From:** PD- Correia, Andrew <ACorreia@co.wayne.ny.us>  
**Sent:** Tuesday, May 23, 2017 9:38 AM  
**To:** rulecomments  
**Subject:** Comments on Proposed Model Disclosure Orders

**Categories:**

To: John W. McConnell, Esq.  
Counsel, Office of Court Administration  
25 Beaver St, 11<sup>th</sup> Fl.  
New York NY 10004

My name is Andrew Correia, 1<sup>st</sup> Assistant Public Defender in Wayne County. Our Chief Defender is James Kernan. I am writing on behalf of my office to provide you with our input regarding the Proposed Model Orders Regarding Disclosure Obligations in criminal cases. In general, we are very supportive of the model orders.

**Model Order Directed to Defense Counsel**

We have no objection to the form and content of this proposed order. Although we believe that we regularly meet all of these directives in our client representation, it is clear to us that there are many places where this is not the case. Because this order is a fair statement of our legal and ethical obligations as defense lawyers, we have no concerns about its use.

**Model Order Directed to the Prosecution**

We have two concerns regarding the Prosecution order.

1) **We believe that the third paragraph from the bottom of the order should be modified to not include any presumption of timeliness.** We would keep only the first sentence and the last sentence of this paragraph. There is no reason to encode a permissible delay in providing Brady information to the defense. Under your proposed order the DAs will certainly take advantage of providing the latest disclosure possible under the order. 30 days before trial in felonies or 15 days before trial in misdemeanors means that DAs will be allowed to sit on favorable information for weeks if not months. This permissive delay could severely compromise defense counsel's ability to follow up on information and investigate these new facts in an ethically required way which would result in zealous trial representation.

But Brady information is also relevant to hearings. Witnesses take the stand at hearings that could be examined about favorable information, if disclosed. If this order is employed, the DA would have every reason to believe that they are ethically on solid ground if they wait until late in the game prior to hearings to release this information, thereby crippling defense counsel's ability to use any such information to its full effect.

2) **We believe the final paragraph should be struck in its entirety.** If this order only prohibits "willful and deliberate conduct" it will encourage the DAs to continue to shield themselves from information that should be disclosed, because they can always take refuge in the fact that they did not willfully and deliberately withhold information. This portion of the order should be removed. Whether personal sanctions should be made available in the case of a violation of discovery obligations should be left to subsequent civil courts, if any such civil action is filed.


Thank you for your request for input on these matters.

ADC

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Wayne County Public Defender  
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May 22, 2017

John W. McConnell, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street, 11th Floor  
New York, New York 10004

RE: Response to Request for Public Comment on Proposed Model Orders Regarding  
Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters

Dear Mr. McConnell:

I write to express my deep concern with the Justice Task Force's Proposed Model Order Regarding the Disclosure Obligations of Prosecutors (the "Proposed Order"). In its current form, a prosecutor who willfully and deliberately withholds *Brady* material would not violate the Proposed Order so long as he or she obtains a guilty plea more than 30 days before a trial or a suppression hearing. That outcome cannot have been the Task Force's intent in promulgating the Proposed Order.

As detailed in its Report on Attorney Responsibility in Criminal Cases, the Task Force created the Proposed Order to educate and remind prosecutors of their ethical obligations under Rule 3.8 of the New York Rules of Professional Responsibility and their constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny to disclose favorable information to the defense because *Brady* violations result in wrongful convictions. That goal is laudable given then-Chief Judge Alex Kozinski's observation that, "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissent from denial of petition for rehearing en banc). Regrettably, the Proposed Order is flawed in its current form.

The principal error in the Proposed Order is contained in its "key provision" that omits mention of a prosecutor's ethical duty to disclose favorable evidence and otherwise misstates when prosecutors must disclose such information. The timing of *Brady* disclosures is not tied to trial or suppression hearings, as the Proposed Order seems to indicate. Rather, in this age where nearly all criminal cases are resolved by plea, favorable evidence must be produced as soon as practicable but certainly no later than in time for it to be effectively used by a defendant in deciding whether to enter a guilty plea.

The “key provision” of the Proposed order reads as follows:

Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL article 240. Disclosures are presumptively “timely” if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL 240.44 or 240.45(1). Disclosures that pertain to a suppression hearing are presumptively “timely” if they are made no later than 15 days before the scheduled hearing date. The prosecutor is reminded that the obligation to disclose is a continuing one.

(Report on Attorney Responsibility in Criminal Cases at Appendix B & pg. 8.)

*Brady* requires a prosecutor to provide favorable evidence in time for its effective use by defense counsel. See *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2011). Despite frequent attempts by prosecutors to tie their *Brady* obligations to trial—something that the Proposed Order appears to do as well—the obligation to make *Brady* disclosures “is pertinent not only to an accused’s preparation for trial but also to his determination of whether or not to plead guilty,” a decision an accused is entitled to make “with full awareness of favorable material evidence known to the government.” *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998). Simply put, *Brady* material must be turned over before a plea.

Rule 3.8(b), as contemplated by the Supreme Court, provides even more extensive protections than the *Brady* doctrine. See *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”) Rule 3.8(b) requires prosecutors to “timely disclos[e]” exculpatory evidence.

On August 29, 2016, the Association of the Bar of the City of New York Committee on Professional Ethics published Formal Opinion 2016-3 (the “City Bar Opinion”). The City Bar Opinion addressed extensively Rule 3.8(b)’s “timely disclosure” requirement. Succinctly put, that requirement means that “once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or that otherwise falls within the rule’s disclosure requirement, the prosecutor ordinarily must disclose it *as soon as reasonably practicable*.” (City Bar Opinion at 8 (emphasis added).)

As the City Bar recognized, the purpose of disclosure under Rule 3.8(b) “includes not only facilitating a potential trial defense but also assisting the defense prior to trial—e.g., enabling the defendant to weigh the strength of the prosecution’s case in order to make a better informed decision whether to plead guilty, and enabling the defense lawyer to conduct a more effective investigation and better prepare for trial.” (City Bar Opinion at 9.) It should come as no surprise that the ethical rules require disclosure of favorable evidence to an accused during the plea process in a criminal justice system where nearly all cases are resolved before trial.

The City Bar’s formal guidance on Rule 3.8(b)’s timely disclosure requirement is consistent with the American Bar Association Standing Committee on Ethics and Professional Responsibility’s Formal Opinion 09-454 which held that Model Rule 3.8(d)—which is substantively identical to New York Rule 3.8(b)—imposes on a prosecutor the ethical duty to disclose favorable evidence “as soon as practicable.” *See also People v. Waters*, 35 Misc. 3d 855, 860 (Sup. Ct. Bronx County 2012) (“Evidence or information that impugns the credibility of the [prosecution’s] principal witness . . . tends to negate his guilt and, therefore, [Rule 3.8(b)] obligates the prosecutor to disclose this material to the defense *as soon as possible*.”) (emphasis added).

If the purpose of the Proposed Order is to educate and remind prosecutors of their constitutional and ethical duties, then the Proposed Order should do so consistent with the actual rules and require disclosure as soon as reasonably practicable. As currently styled, the Proposed Order does not mention the ethical rule vis-à-vis the timing of disclosures. And it misleads a prosecutor into thinking that so long as he or she discloses *Brady* material within 30 or 15 days of trial (depending on the charge), he or she is presumptively cleared of any wrongdoing.

I propose that the Proposed Order include the following revised paragraph:

Favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, CPL article 240, and Rule 3.8(b) of the New York Rules of Professional Responsibility, whichever is sooner. Rule 3.8(b) requires disclosure of such information as soon as practicable. The disclosure is presumptively “timely” if made within two weeks of when the prosecutor first learned of the information. The prosecutor is reminded that the obligation to disclose is a continuing one.

The revised language makes clear the prosecutor’s ethical obligation to disclose favorable material quickly and does not misinform the prosecutor that he or her obligation is in some way tied to trial or suppression hearings. Indeed, a prosecutor’s ethical and constitutional duties

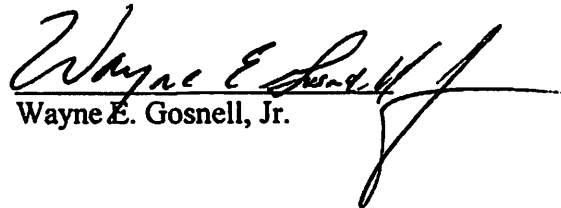
extend beyond the entry of a guilty plea or verdict. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). And it preserves the presumption of “timeliness” only for prompt disclosures.

An example makes the point of why these changes are necessary. Earlier this month, a prosecutor in Suffolk County was caught deliberately withholding from defense counsel more than 100 pages of notes relating to a homicide prosecution—notes that included the names of undisclosed witnesses and evidence that others confessed to the murder. After the malfeasance was discovered at trial, the prosecutor was rightly fired and the defendant was permitted to plead guilty to a significantly reduced charge.<sup>1</sup>

Under the Proposed Order, the prosecutor would have enjoyed a presumption of timeliness for his deliberate withholding of *Brady* material so long as he provided it to defense counsel more than 30 days before the murder trial. And he would face no sanctions if he coerced a plea from the defendant within the same time frame. That is not what the ethical rules or *Brady* countenance—indeed, the prosecutor was ethically and constitutionally obligated to turn that information over immediately. It blinks reality to conclude that defense counsel is not seriously prejudiced by learning at such a late date that other witnesses confessed to the crime or could exculpate the defendant. But under the Proposed Order the court would be presumptively powerless to sanction a prosecutor who engaged in this practice.

The *Brady* rule is supposed to be about fairness. Rule 3.8(b) reinforces that doctrine and goes further. The Proposed Order seemingly educates prosecutors to do the opposite of what those rules provide. We urge you to instruct prosecutors as to their actual obligations so that every defendant enjoys the protections the Constitution and ethical rules afford him or her.

Respectfully submitted,

  
Wayne E. Gosnell, Jr.

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<sup>1</sup> See Parpan, Grant, Riverhead News-Review, *Trial in Demetri Hampton Murder Abruptly Ends as Defendant Accepts Plea Deal*, (May 9, 2017), available at <https://riverheadnewsreview.timesreview.com/2017/05/80587/trial-in-demetri-hampton-murder-abruptly-ends-as-suspect-accepts-plea-deal/>.

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RECEIVED

Haydee Marrero

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**From:** slockwoodesq@aol.com  
**Sent:** Monday, June 05, 2017 11:02 AM  
**To:** rulecomments  
**Subject:** Comment on Proposed Model Orders

Categories:

Attn: John W. McConnell, Esq.

Mr. McConnell,

Please allow this to serve as a comment regarding the Proposed Model Orders Regarding Disclosure Obligations of Prosecutors and Defense Counsel in Criminal Matters. With respect to Section VII. Order Regarding Disclosure Obligations for Prosecutors, the Committee recommends the following:

"The order should be issued by trial courts upon defendant's demand at arraignment on an indictment, prosecutor's information, information, or simplified information (or, where either the People or counsel for the defendant is not present at the arraignment, at the next scheduled court date with counsel present)."

I believe this is inconsistent with the duties of the prosecution and will serve to cause confusion regarding prosecutorial responsibilities with respect to disclosure under currently existing law.

The law requires that the prosecution disclose Brady materials in sufficient time so that the defense will have a reasonable opportunity to use it, see *Leka v. Portuondo*, 257 F 3d 89, 103 (2d Cir 2001).

There is no reason for excluding disclosure of favorable information upon arraignment on a felony complaint or a misdemeanor complaint. In the former circumstance, i.e., arraignment on a felony complaint, disclosure is crucial since this is "precisely the juncture at which legal advice is crucial and ... any discussions relating thereto should be conducted by counsel: at that point the parties are in no position to safeguard their rights." *People v. Settles*, 46 NY 2d 154, 163-64, 412 NYS 2d 874 (1978). Numerous cases in New York have recognized the critical nature of the period of time between arraignment on a felony complaint and a grand jury presentation, *People v. Hunt*, 277 AD 2d 911, 716 NYS 2d 264 (4<sup>th</sup> Dep't 2000); *People v. Stevens*, 151 Ad 2d (2d Dep't 1989); *People v. Matay*, 82 AD 2d 867 (3d Dep't 1981); *People v. Lincoln*, 80 AD 2d 877, 877, 436 NYS 2d 782 (2d Dep't 1981).

To exclude disclosure obligations from complaints, particularly felonies, is an unwarranted abrogation of the constitutional mandates and will only serve to sow more confusion in this already troubled area of jurisprudence.

I thank you for your time and courtesy.

Scott Lockwood, Esq.  
1476 Deer Park Avenue  
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North Babylon, NY 11703  
(631) 242-3369



Haydee Marrero

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**From:** Tatiana Neroni <tatiana.neroni@gmail.com>  
**Sent:** Sunday, June 04, 2017 5:24 PM  
**To:** rulecomments  
**Subject:** public comment on the proposed "standing order on discovery" in criminal cases

**Categories:**

Dear Mr. John W. McConnell

Attached through links is my already published public comment to the proposed rule of "standing orders of discovery" in criminal cases, published by New York court system here:

<http://nycourts.gov/rules/comments/PDF/ModelOrders-DisclosureObligationsCriminalMatters.pdf>.

My public comments consist of 8 parts.

Part VIII is available through a link here:

<http://attorneyindependence.blogspot.com/2017/06/public-comment-on-new-york-proposed.html>,

and Parts I through VII are available through links within Part VIII.

I incorporate through reference all materials I refer to in links in Parts I through VIII.

Thank you.

--

Tatiana Neroni, J.D., M.A. (ESL), M.A. (management)  
P.O. Box 3937  
Pawleys Island, SC 29585