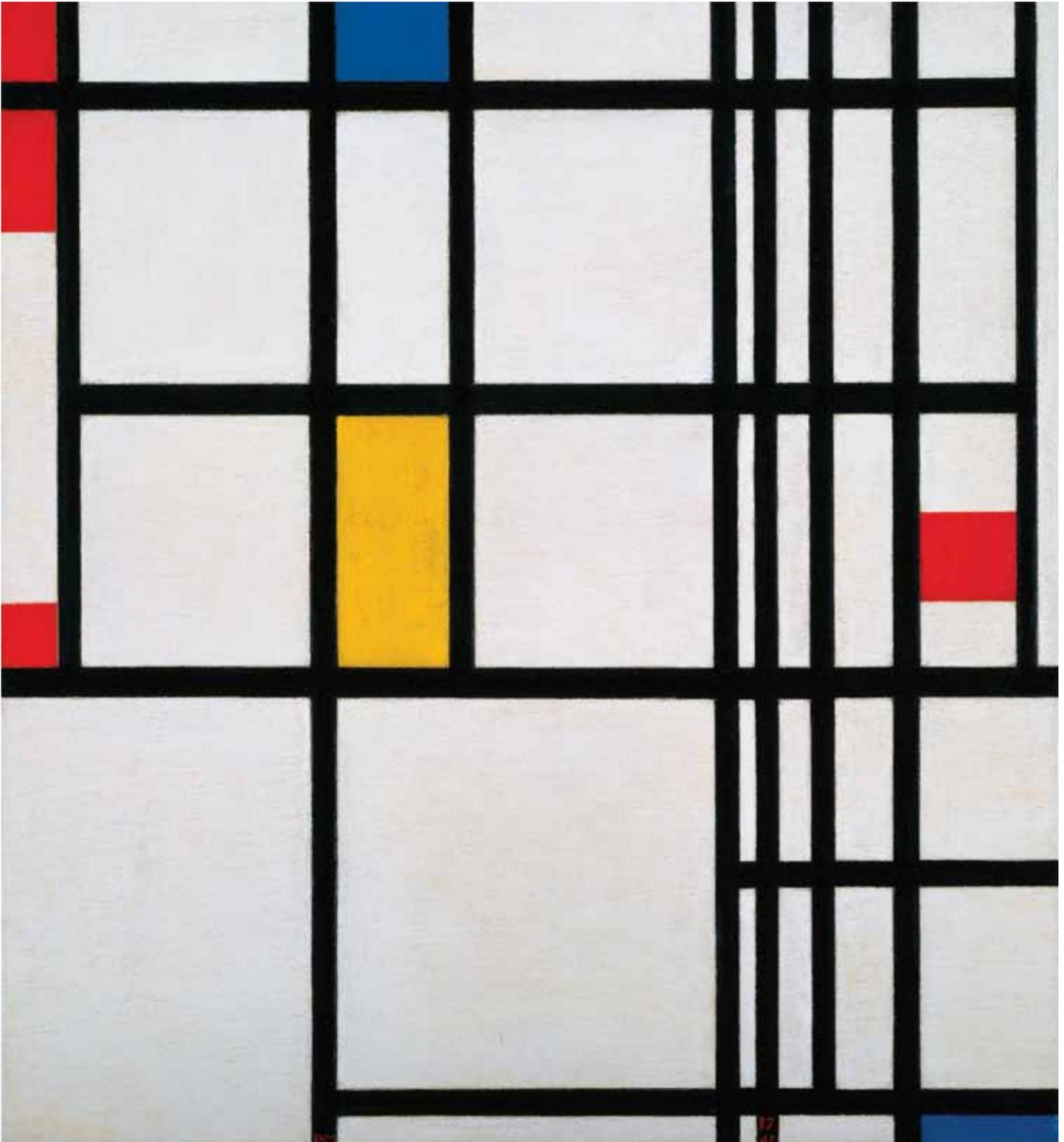


# Establishing Conviction Integrity Programs In Prosecutors' Offices

A Report of the  
Center on the  
Administration  
of Criminal Law's  
Conviction  
Integrity Project



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# Executive Summary

# Executive Summary

Prosecutors can and should be leading the charge to ensure that the public has confidence that criminal convictions are of the guilty, not the innocent. And of course prosecutors themselves want to convict guilty people, not innocent ones. Thus, prosecutors are implicitly committed to the notion of “conviction integrity,” even if they are not already formally implementing a program under that name.

But it is not enough for prosecutors to rely on the good faith efforts of those who work in prosecutors’ offices. The many proven cases of wrongful convictions and their known causes demonstrate that more needs to be done to guard against errors. This Report provides a template for prosecutors looking to formalize conviction integrity mechanisms and to adopt the best available practices. The Report—the product of a Roundtable of current and former prosecutors and law enforcement representatives from around the country, as well as the best available empirical research on wrongful convictions—offers concrete steps and feasible solutions (including appendices with checklists to remind prosecutors of steps they should be taking to guard against errors) that prosecutors can take to mitigate the risk of wrongful convictions. A short summary of the recommendations is discussed in this Executive Summary, with further details in the body of the Report itself.



## Reforms that Prosecutors Can Implement in Their Offices

Prosecutors’ offices should implement conviction integrity programs in their offices that include the following core reforms:

### 1. Leadership and Rewards for Good Prosecutors

Prosecutors should seek to reform or reinforce office culture by establishing the right “tone at the top.” This is not a symbolic or “empty” reform—it is a

necessary prerequisite to reforming (or reinforcing) an office culture that is committed to ensuring that all prosecutors act in an ethical and professional manner. Setting the right tone begins with the recruiting and hiring process, by evaluating candidates on their commitment to doing justice, not just a desire to seek convictions. It also involves recognizing and promoting line prosecutors not merely on the basis of their win-loss records, but on the quality of the work they do in all their cases, regardless of whether they win, lose, or move for post-conviction vacation of a charge. By emphasizing a commitment to justice and ethical behavior, this will lay the ground work for other conviction integrity reforms that an office seeks to implement.

### 2. Training

Prosecutors should also establish training and education programs that focus on ethical and professional obligations. Establishing training programs is not an admission that an office has a problem with attorney misconduct; it is another valuable tool to remind prosecutors of their unique job duties. While many offices already have existing training programs, they should be modified to include a conviction integrity component. This component can include case studies involving exonerations or dismissals for lack of probable cause to illustrate particular challenges that a line prosecutor might face, as well as any lessons learned with the benefit of hindsight.

### 3. Checklists

Prosecutors should take steps to create checklists reflecting best practices in the investigation and prosecution of all criminal cases. In many cases, this

will simply entail formalizing pre-existing, unwritten office policies. Checklists are an effective and relatively low-cost way to implement conviction integrity reforms because they codify routine procedures in criminal cases, which in turn help remind line prosecutors of the need to comply with all steps in the investigative and trial processes. Moreover, checklists can be tailored to apply to a variety of areas, including *Brady* and *Giglio* compliance, investigative and pretrial steps, and interview techniques. Checklists are also useful for supervisors because they can provide a contemporaneous record of how a line prosecutor has handled a case to date.

#### **4. Discovery-Related Initiatives**

Prosecutors should strongly consider enacting an office policy of “open file” discovery, whereby a prosecutor, as a general practice, will disclose all exculpatory evidence of which he or she is aware, without regard to materiality. Open file discovery can actually assist prosecutors in their job duties by obviating the need to engage in the often thorny *Brady* analysis of whether deprivation of evidence *before* trial would render a trial unfair, not to mention lessening the likelihood that a prosecutor will take a piecemeal approach to evaluating whether a single piece of evidence is exculpatory when weighed against the totality of all the evidence. Finally, open file discovery will send a positive signal to the public and the defense bar that an office is committed to transparency, fairness, and accountability in prosecuting all criminal cases.

Even if prosecutors decline to enact open file discovery policies, they should still take steps to define and enforce a uniform, office-wide definition of what constitutes *Brady* material. Rather than allow line prosecutors to engage in an individualized determination of what does (or does not) fall within *Brady*’s confines, the head of an office, in consultation with his or her management team, should attempt to provide a uniform policy that will promote standardized disclosure practices in all cases that come before the office. There are a number of recommended disclosure policies that a prosecutor can consult for guidance, including both the National District Attorneys Association’s

Prosecution Standards and the American Bar Association’s Model Rule 3.8.

Lastly, prosecutors should develop a database to track *Brady* and *Giglio* information as it pertains to key witnesses, such as police officers or expert witnesses with whom prosecutors have engaged and/or expect to engage in the future. This is important because it mitigates the risk that a case will proceed to trial on the basis of questionable (or non-disclosed) evidence about that witness, especially when expert witnesses testify on behalf of the prosecution, given that defendants generally lack resources to present opposing opinions.

#### **5. Investigating Post-Conviction Claims of Innocence**

In the wake of exonerations that have occurred across the country, prosecutors should create procedures designed to review post-conviction claims of actual innocence that are raised by defendants whom their office has convicted. Establishing a Conviction Integrity Unit (CIU) to investigate these claims is consistent with a prosecutor’s ethical obligation to do justice—which does not end simply because a prosecutor secures a conviction in a case. When a prosecutor learns of new information that a defendant has a reasonable claim of actual innocence—regardless of whether it is DNA or non-DNA evidence—the prosecutor has a duty to further investigate such claim. And although an office may be constrained in the types of cases it can review (*i.e.*, DNA versus non-DNA claims) due to limited financial or human capital, this should not discourage prosecutors from establishing procedures for identifying legitimate post-conviction claims that merit reinvestigation.

## **B. Reforms that District Attorneys Can Implement in Conjunction with Law Enforcement**

Prosecutors’ offices should work with their local police departments and forensic labs to implement the following conviction integrity reforms:

## 1. Working with Police Departments

### a. Greater Cooperation and Coordination at the Investigative Phase

*“Prosecutors should work with their local police departments to encourage greater cooperation and coordination at the investigative phase of a case.”*

Prosecutors should work with their local police departments to encourage greater cooperation and coordination at the investigative phase of a case. This is an important reform that will allow prosecutors to assist the police in avoiding investigative errors, including constitutional errors that would otherwise create problems during the pretrial and trial phase of a case. In addition, this reform can benefit the police as well because it will allow them to avoid mistakes, the repercussions of which can include adverse credibility determinations against an officer or bad case law that hampers police ability to conduct investigations. Cooperative efforts between prosecutors and the police might include allowing prosecutors to attend regular police meetings where major crimes are reviewed and permitting prosecutors to participate in criminal investigations, including decisions regarding obtaining evidence and taking witness testimony.

### b. Training on Trial Proceedings, *Brady* Disclosures, and Wrongful Convictions

Because prosecutors rely heavily on investigative work done by the police, they should partner with their local police departments to train officers on a variety of investigative and pretrial areas, including educating officers on: *Brady* and other disclosure obligations; how to testify and handle cross-examination in court proceedings; and what lessons the police can learn from wrongful convictions and exonerations. In addition, prosecutors should try to involve officers in the pretrial and trial process. For instance, prosecutors should inform officers about the outcome of pretrial hearings in which they were involved, including whether a court issued an adverse credibility determination. In addition, when wrongful convictions are found and exonerations occur, prosecutors should inform the officers involved in these investigations and cases about these outcomes. All of these reforms are important—not just because these are important areas where the risk of mistakes can lead to later problems as a case proceeds to trial—but because they can help instill

in officers the importance associated with their investigative work. These reforms can reinforce the notion that an officer’s work does not end with an arrest and can illustrate how an officer’s decision at the front-end can help decrease the likelihood that wrongful convictions will occur.

### c. Videotaping Custodial Interrogations

Prosecutors should work with police departments to develop protocols for videotaping custodial interrogations. Recent studies have shown the role that false confessions can play in causing wrongful convictions, and videotaping is quickly gaining acceptance across a number of different jurisdictions. Videotaping custodial interrogations is a powerful deterrent against the risk that a suspect will falsely confess to a crime he or she did not commit. Moreover, aside from protecting against this risk, videotaping confessions provides a clear record of the interrogation techniques used. This record can disarm potential defense arguments of coercion or compulsion, as well as protect the police from civil liability.

### d. Sequential Double Blind Administration of Lineups and Photo Arrays

Erroneous eyewitness identifications are a leading cause of wrongful convictions. Accordingly, prosecutors and their local police departments should reform current procedures relating to the administration of photo arrays and in-person line-ups to provide for sequential, double-blind administration. These changes are important for two reasons. First, by having a “double blind” procedure, there is no risk that an officer can influence a witness, either deliberately or subconsciously. Second, by having the line-up or photo array done sequentially, it is more likely that a witness will evaluate each photo or person independently, as opposed to engaging in a comparative selection of who “looks most like” the suspect.

## 2.

### Working with Forensic Labs

#### a. Evidence Retention Policy

Given the advances made in DNA testing over the past two decades, there is always a possibility that previously untestable DNA samples will someday become testable. Furthermore, given that DNA testing can often be dispositive of a defendant's guilt or innocence, it is important for prosecutors to work with forensic labs to create a uniform evidence retention policy for DNA samples for at least major crimes (such as rapes and homicides). The creation of an evidence retention policy will also bolster the "back-end" work done by CIUs as they investigate post-conviction claims of innocence because it will increase the likelihood that, should a claim merit investigation, the evidence will have been preserved for DNA testing. Finally, and equally as important, preservation of evidence is critical because in the event that DNA testing exonerates an individual, a prosecutor will now have an opportunity to use the preserved evidence to identify and convict the right suspect.

#### b. DNA Hits in Closed Cases

Prosecutors should also work with forensic labs to establish policies regarding post-conviction testing in closed cases. As these requests become more commonplace, there is a real possibility that post-conviction testing will yield "unknown" DNA profiles suggesting that another individual (or individuals) were present at the crime scene, along with the defendant who was ultimately convicted of the crime. Of course, the presence of other unknown individuals does not automatically suggest a wrongful conviction, but it is a probative fact of which a prosecutor should be made aware. Accordingly, when DNA testing in closed cases yields "new" hits, including hits that can be tied to a specific individual whose DNA is already in the Combined DNA Index System ("CODIS"), the national DNA database established and funded by the FBI, this information should promptly be passed on to the prosecutor, who can decide how to evaluate this evidence in the context of the post-conviction investigation.



### Publicizing these Reforms

Finally, prosecutors should actively promote and publicize any conviction integrity programs or reforms implemented by their office. There are two components to publicizing these reforms: (1) promoting the values of a conviction integrity unit within the office; and (2) publicizing these reform efforts outside of the office to the media and general public.

#### 1.

##### Promoting a "Buy In" Within a Prosecutor's Office

DAs and other office heads must promote conviction integrity reforms *within* their offices in order to get line prosecutors to "buy in" to the importance of these initiatives. This is a crucial first step to successfully implementing the front-end and back-end reforms that are discussed in this Report. Without cooperation from line prosecutors—who will be called on to make the bulk of these changes—conviction integrity reforms will likely be unsuccessful. In order to bring line prosecutors on board, an office must demonstrate a clear commitment to both the CIU—such as by appointing a well-respected, veteran prosecutor to head it—and to the line prosecutors themselves—such as by emphasizing that the CIU is there to partner with prosecutors and assist them when difficulties arise. Leadership needs to emphasize that much of the front-end reforms a CIU will implement are designed to ferret out problems in a line prosecutor's case *before* it reaches a crucial stage.

#### 2.

##### Promoting Reforms to the Public and Working with the Defense Bar

Prosecutors must also be willing to promote the office's reforms to the media and to the general public. This is important for two reasons. First, the media has generally tended to report on wrongful convictions from the perspective of the Innocence Projects and defense counsel who represent the exonerated. While their experiences are important and deserve to be heard, the failure to report on

*“... the failure to report on prosecutors’ reform efforts has had the unintended consequence of making it look like prosecutors are sitting on their hands, waiting for the defense bar to uncover wrongful convictions ... publicizing these efforts sends an important message to the public—including potential witnesses, jurors, and voters—that a DA’s office is committed to proactively improving the criminal justice system to ensure that the process is truly fair.”*

prosecutors’ reform efforts has had the unintended consequence of making it look like prosecutors are sitting on their hands, waiting for the defense bar to uncover wrongful convictions. Second, publicizing these efforts sends an important message to the public—including potential witnesses, jurors, and voters—that a DA’s office is committed to proactively improving the criminal justice system to ensure that the process is truly fair.

Prosecutors should also consider whether they can more effectively communicate their conviction integrity reform efforts by partnering with the defense bar and other defense-side institutions such as The Innocence Project. Although these actors approach conviction integrity reform from a different perspective, they are obviously committed to the concept of conviction integrity. Thus, prosecutors and the defense bar should be able to find common ground, not to mention mutual support, in lauding proactive efforts by a DA’s office to implement a CIU or other conviction integrity-related initiatives. Such partnerships can involve issuing joint statements of support for new reforms, whether from local defense counsel or from larger organizations, such as the National Association of Criminal Defense Lawyers.

## D Cost-Effective Reform Measures: Concerns for Smaller Offices

While conviction integrity reforms have been implemented in larger district attorneys’ offices, this Report recognizes that the majority of prosecutors’ offices do not have the number of personnel or the resources that are available to larger offices. Accordingly, the Center identifies in this section the most cost-effective initiatives that can be implemented in furtherance of conviction integrity reform in even the smallest offices.

### 1. Leadership and Rewarding Prosecutors

Establishing the right “tone at the top,” namely a commitment to doing justice and seeking the

truth in every case that comes before an office, is an essentially costless conviction integrity reform. It also does not take additional human capital or impose a greater time burden on a smaller office to ensure that its recruiting and hiring practices assess a candidate’s ethical compass, and not just his or her academic credentials. Finally, the practice of rewarding prosecutors for “doing the right thing” is also a low-cost reform because it simply recognizes the fact that there are other job performance metrics that should be taken into account beyond a win-loss record.

### 2. Training

Training programs are easily scalable to accommodate human resource and time constraints. For instance, a smaller DA’s office may lack the ability to institute formal training programs, but they can always appoint one prosecutor in the office to track cases that present challenging ethical problems or raise questions about whether there is probable cause to proceed with a charge. These cases can then be flagged for discussion at informal office meetings. Alternatively, smaller offices can reach out to larger offices in their county or state to partner with them in creating training programs with a conviction integrity component.

### 3. Checklists

Checklists are also easily scalable to accommodate an office’s size constraints. For some small offices with clear but unwritten office policies, the creation of a checklist may be as easy as committing these policies to writing. Other offices have the option of using preexisting work product and modifying it to reflect the particular practices in their jurisdiction. Aside from the checklists included as appendices to this Report, smaller offices can and should also reach out to larger offices in their jurisdiction to see whether they have work product that can be adapted. In addition, state and local bar associations and commissions that have studied the problem of wrongful convictions have issued publicly available reports that can serve as guidance for creating individualized checklists.

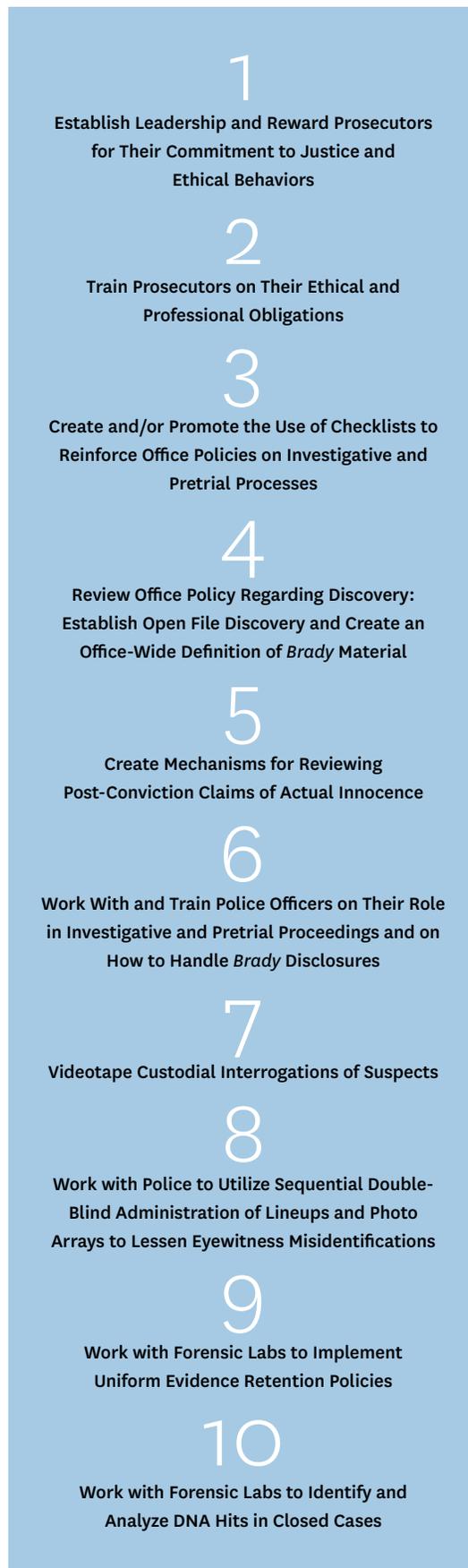
#### 4. **Creating an Office-Wide Definition of *Brady* Material**

Offices of all sizes that do not have full “open file” discovery are already engaged in the practice of determining when evidence is (or is not) *Brady* material. Accordingly, developing a uniform office-wide policy should not impose an undue burden on smaller offices. In fact, for smaller offices with fewer prosecutors, this may be as simple as discussing current *Brady* practices and formalizing them in a written policy, which can serve as a reminder in the future. To the extent that smaller offices were not operating pursuant to a uniform policy, they can again utilize the work product of larger offices to draft and enforce their own office-wide definition of *Brady* material. For instance, the work done by the Manhattan CIU, attached as Appendix A, Ex. 4 to this Report, can serve as a template for defining *Brady* material. Likewise, the recommendations on *Brady* disclosure obligations made by both the National District Attorneys Association and the American Bar Association also provide helpful guidance.

E.

#### **The Center “Top Ten”: Ten Conviction Integrity Best Practices**

Prosecutors should strive to implement or influence police departments or forensic labs to implement the following ten reforms, which constitute “best practices” in the arena of conviction integrity initiatives.





The  
Conviction  
Integrity  
Project  
Report

# Introduction

A prosecutor's obligation is to do justice. Typically, this requires prosecutors to thoroughly investigate and to zealously pursue convictions against those who are guilty of crimes. This obligation also requires prosecutors to constantly evaluate and reassess their cases to ensure that they are pursuing the correct path. Sometimes, prosecutors must change course, decline to prosecute, or walk away from charges already brought or convictions already obtained.

All prosecutors want to convict the guilty, and no prosecutor wants to convict an innocent person. Thus, prosecutors are implicitly committed to the notion of "conviction integrity," even if they are not already formally implementing a program under that name.

This Report provides a template for prosecutors looking to formalize conviction integrity mechanisms. It offers concrete steps and solutions to mitigate the risk of wrongful convictions, and thereby increase the actual and perceived integrity of convictions obtained. These are goals that all prosecutors share regardless of their politics or office location. This Report seeks to help prosecutors attain these goals.

The Report is the outgrowth of the Center's Conviction Integrity Project, including its Conviction Integrity Roundtable, an event hosted by the Center that included a number of current and former District Attorneys from across the country, representatives from the Department of Justice, and individuals from various state law enforcement agencies and research institutes. The goal of the Roundtable was to discuss wrongful convictions and conviction integrity programs to help identify the best available practices.

The Report proceeds in three parts. Part I describes the Conviction Integrity Project and the Conviction Integrity Roundtable's purposes and goals.

Part II provides a detailed discussion of the reforms that prosecutors can implement within their offices. These reforms include "front-end" reforms, which enhance the integrity of convictions secured and mitigate the risk that wrongful convictions will occur, and "back-end" reforms, which address and investigate post-conviction claims of actual innocence, including exoneration of defendants when appropriate. Additionally, Part II emphasizes the importance of publicizing conviction integrity reforms to both the public and the defense bar in order to showcase an office's commitment to doing justice. In particular, these publication efforts can and should include partnering with the defense bar to highlight the message that both parties are committed to the same set of goals in our criminal justice system.

Part III provides a detailed discussion of the reforms that prosecutors can implement in conjunction with their local police department(s) and forensic labs.

# The Conviction Integrity Project

## A. Why Implement Conviction Integrity Programs?

Prosecutors should consider implementing conviction integrity programs or units within their offices to safeguard the public and fulfill their ethical duty to seek justice in every case. Seeking justice is about more than conviction rates and win-loss records: It is about seeking the *right* result in each case. In some instances, this means declining to prosecute a case where the evidence does not support that a defendant committed the crime at issue. In other instances, this means that a prosecutor faced with newly discovered evidence that an innocent person may have been wrongfully convicted should undertake an investigation to determine whether the conviction should be sustained, or whether it was obtained in error.

Equally important, conviction integrity programs can improve the integrity and accuracy of the cases an office brings. While these programs can—and should—investigate claims of actual innocence in closed cases, they can—and should—also focus on reforming office policies that apply during the investigative and pretrial phases. For instance, policies that seek to define and consistently apply an office-wide definition of *Brady* and *Giglio* material can ensure that evidence is uniformly disclosed to defense counsel, thus lowering the likelihood that potentially exculpatory and/or material information is withheld. This, in turn, leads to more convictions based on all the relevant evidence. There are, of course, other reforms that an office can choose to implement, and they all share one common trait: they are designed to improve the quality of the cases a prosecutor brings, which in turn ensures that the right persons are being convicted of crimes.

Finally, conviction integrity programs are important because they can improve public confidence

in the criminal justice system. The issue of wrongful convictions is very much in the public’s consciousness. As more individuals are exonerated for crimes that they did not commit, the public might perceive that wrongful convictions are a growing trend. This creates a risk that the public—which includes jurors, witnesses, and judges—will begin to lose confidence in prosecutors and view them as responsible. To combat this misperception, prosecutors have two choices. Prosecutors can allow defense-side groups or Innocence Projects to tout wrongful convictions and cast doubt on the legal system (even though they often represent a very small subset of cases brought), or prosecutors can take affirmative steps to safeguard and improve the integrity of their cases, thereby shaping the narrative on wrongful convictions. Put differently, by establishing *and* publicizing newly implemented conviction integrity programs or reforms in their offices, prosecutors can show that they deserve the respect and trust of the public. The public should know that prosecutors are just as committed as the public and the defense bar to justice and to stopping wrongful convictions—both for victims who deserve to see the right person punished and for innocent persons who have been wrongfully convicted.

## B. The Purposes and Goals of Conviction Integrity Programs

Prosecutors should bear in mind that the purposes of a successful conviction integrity program should be two-fold: first, to reduce the risk of wrongful convictions in the first instance before a case goes to trial (“front-end reforms”), and second, to address claims of actual innocence stemming from closed cases (“back-end reforms”). The goals of a conviction integrity program will be a function of these two reform efforts. For instance, front-end reforms such as the ones discussed in this Report will focus on improving (and in some cases formalizing) office policies and procedures at the investigative and pretrial phases to lessen the likelihood that an office’s cases will result in wrongful convictions. In contrast, back-end reforms will involve establishing a process by which an individual claiming actual innocence can have his or her case reviewed by a

*“Seeking justice is about more than conviction rates and win-loss records: It is about seeking the right result in each case. In some instances this means declining to prosecute a case where the evidence does not support that a defendant committed the crime at issue.”*

prosecutor (or prosecutors) to determine whether he or she has been wrongfully convicted of a crime and to take steps, when appropriate, to vacate convictions that were made in error.

### C. The Conviction Integrity Roundtable

This Report is an outgrowth of the Conviction Integrity Project run by the Center on the Administration of Criminal Law at New York University School of Law (“The Center”). The Center is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. The Center’s academic component researches criminal justice practices at all levels of government, produces scholarship on criminal justice issues, and hosts symposia and conferences to address significant topics in criminal law and procedure.

The Project included independent research conducted by the Center as well as a Roundtable hosted by the Center at NYU on December 6, 2011. The Roundtable participants included a number of current and former District Attorneys from across the country, representatives from the Department of Justice, and individuals from various state law enforcement agencies and research institutes. The participants met for two 2-hour sessions to discuss a variety of issues relating to conviction integrity and wrongful convictions. The sessions, which were not open to members of the public, included a full and frank discussion on many of the issues that will be discussed in Sections II and III, below. At the end of these closed sessions, four outside experts representing the perspective of defense lawyers, academia, and Innocence Project groups were invited to speak at a 2-hour session. These experts were not privy to the earlier sessions and offered their own perspectives on how prosecutors should respond to the issues that are raised by wrongful convictions and subsequent exonerations.

## Reforms That Prosecutors Can Implement Within Their Offices

Prosecutors can independently implement a number of conviction integrity efforts in their offices that do not require partnership with or cooperation by any other law enforcement actors. Several of these reforms are also essentially costless in terms of resource expenditure, such that even the smallest office can implement them on some level. As noted in the Introduction, these reforms break down into “front-end” reforms, which enhance the integrity of convictions secured and mitigate the risk of wrongful convictions, and “back-end” reforms, which address and investigate post-conviction claims of actual innocence and, when appropriate, exonerate defendants if a wrongful conviction is discovered during the investigative process.

### A. Front-End Reforms

#### 1. The Importance of Leadership in Establishing a Commitment to Conviction Integrity Reforms

One of the first reforms that district attorneys should implement is establishing the right tone regarding the ethical and professional duties expected of all prosecutors in their office. This effort can and should be made at both the recruitment and hiring phases. For example, offices should develop hiring criteria to identify and recruit lawyers who are committed to defending communities and victims’ rights, adhering to their ethical obligations, and generally “doing the right thing.” Recruiting materials and speakers at recruiting events can be used to emphasize the role of the prosecutor to do

*“Several of these reforms are ... essentially costless in terms of resource expenditure, such that even the smallest office can implement them on some level.”*

*Participants at the closed sessions included the following individuals:*

**Daniel Alonso,** Chief Assistant District Attorney, Manhattan District Attorney's Office

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**Rachel E. Barkow,** Segal Family Professor of Regulatory Law and Policy at New York University School of Law and Faculty Director, Center on the Administration of Criminal Law; member of the New York County District Attorney's Office's Conviction Integrity Unit's Advisory Board;

**Neil Barofsky,** Senior Fellow, Center on the Administration of Criminal Law; former Special Inspector General of the Trouble Asset Relief Program and Assistant United States Attorney, United States Attorney's Office for the Southern District of New York;

**Scott Burns,** Executive Director of the National District Attorneys Association;

**Paul Connick, Jr.,** District Attorney, Jefferson Parish, Louisiana;

**Daniel F. Conley,** District Attorney, Suffolk County, Massachusetts;

**Susan Gaertner,** Principal, Gray Plant Mooty; former District Attorney, Ramsey County, Minnesota;

**Norman Gahn,** Assistant District Attorney, Milwaukee County District Attorney's Office;

**Seema Gajwani,** Program Officer for Criminal and Juvenile Justice, Public Welfare Foundation;

**Molly Griswold Donaldson,** Senior Research Associate, Police Executive Research Forum;

**Kristine Hamann,** Executive Assistant District Attorney, Special Narcotics Prosecutor's Office;

**Katherine A. Lemire,** Counsel to Raymond W. Kelly, Police Commissioner of the City of New York;

**Suzy Loftus,** Then-Special Assistant Attorney General, California Department of Justice;

**Anne Milgram,** Senior Fellow at the Center on the Administration of Criminal Law and the former Attorney General of the State of New Jersey; former Assistant District Attorney in the New York County District Attorney's Office; Attorney's Office;

**Melissa Mourges,** Chief of the Forensic Sciences/Cold Case Unit, Manhattan District Attorney's Office;

**Denise O'Donnell,** Director, Bureau of Justice Assistance, Department of Justice;

**Dr. Mechthild Prinz,** Director, Department of Forensic Biology, Office of the Chief Medical Examiner, New York City;

**Jeff Rosen,** District Attorney, Santa Clara County, California;

**Bonnie Sard,** Chief of the Conviction Integrity Program, Manhattan District Attorney's Office;

**Darrel Stephens,** Instructor, Public Safety Leadership Program, Johns Hopkins University School of Education; Executive Director, Major Cities Chiefs Association;

**J. Scott Thomson,** Police Chief, Camden, New Jersey;

**Chris Toth,** Deputy Executive Director, National Association of Attorneys General; Director, National Attorneys General Training and Research Institute;

**Dawn Weber,** Chief Deputy District Attorney, Cold Case Unit & Justice Review Project, Denver District Attorney's Office;

**Chuck Wexler,** Executive Director, Police Executive Research Forum;

**Russell Wilson II,** Special Fields Bureau Chief, Conviction Integrity Unit, Dallas County District Attorney's Office;

**Cyrus R. Vance, Jr.,** District Attorney, New York County, New York; and

**Charles Branson Vickory, III,** District Attorney, 8th District of North Carolina.

*Participants on the outside expert panel included the following individuals:*

**Brandon L. Garrett,** Roy L. and Rosamund Woodruff Morgan Professor of Law at the University of Virginia School of Law;

**Jeffery Robinson,** Shareholder, Schroeter, Goldmark & Bender;

**Barry C. Scheck,** Professor of Law, Benjamin N. Cardozo School of Law; Co-founder and Co-director, The Innocence Project; Partner, Neufeld, Scheck & Brustin, LLP; and

**Bryan Stevenson,** Professor of Law, New York University School of Law; Executive Director, Equal Justice Initiative.

justice—not just to seek convictions for their own sake. Hiring processes can also attempt to measure applicants' commitment to ethics and proper conduct by posing ethical hypotheticals or asking potential hires to discuss key ethical rules or obligations. The head of an office can further emphasize the obligation of prosecutors to do justice and not merely to win cases by delivering a speech or holding an informal meeting with new recruits. The head of the office should continue sending this message by rewarding and praising prosecutors for their commitment to justice and for doing the right thing, regardless of whether they win, lose, or dismiss a case. Finally, although setting the right tone at the top may seem amorphous or “soft,” it is a necessary prerequisite for implementing many of the conviction integrity reforms discussed below, because it increases the likelihood that prosecutors will buy into these changes and embrace them going forward. Furthermore, setting the right ethical tone goes a long way towards changing (or in many cases reemphasizing) the role of a prosecutor's job: to do justice, not just to win or seek convictions.

Roundtable participants use various methods to emphasize to their prosecutors their office's commitment to doing justice and to ensuring the integrity of convictions. For instance, the Suffolk County and Santa Clara County DA offices ask hypothetical ethical questions at the hiring phase that are designed to get a sense of an applicant's ethical compass, not just his or her academic credentials and skill level. These hypotheticals may change, but both offices focus on testing an applicant's commitment to ethics and proper conduct. Suffolk County DA Dan Conley reinforces this commitment when he speaks with new hires one-on-one, emphasizing the core values of the office—honesty, discharging one's professional duties in full compliance with professional and ethical obligations, and never cutting corners when investigating and prosecuting cases.

Conley, former Ramsey County DA Susan Gaertner, and Santa Clara DA Jeff Rosen also emphasize the message that their prosecutors are not evaluated solely on their win-loss records but instead upon their job performance more broadly—including making good decisions not to bring cases or even to abandon cases that have already been brought.

Gaertner stated that it was important to emphasize integrity and to reinforce that, even if a prosecutor dismisses a case, the real emphasis is on hard work and behaving honorably and professionally with opposing counsel and before the court. She also felt this message, especially when coming from seasoned trial attorneys in the office, carries real weight with younger prosecutors.

Rosen noted his tradition of giving prosecutors a “challenge coin” whenever they did truly exemplary work. In that vein, he recently decided to recognize and give awards to two prosecutors (the head of his office's CIU and the ADA who initially prosecuted the case) for their decision, after reinvestigation, to move to vacate a conviction. He decided to do this in order to emphasize to the entire office that these prosecutors' commitment to seeking justice was consistent with the core values of his office—service, hard work, transparency, and integrity.

The Manhattan DA's Office has shown its commitment to conviction integrity reform not just by establishing the CIU, but also by appointing a long-time prosecutor with substantial trial experience, Bonnie Sard, to head the Unit. The selection of a veteran prosecutor sent a clear message to the office that the District Attorney, Cyrus Vance, was committed to reform efforts. Moreover, Vance gave Sard the necessary autonomy to implement CIU reforms, as he had her personally report to him rather than to an intermediary. Finally, the appointment of a seasoned and respected prosecutor enhanced the likelihood that the office's prosecutors would view the CIU as an entity to cooperate with and respect rather than as an adversary or “internal operations” bureau.

Non-law enforcement participants in the Roundtable agreed with the law enforcement Roundtable participants on the issue of leadership and reforming office culture. In particular, Jeffery Robinson of Schroeter, Goldmark & Bender, stressed that someone needs to be in charge of defining and enforcing office-wide standards for investigating and prosecuting cases, regardless of whether it is one person or an entire unit. Robinson singled out the fact of a seasoned prosecutor like Sard running the Manhattan CIU as sending a positive message to the defense bar that the Manhattan DA's Office took conviction integrity reforms seriously.

### **a. Considerations for Smaller DA Offices**

(Re)emphasizing leadership and a commitment to transparency in the administration of justice is a manageable reform even for smaller prosecutors' offices and does not require substantial human or capital resources. The head of an office can alone effectively communicate a commitment to transparency. The same can be said for importing ethical evaluations into recruitment and hiring, for rewarding and praising prosecutors for "doing the right thing" (even in instances where cases are lost or prosecutions dismissed), for putting an experienced prosecutor in charge of conviction integrity efforts (however large or small), and for emphasizing and reiterating the proper role and obligation of prosecutors to do justice. All are essentially costless measures that will send a strong signal—to prosecutors in the office, the defense bar, and the public—that an office is committed to ensuring the integrity of its convictions.

## **2. Training and Educating Prosecutors**

Both new and experienced prosecutors must be trained and educated about their ethical and professional obligations. Ongoing training programs are not an admission that an office has a problem with attorney misconduct; they are a necessary component of reminding prosecutors about their unique job responsibilities. District attorneys and other office heads should include a conviction integrity component in their office's training and educational programs. For example, hard cases prosecuted by the office—close cases where a prosecutor declined to bring charges, cases where a prosecutor consented to dismissal of charges, and cases (if any) involving exonerations—can be presented to line prosecutors as case studies in order to identify lessons learned, not to mention identifying practices that can mitigate the risk that such errors or acts will recur.

The Manhattan DA's Office has added a conviction integrity component to its extensive in-house training program, which predates the creation of its CIU. Indeed, this was one of the first reforms that CIU head Bonnie Sard implemented. This training consists of case study presentations that

dissect cases where the office decided to dismiss charges or consented to vacation of a conviction. In addition, Sard has spoken with trial ADAs on these cases to understand their perspectives and to see whether there are any lessons to be gleaned and shared with other prosecutors in the office.

Kristine Hamann, who chairs the Practices Sub-Committee ("Best Practices Committee") of the District Attorneys Association of the State of New York ("DAASNY") Committee on the Fair and Ethical Administration of Justice, noted that this Committee is reviewing the 50-60 exonerations from across New York in order to understand how errors occurred and what lessons could be learned from these cases going forward. The Best Practices Committee is made up of District Attorneys and senior Assistant District Attorneys from 33 of New York's 62 counties, which include metropolitan, suburban, and rural jurisdictions. Generally, the review starts with a presentation from a member of the District Attorney's Office where the exoneration occurred. At one meeting, an exonerated individual was also invited to speak about his case. Following these presentations, the Best Practices Committee members discussed what they learned, as each case raised different issues that became clear with the benefit of hindsight. Notably, although the county DA presenting the case did not always believe that the exonerated individual was innocent, all the cases the Best Practices Committee reviewed provided valuable lessons and teachable moments that could be passed on from Best Practices Committee members to colleagues in their own offices.

The Best Practices and Ethics Committees of the District Attorneys Association of the State of New York collaborated on an ethics handbook entitled "The Right Thing: Ethical Guidelines for Prosecutors." This handbook outlines the ethical obligations governing the work of a prosecutor. It has been distributed to all District Attorneys and Assistant District Attorneys in New York State. A copy of the handbook was shared with all members of the Roundtable discussion and is attached hereto as Appendix B.

Finally, Santa Clara DA Jeff Rosen noted that, while his office had publicly exonerated individuals prior to his assumption of office, these cases had

*"Ongoing training programs are not an admission that an office has a problem with attorney misconduct; they are a necessary component of reminding prosecutors about their unique job responsibilities."*

*“Checklists codify routine steps that need to be taken in repetitive multi-step procedures and serve to remind actors about the need to comply with all steps in the process. Their efficacy has been demonstrated in the field of medicine in delivering medical care more effectively and with lower incidence of error, resulting in millions of dollars in savings.”*

not yet been used as teachable moments or learning experiences. He opined that enough time has passed from the time of the exonerations to incorporate these cases into training in a more seamless manner and voiced his intention to discuss these hard cases with his office and use them to distill teaching moments for his prosecutors.

### **a. Considerations for Smaller DA Offices**

Smaller DA offices can also implement effective training and education programs for their prosecutors. While they may lack the ability to conduct in-house training or devote full-time staff to develop these programs, they might partner with larger DA offices in their area (or the National District Attorneys Association (“NDAA”)) to import existing training programs and scale them to their office. In addition, smaller offices can designate one prosecutor to flag key issues that arise in the office’s cases, and training can be as simple as discussing these issues at regularly scheduled meetings. Finally, smaller DA offices should take advantage of the education resources available to them by reaching out to state and national commissions or by obtaining information regarding exonerations and disseminating that information or using it in training.

## **3. Using Checklists to Promote Best Practices**

Checklists are an effective way to implement conviction integrity reforms and to reinforce best practices in the investigation and prosecution of cases. Checklists codify routine steps that need to be taken in repetitive multi-step procedures and serve to remind actors about the need to comply with all steps in the process. Their efficacy has been demonstrated in the field of medicine in delivering medical care more effectively and with lower incidence of error, resulting in millions of dollars in savings.<sup>1</sup> Prosecutors can import this concept by using checklists in executing their job duties, including *Brady* and *Giglio* compliance, investigative and pretrial steps, and interviewing

techniques. In short, checklists can be tailored to promote compliance in a variety of areas. Moreover, checklists are a useful tool for supervisors: They provide a concrete and contemporaneous record of how a prosecutor has handled a case to date so that the case can subsequently be used as an example of good practice or to detect errors as the case moves forward.

The Manhattan DA’s Office has assembled a number of checklists designed to assist its prosecutors in investigating and prosecuting their cases. These checklists did not, for the most part, create new practices. Instead, they represented the formalization of existing office policies and practices. However, even though the checklists did not contain new policies, the Manhattan DA’s Office wanted to emphasize the importance of distilling existing office policies into checklists. Those checklists are included in Appendix A to this Report. The checklists were the product of a working group comprised of senior prosecutors, whose task was to identify a number of general “red flag” areas where problems could occur in the investigative and trial phases of criminal cases. Once these “red flag” areas were identified, the working group was tasked with creating checklists designed to assist prosecutors in identifying potentially problematic aspects of their cases during the investigative phase of their cases, thereby reducing the risk that a prosecutor would proceed to trial with erroneous or inaccurate evidence or testimony. These checklists, which are discussed in more detail below in the sections of the Report addressing the relevant subject area, focus on four primary areas: (1) disclosure of *Brady* and *Giglio* material, (2) handling cases in which the identity of the defendant as the perpetrator of the crime is or might be an issue (“ID cases”), (3) working with and relying on police officer testimony, and (4) using confidential informants.

Other Roundtable participants either created checklists designed to assist prosecutors in preparing their cases for trial or are in the process of creating checklists that would be adapted for use on a statewide basis. For instance, the Jefferson Parish District Attorney’s Office uses checklists and is in the process of revising the checklists with the intention of sharing them with other Louisiana DAs

<sup>1</sup> Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (2009).

in order to disseminate them on a statewide basis. Similarly, the DAASNY Best Practices Committee has produced a booklet detailing ethical guidelines for prosecutors, which was distributed to all prosecutors in New York. (The booklet is included with this Report as Appendix B.) Although the booklet is not a checklist, it does include a discussion of a prosecutor’s *Brady* obligations, as well as a discussion of the day-to-day ethical challenges and quandaries that a prosecutor might confront. Its guidelines do not take a “one size fits all” approach, but instead were developed with input from DAs representing both small and large jurisdictions. The participation of large and small offices is a deliberate strategy, which allows the ethical guidelines to be “cross-pollinated” in both larger and smaller DA offices in the State of New York.

Office heads should seek to develop checklists and questionnaires that delineate and in some cases codify existing office policies regarding best practices in the investigation and prosecution of cases. Using checklists is a low-cost and non-time-intensive reform, but it is an important one. The use of checklists can raise the likelihood that prosecutors will base their charging decisions on the existence of all available evidence, including possible exculpatory information, not to mention make it more likely that such evidence will be disclosed to the defense.

### **a. *Brady/Giglio* Checklists and Questionnaires**

*Brady/Giglio* compliance is an area ripe for the use of checklists and questionnaires. Such materials can flag types of potential *Brady* information that surface recurrently in prosecutions. For example, experts point to identification evidence—despite its essential role in effective law enforcement and prosecution—as an area that can lead to wrongful convictions.<sup>2</sup> An effective checklist or questionnaire could highlight the possibility that a witness identified a person other than the defendant as the perpetrator or failed to identify the defendant as the perpetrator. Even if they know that a

misidentification or non-identification should be disclosed, prosecutors at any level might overlook such evidence, even when acting in good faith. A checklist or questionnaire could also highlight the importance of considering variances in witness statements and the various audiences that could have heard such statements other than the prosecutor himself or herself, such as a victim-witness assistance unit. Similarly, a checklist or questionnaire can ensure that prosecutors specifically consider whether any benefits have been provided to a witness, including benefits of the sort that might be easily overlooked due to their facially routine nature, such as a statutorily-required payment of witness fees.

The Manhattan DA’s CIU has promulgated a *Brady/Giglio* questionnaire designed to help prosecutors identify potential areas in their cases where *Brady/Giglio* material might exist that needs to be disclosed. CIU Chief Sard noted that the questionnaire was not a checklist, in that a prosecutor need not literally check a box for each type of evidence that does (or does not) exist in a given case. Instead, the CIU chose to use a questionnaire both to provide flexibility to prosecutors in assessing their cases and to remove any notion that, by checking a box, they were making formal representations regarding the existence (or lack thereof) of such evidence in their case. The *Brady/Giglio* questionnaire focuses on the following broad categories of information:

- (1) Misidentifications and non-identifications;
- (2) Prior inconsistent statements of witnesses;
- (3) Material variances in witness statements;
- (4) Non-recorded *Brady* and *Giglio* information, regardless of whether it has been memorialized in a document or some other form;
- (5) Witness or third-party benefits;
- (6) Known but uncharged criminal conduct;
- (7) Mental and physical health conditions that may impair a witness’s ability to testify to the events he/she perceived; and
- (8) Bias or motive to fabricate testimony.

See Appendix A, Ex. 4.

The Manhattan CIU’s use of checklists is exemplary and arguably represents a growing trend, as the checklist concept has been endorsed by a wide

<sup>2</sup> Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* (2011).

“...eyewitness misidentifications have been identified as a leading cause of wrongful convictions ... [t]hus, ID cases also lend themselves to the use of checklists.”

variety of criminal justice institutions.<sup>3</sup>

Although checklists are not—and should not be taken as—a guarantee that a prosecutor will always comply with *Brady* and/or *Giglio*, they are nonetheless helpful tools to assist prosecutors in complying with their obligations, particularly with respect to information that commonly appears in cases but can, even when acting in absolute good faith, be overlooked and not disclosed.

### b. ID Cases Checklists

ID cases—where the identity of the defendant as the perpetrator of the crime is or may be at issue—have drawn considerable attention. As mentioned above, eyewitness misidentifications have been identified as a leading cause of wrongful convictions,<sup>4</sup> and recent state court cases have highlighted the fact that eyewitness identifications may not be as infallible and reliable as initially thought.<sup>5</sup> Thus, ID cases also lend themselves to the use of checklists, as they can assist prosecutors in evaluating the relative strengths and weaknesses of their cases where the identity of the perpetrator of the crime is, or potentially will be, at issue.

<sup>3</sup> See Final Report of the New York State Bar Association’s Task Force on Wrongful Convictions at 8-10, 29-31 (April 4, 2009), available at <http://www.nysba.org/Content/Content-Folders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (last visited on June 11, 2012); “Criminal Courts Should Provide a Brady Checklist, ABA Says,” available at [http://www.abajournal.com/news/article/criminal\\_courts\\_should\\_provide\\_a\\_brady\\_checklist\\_aba\\_says/](http://www.abajournal.com/news/article/criminal_courts_should_provide_a_brady_checklist_aba_says/) (last visited on June 11, 2012); “Report by the Criminal Courts Committee and Criminal Justice Operations Committee Recommending the Adoption of a Brady Checklist,” available at [http://www2.nycbar.org/pdf/report/uploads/7\\_20072170-ReportrecommendingtheadoptionofBradychecklist.pdf](http://www2.nycbar.org/pdf/report/uploads/7_20072170-ReportrecommendingtheadoptionofBradychecklist.pdf) (last visited on June 11, 2012); Department of Justice Memorandum for Department Prosecutors from David W. Ogden, available at <http://www.justice.gov/dag/discovery-guidance.html> (last visited on June 11, 2012); California Commission on the Fair Administration of Justice Final Report on Wrongful Convictions at 15-16, available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (last visited on June 11, 2012).

<sup>4</sup> Garrett, *supra* at note 2; Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations* 40 tbl.13, 43-49 (May 2012), available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (last visited on June 11, 2012).

<sup>5</sup> See, e.g., *State v. Henderson*, 208 N.J. 208 (2011); *State v. Chen*, 208 N.J. 307 (2011). See also *State v. Cabagbag*, No. SCWC-30682, 2012 WL 1764064 (Haw. May 17, 2012) (holding that courts are required upon request of defendant to give specific jury instruction evaluating the trustworthiness of eyewitness identification when the identification is central to the case).

The Manhattan CIU has created a checklist that assists prosecutors in evaluating the strengths and weaknesses of ID cases. The point of the checklist is to focus on evidence that will support the identification of the defendant as the perpetrator of the crime or that will suggest that the identification was made in error. Accordingly, the checklist focuses on the categories of information that prosecutors and police should locate, obtain, and evaluate to corroborate the eyewitness identification of the defendant. For instance, the checklist focuses on the following:

- (1) Scrutinizing police reports in order to evaluate and understand a defendant’s claims as to his or her whereabouts and actions at or around the time of the crime;
- (2) Utilizing specific investigative techniques that may either corroborate or undermine the identity of the defendant as the perpetrator of the crime. This includes the following:
  - a. Executing search warrants for the defendant’s home and/or body to find corroborative evidence, such as clothes or jewelry worn during commission of the crime or unusual markings or injuries on the defendant’s body observed or suffered during the commission of the crime;
  - b. Subpoenaing defendant’s E-Z Pass history, Metrocard history, and phone records, including cell site information, calls, text messages and photographs to determine his or her whereabouts and movements;
  - c. Obtaining defendant’s work records and school records, including attendance records, to determine his or her whereabouts and movements;
  - d. Searching defendant’s online presence, including Googling defendant and locating his or her profile(s) on social networking sites; and
  - e. If defendant is or was incarcerated, obtaining defendant’s jail phone records and phone calls, jail visitor logs, and prior dates of incarceration, as well as interviewing his or her probation or parole officer, including ascertaining whether defendant visited the latter at or around the time of the crime.

See Appendix A, Ex. 5.

### c. Law Enforcement Testimony Checklists

Nearly all reactive cases handled by prosecutors involve police and/or law enforcement testimony. In order to prepare law enforcement to testify, prosecutors often conduct an interview (or series of interviews) designed to elicit information about what the officer witnessed. These interviews are often free-flowing and unpredictable. Moreover, given their different backgrounds and approaches to cases, it is possible that both individuals may use different terminology and/or emphasize the importance of different facts during the interview process, which in turn can lead to miscommunications and inadvertent mistakes, even when both parties are operating in good faith. Thus, interaction with law enforcement is an area that lends itself to the use of checklists; using a checklist can remind prosecutors to return to some first principles in every police interview to ensure that they are not overlooking exculpatory information or unintentionally suborning perjury. Furthermore, the use of checklists can safeguard police officers against serious repercussions, such as adverse credibility determinations against them that could compromise their ability to testify in the future.

The Manhattan DA's CIU has developed a written questionnaire to address various issues arising out of police testimony. The questionnaire does not embody a new policy—the office has always had procedures for early case assessments—but instead reflects a formalized commitment to ensuring accuracy at the outset in its criminal cases. The guidelines—which are included in the Appendix, and are designed to elicit information about the officer's firsthand knowledge of the arrest and the details of the crime—address the following subjects:

- (1) The source of the officer's information;
- (2) Details of the recovery of property;
- (3) Additional questions in civilian cases; and
- (4) Other key areas such as the use of informants, the identity of all officers at the scene during property recovery, and identification procedures. See Appendix A, Ex. 3.

Questions regarding the source of the officer's information and recovery of property are designed to mitigate the incidence of so-called "accommodation perjury," *i.e.*, where one officer might take "credit" for the work of another, such as testifying before the grand jury that he or she recovered certain evidence when it was actually their partner who did so, so that their partner need not come to court on his or her day off. In these instances, there is no animus or bad faith—the concept assumes compliance with all constitutional and relevant laws and procedures—but it is nonetheless problematic. However, by reminding prosecutors to inquire specifically about the source of information and about evidence recovery, and suggesting appropriate follow-up questions designed to clarify an officer's personal knowledge and actions, prosecutors can uncover, deter, and remediate accommodation perjury before an officer actually testifies.

### d. Confidential Informant Checklists

Informant testimony is frequently essential to effective law enforcement and prosecution. At the same time, experts point to the use of informant testimony as a contributing factor in many wrongful convictions.<sup>6</sup> Accordingly, prosecutors seeking to proactively ensure the integrity of their cases should formulate and adopt procedures and guidelines to govern the use of informant testimony.

For example, an office can establish a central database detailing information about all potential confidential informants. The Santa Clara County DA's Office has done so in response to a prior incident in which a certain informant had previously given the office unreliable information, but, since not all prosecutors were aware of this issue, the informant continued to be used. District Attorney Rosen thus created a central database of informants used by his office to allow prosecutors to conduct due diligence on their backgrounds. This reform is also consistent with the recommendations made by the California Commission on the Fair Administration of Justice ("CCFAJ").<sup>7</sup>

<sup>6</sup> Garrett, *supra* at note 2; Gross & Shaffer, *supra* note 4, at 40 tbl.13, 53-56.

<sup>7</sup> See CCFAJ Final Report on Wrongful Convictions at 13-14.

The Manhattan CIU has also taken steps to regulate the use of confidential informants. The CIU working group created a 14-point checklist that formalizes the office's pre-existing policies regarding confidential informants by identifying certain "red flag" areas regarding the use of informants. The 14-point checklist, which is included in Appendix A, Ex. 2, requires prosecutors to provide information regarding an informant's background and relationship to the case, including the following:

- (1) The potential cooperator's criminal history and/or present status with parole/probation;
- (2) The history of plea offers made in the potential cooperator's present case;
- (3) The potential cooperator's prior cooperation efforts and relationship with law enforcement; and
- (4) An investigative plan for the potential cooperator, including how the cooperator will be utilized.

In addition, the Manhattan CIU checklist also requires each prosecutor to meet with the Chief of the Trial Division to get supervisory approval to use confidential informants. In general, prosecutors must be prepared to discuss the following:

- (1) The potential cooperator's full personal history and biographic information;
- (2) The potential cooperator's motivations for cooperating;
- (3) The target and/or co-defendant's background and criminal history;
- (4) A brief summary of serious crimes witnessed by the potential cooperator (as a non-participant in those crimes);
- (5) A detailed account of evidence corroborating the potential cooperator's statements and activities; and
- (6) An evaluation of the potential cooperator as a witness.

See Appendix A, Ex 2.

The Manhattan CIU's work product provides offices with a clear template for drafting their own checklists. In addition, the CIU's reforms are consistent with those recommended by a number of state commissions formed to study the causes of wrongful convictions and has also been the focus of

prosecutorial training in the Ninth Circuit. Thus, DA offices have a host of reports and recommendations that they can and should consider in enacting office reforms regarding the use of informant testimony.<sup>8</sup>

### e. Considerations for Smaller DA Offices

Checklists are not necessarily time or labor-intensive. Even the smallest office can easily use checklists and questionnaires, and at no cost. This will often involve tasking a prosecutor with formalizing office policies and practices in a written document that can be disseminated throughout the office. To the extent that an office is interested in expanding on or modifying existing policies, it has a number of different options available. It can use the checklists included with this Report as a template (which is what the Best Practices Committee has done in adapting the Manhattan CIU's checklist for statewide use), or it can borrow from recommendations made in reports issued by various state commissions and bar associations. Alternatively, larger DA offices in a state can assist smaller offices by doing most of the drafting work and then interfacing with an appointed attorney in smaller offices to work together to implement the

<sup>8</sup> See CCFJA Final Report on Wrongful Convictions at 13-14. California recently passed a law prohibiting prosecutors from seeking convictions based solely on jailhouse informant testimony and requiring the presentation of additional evidence corroborating the informant's testimony. See Editorial, "Unreliable Witnesses," Los Angeles Times (Aug. 11, 2011), available at <http://articles.latimes.com/2011/aug/11/opinion/la-ed-informants-20110811> (last visited on January 12, 2012). See also Pennsylvania Report of the Advisory Committee on Wrongful Convictions at 5-6 (September 2011), available at <http://www.jsf.legis.state.pa.us/.../9-15-11%20rpt%20-%20Wrongful%20Convictions.pdf> (last visited on June 11, 2012); Final Report on the New York State Bar Association's Task Force on Wrongful Convictions at 14, 114-20 (April 4, 2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> / (last visited on June 11, 2012); Thomas P. Sullivan, "Preventing Wrongful Convictions—A Current Report from Illinois," 52 DRAKE L. REV. 605, 612-13 (2004); ABA Section of Criminal Justice Report to the House of Delegates Regarding the Use of Jailhouse Informant Testimony (February 2005), available at <http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAInformant'sRecommendations.pdf> (last visited on June 11, 2012); Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process at 66-78 (2006), available at <http://apps.americanbar.org/crimjust/committees/innocencebook.pdf> (last visited on June 11, 2012); Hon. Stephen J. Trott, "The Use of a Criminal as a Witness: A Special Problem," (October 30, 2007), available at [http://www.aclu.org/files/pdfs/drugpolicy/informant\\_trott\\_outline.pdf](http://www.aclu.org/files/pdfs/drugpolicy/informant_trott_outline.pdf) (last visited on June 11, 2012).

checklists. Indeed, the Jefferson Parish DA's Office is working to adapt its checklists for statewide dissemination. Accordingly, smaller DA offices need not expend resources by setting up committees or appointing a prosecutor to draft checklists for the office. Instead, when necessary, they can and should utilize preexisting work product and/or work in conjunction with larger DA offices in their state to develop appropriate checklists and questionnaires.

#### 4. Other Discovery-Related Initiatives

Non-disclosure (or late disclosure) of exculpatory information is also a major contributing factor to wrongful convictions.<sup>9</sup> Studies show that official misconduct contributes to as many as 42% of false convictions that later lead to exoneration (most prevalently in homicide cases) and failure to disclose exculpatory information is the most common form of misconduct.<sup>10</sup> The frequency of these failures can be attributed to powerful cognitive biases, collectively called “tunnel vision,” which can lead law enforcement officers to disfavor new evidence that discredits prior hypotheses.<sup>11</sup> Furthermore, the materiality requirement in *Brady* exacerbates this problem because it allows these biases to creep into rulings on appeal, prompting determinations that no reasonable probability of another outcome existed even if there had been proper disclosure of all evidence.<sup>12</sup> Prosecutors can thus mitigate the risk of wrongful convictions by adhering to policies that promote timely and full disclosure of relevant information.

9 See Keith A. Findley, *Tunnel Vision*, in *Conviction of the Innocent: Lessons from Psychological Research* 316-17 (Brian L. Cutler ed., 2012); Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations* at 40 tbl.13, 65-66 (May 2012), available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (last visited on June 11, 2012). Cf. Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* 22-25 (2012).

10 See Gross & Shaffer, *supra* note 9, at 66.

11 See Findley, *supra* note 9, at 303-19; Simon, *supra* note 9, at 22-25.

12 See Findley, *supra* note 9, at 316.

##### a. Open File Discovery

Open file discovery is one possible policy that prosecutors can adopt to reduce the incidence or likelihood of wrongful conviction. Although “open file” discovery has a range of possible meanings, this Report uses the phrase to mean that, as a matter of policy, prosecutors disclose all exculpatory evidence of which they are aware without evaluating its materiality. Open file discovery has significant advantages for a prosecutor's office, because it can alleviate the challenges associated with a *Brady* analysis.

One of the most vexing aspects of the *Brady* analysis is its materiality component, and open file discovery would remove prosecutors from the business of evaluating materiality. If the evidence in question is not material, disclosure is not currently required, even though it might be useful to the defense. Materiality, in turn, hinges on whether non-disclosure will result in the deprivation of a fair trial considering all of the proof adduced at trial. This is an awkward assessment, as it requires the prosecutors to determine *before* trial whether the trial would be deemed fair *afterward*—when the record is complete and the verdict rendered—if the evidence is not disclosed. Requiring prosecutors to estimate the fairness and outcome of the trial before it actually occurs poses particular quandaries, starting with the prosecutor's lack of information about how the trial will develop at the time materiality must be considered.

A second challenge *Brady* poses is that, because the materiality standard requires weighing a single piece of potentially exculpatory evidence against all inculpatory evidence, the totality of which may seem especially powerful at the investigative stage, the guiltier a defendant seems before trial, the less disclosure he is legally owed. Because prosecutors typically believe in the guilt of those they charge and labor to convict—indeed, under ethics rules, they cannot proceed with the case otherwise—the materiality analysis is often in tension with a prosecutor's beliefs and job duties and may result in under-disclosure.

Additionally, open file discovery could potentially prevent *Brady* violations that occur in the context of plea agreements. While this Report does

*“Studies show that official misconduct contributes to as many as 42% of false convictions that later lead to exoneration (most prevalently in homicide cases) and failure to disclose exculpatory information is the most common form of misconduct.”*

*“A commitment to open file discovery is consistent with a commitment to transparency, fairness, and accountability ...”*

not mean to suggest that these violations are rampant in the plea context, much less that they are occurring purposefully, there is nonetheless a possibility that such violations will not come to light prior to a criminal case being resolved by plea, and currently the majority of criminal cases are resolved in this manner.

Moreover, an open file discovery policy would alleviate difficulties presented by changes in personnel handling particular prosecutions, whether such changes occur as a result of attrition, supplementation of staffing of cases, or horizontal prosecution office structures. Staffing changes in large-scale prosecutions are not infrequent, and when a new prosecutor begins to work on a case, he/she has incomplete information regarding events that preceded him or her joining the case. Thus information that should be disclosed might not be evident or obvious when it comes to light; for example, a prosecutor meeting a witness for the first time must rely on conversations with colleagues or written documents rather than personal memory and experience to measure whether the witness' statements are inconsistent with earlier statements made to a different prosecutor.

Finally, consistent with one of the core goals of conviction integrity initiatives, open file discovery would enhance prosecutors' standing in the public eye. A commitment to open file discovery is consistent with a commitment to transparency, fairness, and accountability that would preempt criticism of prosecutorial practices, reduce the number of cases in which disclosure is a problem (even if that number might be small), and formalize the notion that prosecutors view their mission as doing justice rather than pursuing convictions at any costs. Put differently, regardless of the actual scope of prosecutorial misconduct, open file discovery would enhance the public's perception of the fairness of the criminal justice system and of prosecutorial actions. Furthermore, open file discovery would improve the ability of defendants to prepare to defend against the charges they face and accordingly make the criminal justice system fairer to the accused. And, in certain instances, full disclosure can actually lessen the cost and burden associated with trials, as it may prompt defendants to engage

in earlier and more frequent plea negotiations and plea bargains.

Of course, open file discovery is not without its critics. However, the costs associated with this type of discovery policy are arguably lower than might be expected. First, mandatory disclosure of all exculpatory evidence would broaden prosecutors' current disclosure obligations only by extending those obligations to arguably immaterial exculpatory evidence. Immaterial evidence by definition should not affect the outcome of a prosecution and thus mandatory disclosure of it should not thwart prosecutions. Second, open file discovery is mandated in several states and in Europe, and studies of these systems have found no evidence that those criminal justice systems have suffered any drop in efficiency as a result.

The most significant potential costs of an open file discovery policy would be in potential harm to witnesses, national security interests, or ongoing investigations. But such concerns are likely presented in a small minority of cases, and, more importantly, they could be accommodated via exceptions to the general rule or by enabling prosecutors to seek protective orders when necessary. Again, experience in jurisdictions with open file discovery shows that it does not present a security problem.

Finally, although open file disclosure could frustrate prosecutors' well-founded aversion to the insertion of irrelevant or non-probative information and/or spurious issues or arguments that detract from examining the genuine issues into the trial process, more aggressive policing of evidentiary admissibility questions by trial judges could alleviate this concern—which, as noted, would be relevant only in the small minority of cases that proceed to trial.

Roughly half of the offices represented at the Conviction Integrity Roundtable, including Dallas County, the 8th District of North Carolina, Jefferson Parish, Santa Clara County, and Ramsey County, operate pursuant to open file discovery rules. All of the DAs from these counties advocated for open file discovery as a way to resolve difficult questions regarding what is (or is not) *Brady* material with the use of checklists as a helpful supplement. Former Ramsey County DA Susan Gaertner noted that

open file discovery had a tendency to standardize office culture across all the DA offices in Minnesota, given that the offices all operated according to uniform policies.

Jefferson Parish DA Paul Connick, Jr. also endorsed the use of open file discovery and augmented this practice with checklists. Defense counsel was generally provided a checklist showing all the information included in a police report, which enabled prosecutors to keep track of what was (and was not) disclosed. His office also files supplemental reports prior to trial to ensure that supplemental *Brady* disclosures, if any, were timely made. Likewise, *Giglio* information is disclosed upfront to defense counsel as soon as prosecutors receive this information, rather than shortly before a witness testifies. Connick's office also educates prosecutors on their disclosure duties, including where they should look for information and the types of documents that should be disclosed.

### **b. Creating an Office-Wide Definition of What Constitutes *Brady* Material**

For offices that opt not to implement open file discovery, DAs and office heads should focus on promulgating a clear definition of what constitutes *Brady* material and ensuring that this definition is applied on an office-wide basis. Of course, disclosure obligations vary from jurisdiction to jurisdiction, and prosecutors must often consult federal and state law, as well as local law and court rules, to determine whether they impose obligations in excess of federal constitutional requirements. Thus, prosecutors must often navigate a web of legal rules in assessing whether they have complied with disclosure obligations. Rather than leave this individualized assessment to each prosecutor in an office, the head of an office and his or her management team should standardize and codify this assessment by adopting an office-wide definition of *Brady* material. This definitional reform (or in some cases codification) will facilitate disclosure and is a significant step toward implementing front-end conviction integrity reforms. Training programs such as the ones discussed above can assist in promulgating the office-wide definition, as well as offer examples of how to apply the uniform disclosure standard

through hypotheticals and other simulation exercises. Furthermore, written definitions, checklists, and other guidance can be disseminated either in hard copy or via office intranet.

Two leading national organizations, the NDAA and the American Bar Association (ABA), have promulgated recommended disclosure policies. Significantly, neither mentions materiality as a requirement of what should be disclosed before a conviction. The NDAA's Prosecution Standards and Commentary<sup>13</sup> includes the following principles:

- (1) Prosecutors shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct;<sup>14</sup>
- (2) Prosecutors have a duty to carry out their discovery obligations in good faith and should pursue the discovery of material information and fully and promptly comply with lawful discovery requests from defense counsel;
- (3) Prosecutors have a continuing duty to disclose information or other material that has been requested by defense counsel or that is subject to disclosure;
- (4) Doubts about whether evidence should be disclosed should be resolved in favor of the defendant, and prosecutors should exercise care in labeling information as "work product" that is exempt from disclosure;
- (5) In post-conviction proceedings, prosecutors have a duty to cooperate in providing discovery to defense attorneys where evidence is constitutionally exculpatory or where the prosecutor reasonably believes in the defendant's claim of actual innocence;
- (6) In cases of actual innocence, the prosecutor should disclose, within a reasonable time, any material and credible evidence of which he or she is aware which leads them to believe that the defendant is actually innocent.

13 National District Attorneys Association, Prosecution Standards and Commentary, available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

14 DA offices should look to relevant state statutes and ethical rules to determine whether their jurisdictions have statutorily defined *Brady* obligations.

The ABA's Model Rule 3.8, "Special Responsibilities of a Prosecutor,"<sup>15</sup> includes the following guidelines:

- (1) Prosecutors shall make timely disclosure of exculpatory or mitigating evidence known to them that tends to negate guilt or mitigates the offense;
- (2) When prosecutors know of new, credible and material evidence creating a reasonable likelihood that a defendant is innocent, prosecutors shall promptly disclose this to the court or appropriate authority and will undertake further investigations to determine whether the defendant was wrongfully convicted.
- (3) When a prosecutor knows of clear and convincing evidence establishing that a defendant has been wrongfully convicted, he or she shall seek to remedy the conviction.

The non-law enforcement panelists endorsed the need to establish uniform, office-wide *Brady* definitions and, ideally, the use of open file discovery as a means of avoiding prosecutorial errors and misconduct relating to *Brady* disclosures. For instance, Innocence Project co-founder and co-director Barry Scheck advocated for clearer and more uniform definitions of what constitutes *Brady* material, including having an office policy that *Brady* definitions need to be assessed prospectively—not once a case has been commenced. Scheck also endorsed the *Brady* definitions promulgated by both the NDAA and the ABA regarding a prosecutor's duty to disclose evidence in post-conviction proceedings.

### c. Tracking *Brady* and *Giglio* Information

DA offices should also establish a database or network for tracking *Brady* and/or *Giglio* information as it relates to key witnesses, such as police officers or expert witnesses who will potentially work with a prosecutor in the future. This is yet another important front-end reform because it reduces the likelihood that a case will proceed to trial on the

basis of questionable (or non-disclosed) evidence, let alone that a case will be overturned as a result of failure to disclose *Brady* or *Giglio* material related to key witnesses.

At least two of the Roundtable participants tracked *Brady* and *Giglio* material relating to key witnesses. For instance, the Jefferson Parish DA noted that its police departments have assigned an officer to disclose any disciplinary problems that an officer has that might directly impact a criminal case.<sup>16</sup> To safeguard against *Brady* and *Giglio* issues, the Jefferson Parish DA's Office can issue written requests for information from a police officer's file that might be subject to disclosure. This information would then be discussed internally amongst prosecutors, and the officer's name would be put into a database that would, in turn, alert prosecutors when the officer's name is run as a potential witness. In the event this officer was ever needed as a witness, a prosecutor would then be able to go back and review the officer's involvement in prior cases to determine whether to prosecute the case in the first instance based on the officer's testimony, and, if the case proceeds, to make appropriate disclosures to the defense.

The Santa Clara DA has a similar process for disclosing *Giglio* material relating to police officers. If an officer is arrested in Santa Clara County for criminal conduct, the case would be flagged for his office, and they would decide whether to put the officer on an internal list. If an officer's name is added, all prosecutors are notified of this event, and the likely outcome is that prosecutors will avoid calling or using the officer in the future. Rosen noted that his office wanted to expand this practice to run police officer rap sheets on a statewide basis—as they do for civilian witnesses—but were encountering resistance by local police to this reform. Currently, there is an informal agreement between DA offices in California to share information about police officer arrests with each other.

<sup>15</sup> See [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html) (last visited on June 11, 2012).

<sup>16</sup> The District of Columbia United States Attorney's Office engages in a similar practice: It maintains a computerized database, accessible to all prosecutors, which identifies whether any District of Columbia Metropolitan Police Department officer has any issues that must be considered for possible disclosure. This database is called the "Lewis list" after a case decided in the District of Columbia Court of Appeals.

These concepts need not be limited in application to police witnesses. The Harris County District Attorney’s Office maintains a list of experts and other witnesses who had given questionable testimony in prior cases, which is available to all prosecutors on the office’s website.

## **B. Back-End Reforms**

A successful conviction integrity program should also incorporate “back-end” reforms. Back-end reforms include establishing procedures and practices for investigating post-conviction claims of actual innocence and, where appropriate, taking steps to vacate these convictions and exonerate the individuals involved. These reforms are equally important to ensuring that prosecutors are fulfilling their professional and ethical obligations to do justice. A commitment to “doing justice” does not end with a conviction; in certain circumstances, prosecutors have a duty to reinvestigate closed cases, such as when new evidence comes to light suggesting that the wrong person has been convicted of a crime.

Roughly half of the participants at the Roundtable had established CIUs that would review post-conviction claims of innocence, either in their own offices or through an independent commission, as is the case in North Carolina. On the whole, the participants felt that it is generally more effective for these entities to be located within a prosecutor’s office, rather than outside of it (as is the case with Innocence Project organizations). This viewpoint recognized the sense that prosecutors are often better positioned to ensure equity in the handling of all post-conviction claims. Moreover, prosecutors tend to get easier access to evidence for testing. Indeed, Dawn Weber of the Denver District Attorney’s Office noted that, in her experience, defense-side projects often experienced frustration at not being allowed sufficient access to adequate trial and case materials, or evidence for post-conviction testing, and, as a result, needing to spend much of their funding on litigating access to evidence, whereas her office was able to obtain such access relatively quickly.

## **5. Investigating Post-Conviction Claims of Actual Innocence**

The number of post-conviction claims of actual innocence that are raised obviously vastly exceeds the number of such claims with merit. Moreover, prosecutors have limited or even scarce resources. Even those who establish conviction integrity initiatives—especially smaller offices—are acutely concerned about issue of resource expenditure. Thus it is essential for prosecutors to have effective mechanisms to identify which claims deserve closer scrutiny. These mechanisms can use a variety of strategies to cull the volume of claims, including limiting the types of offenses that are investigated and establishing rules tying whether a claim will be investigated to whether relevant evidence was preserved, whether the claimant has maintained innocence throughout the prosecution, or whether the claimant was making the claim for the first time in this post-conviction setting.

### **a. Model Procedures for Selecting Post-Conviction Claims for Review**

The Roundtable provided at least three established protocols for selecting which post-conviction claims to review with close scrutiny. The Ramsey County, Minnesota, District Attorney’s Office conducted a large-scale post-conviction DNA review. Former Ramsey County DA Susan Gaertner developed a protocol that includes the following:<sup>17</sup>

- (1) All cases prosecuted after 1994 were reviewed to see whether biological evidence existed that could be tested, including cases where defendants made post-conviction requests for DNA testing;
- (2) Law clerks would draft an initial case review report, which included information on whether the case was disposed of by a guilty plea or a conviction;
- (3) A prosecutor would then review the initial case review report to determine, among other things, whether a defendant consistently maintained

*“A commitment to “doing justice” does not end with a conviction; in certain circumstances, prosecutors have a duty to reinvestigate closed cases, such as when new evidence comes to light suggesting that the wrong person has been convicted of a crime.”*

<sup>17</sup> This protocol was included as a template for conducting post-conviction DNA reviews in the American Prosecutors Research Institute’s *DNA Evidence Policy Considerations for the Prosecutor* (September, 2004).

*“Post-conviction claims of innocence should be reviewed regardless of whether the inmate’s case was resolved by plea or by conviction.”*

his innocence, and whether biological evidence existed that could be tested that would raise a reasonable probability of a more favorable outcome if the results had been available at the time of conviction; and

- (4) If evidence is available for testing, the DNA is sent to the Minnesota Bureau of Criminal Apprehension or the FBI. If neither lab can perform testing, then a lab selected by both the prosecutor and defense counsel will be used.<sup>18</sup>

The Manhattan CIU also created written guidelines, which are included as Appendix A, Ex. 1, that govern the process for reviewing and responding to post-conviction claims of innocence. These guidelines—which go beyond the Minnesota approach because they address all claims of actual innocence regardless of whether they were DNA or non-DNA based—include the following policies:

- (1) The CIU chief reviews all post-conviction claims of actual innocence, whether raised by formal motion or some other means (such as a letter);<sup>19</sup>
- (2) Particular scrutiny is paid to claims of actual innocence that cite newly discovered evidence that bears on innocence or that raises “red flag” issues such as misidentification, witness recantation, lying by an informant or cooperator, and meaningful claims of alibi;
- (3) Motions requesting DNA testing will be forwarded to the chiefs of the Forensic Sciences/Cold Case Unit for further review, and claims for DNA testing are viewed liberally (DNA testing will be agreed to in any case in which the results will be dispositive on the issue of guilt or informative as to any question strongly related to the issue of guilt or innocence);

18 See <http://www.co.ramsey.mn.us/NR/rdonlyresCFFF14C4-0F44-4BD9-9995-0186E9C17085/15111/RamseyCountyEvidenceRetentionPolicy1.pdf> (last visited on June 11, 2012).

19 Manhattan CIU Chief Sard noted that, when the Manhattan DA launched its program, she spoke with Dallas County DA Craig Watkins and he advised her that the CIU should seek to investigate cases where the defense version of the case “makes more sense than what the prosecutor presented at trial.” With that broad definition in mind, Sard noted that the CIU looked for red flags in an inmate’s case, and that the red flags did not necessarily need to be “new” evidence so long as the defense theory tended to support a colorable claim of actual innocence.

- (4) Claims with strong indicia of actual innocence will be investigated, if necessary, by two to four prosecutors other than the prosecutor who initially handled the case, under the supervision of the CIU Chief; and
- (5) As a matter of general policy, the Office will not re-investigate claims where a defendant knew or should have known the basis of his or her current claim, or where the defendant now disavows his or her trial testimony and proffers a different theory of innocence.

See Appendix A, Ex. 1.

The Colorado DNA Justice Review Project (the “Colorado DNA Project”) has proceeded in two rounds. The first round, launched with funding from the Department of Justice and recently completed before the Roundtable, used the following protocol:

- (1) Only non-negligent homicides and sexual assaults were eligible for further review;
- (2) Cases had to be resolved by a jury verdict—plea cases were not eligible;
- (3) Cases were not driven by inmate requests—inmates were not aware whether their case was selected for testing, and inmates did not need to be represented by defense counsel in order to get their case reviewed;
- (4) Cases that no longer had evidence available were not eligible for testing;
- (5) Inmates had to continually maintain innocence in order to be eligible for testing; and
- (6) Eligible cases were preliminarily reviewed by a team of law students from the University of Denver College of Law. Following this initial screening, both a seasoned investigator and Weber herself reviewed the cases to determine which should be submitted to a panel that would determine whether to grant testing. Weber retained sole discretion to determine which cases should be submitted to the final reviewing panel.

Weber, one of the co-heads of the Colorado DNA Project, reported that the first round yielded 5,000 inmates that were convicted of offenses which qualified them to participate in the Project’s review process. Of these cases, two were ultimately selected for

further testing. One case had test results pending, while the other case did not move forward after the inmate declined to submit to consensual swab testing upon being informed that his DNA would be entered into a database and cross-checked against DNA from other unsolved crimes.

The second round of the Colorado DNA Project, again implemented with funding from the Department of Justice, used expanded protocols, including the following:

- (1) The Denver DA publicized the Project to inmates in an effort to get inmate-driven requests for post-conviction DNA testing;
- (2) The list of eligible crimes was expanded to include certain enumerated statutory crimes of violence;
- (3) The Project anticipated a 1 in 5 response rate, based on similar projects across the nation; and
- (4) The Project did not exclude cases that were resolved by pleas, recognizing the possibility that an individual may plead to a crime he did not commit (either he or she is actually innocent, or he/she only committed a lesser degree of a related crime) due to the sentencing discount a defendant receives for pleading guilty.

The Colorado DNA Project's second round will involve a similar process of reviewing inmates' claims for testing eligibility.

### **b. The Standard of Review for Assessing Post-Conviction Claims of Actual Innocence**

Aside from establishing procedures for culling and identifying post-conviction claims of innocence that merit reinvestigation, DA offices must also establish a standard of review for assessing these claims. Roundtable participants, particularly those from Dallas, Manhattan, and Santa Clara, agreed that the proper standard of review should be whether there is clear and convincing evidence that there exists a plausible claim of actual innocence.<sup>20</sup> At least one participant—the Dallas CIU—

also noted that it would sometimes relax this standard if a post-conviction investigation uncovered glaring constitutional errors at a defendant's trial, even if those errors did not obviously relate to guilt or innocence.

Notably, the participants all acknowledged the difficulty of conducting post-conviction investigations, especially where the verdict was obtained through an otherwise constitutionally sound process. In those instances, at least some participants expressed concern about acting as the "thirteenth juror" in the post-conviction context. Thus, the participants agreed that the standard of review in reinvestigating closed cases is not whether reasonable doubt exists. The existence of reasonable doubt should influence prosecutors to pursue additional investigation, but does not necessarily result in a conclusion that a defendant is actually innocent. As an example, Santa Clara DA Jeff Rosen analogized investigations of post-conviction innocence claims to traditional investigations of any serious violent crime, stating that the CIU in his office asks whether all avenues of inquiry have been exhausted and whether, based on the investigation, there was a plausible claim of innocence. He explicitly contrasted this approach with acting as a "thirteenth juror" and asking whether there was reasonable doubt at trial. Put differently, Rosen noted that the existence of reasonable doubt may influence the CIU's decision to pursue additional investigation and inquiries, but it would not cause them to conclude that an inmate was in fact innocent.

Post-conviction claims of innocence should be reviewed regardless of whether the inmate's case was resolved by plea or by conviction. Roundtable participants were in consensus on this question, recognizing that individuals may plead to a crime they did not actually commit because of the sentencing discount received by pleading guilty or as a result of ineffective legal assistance. Some offices have decided to apply a higher standard of review to post-conviction claims arising out of matters resolved by plea than to claims arising out of matters resolved by trial. For example, the North Carolina Innocence Commission requires unanimous consent before a conviction resolved by plea could be sent to a 3-judge panel of superior court judges for formal

<sup>20</sup> The term "actual innocence" may be statutorily defined in certain jurisdictions. Accordingly, an office should consult relevant statutes to determine whether it operates in a jurisdiction with a statutory definition.

*“... the goal of the CIU should be to form a long-term cooperative relationship [with defense counsel] with mutual trust on both sides ... [distinguished from] the traditional adversarial relationship that exists at trial.”*

judicial intervention. Similarly, the Manhattan CIU applies higher scrutiny to post-conviction claims of innocence arising out of guilty pleas.

Moreover, the passage of time may influence the standard of review. On one end of the spectrum, it may be easier for a prosecutor to ascertain whether the standard of review has been met due to improvements in forensic sciences, such as the availability of increasingly sophisticated DNA testing that was previously unavailable at the time the case was brought. On the other hand, it may become more difficult to determine when the standard of review has been met based on a reinvestigation. In non-DNA cases, the only evidence that exists may be statements from witnesses who either are no longer able to recall key events with any level of certainty or who cannot be located for interviews. In these instances, investigations may yield ambiguous or non-dispositive questions about the accuracy of a conviction. When asked about the difficulty of ascertaining when “enough” of an investigation has been done for purpose of applying the standard of review, Russell Wilson II, Chief of the Dallas County District Attorney’s Office CIU, noted that in difficult cases his office would likely be inclined to simply present the full investigation to the court. The filing may not make any recommendations regarding vacation of the conviction, but it would inform the court about the work done. Bonnie Sard took a similar approach, noting that the Manhattan CIU would likely not be inclined to file a motion supporting vacation of the conviction where an exhaustive reinvestigation failed to meet the “clear and convincing” standard.

## **6. Defense Counsel’s Role in Post-Conviction Investigations and Attorney-Client Privilege Waivers**

When enacting back-end reforms that focus on post-conviction claims of innocence, prosecutors should consider how to involve defense counsel in these investigations. Even when these investigations never result in litigation or court proceedings, it is likely that defense counsel will be involved in these investigations, either by contacting an office to present a claim on a client’s behalf or by

presenting new information and evidence to the office, either orally or in writing. In some instances, the information defense counsel has might not be available to the prosecutor and can thus bring substantial value to any post-conviction investigation, such as by clarifying uncertainty and allowing an office to draw conclusions as to whether there is a plausible claim of actual innocence.

The Manhattan CIU is cognizant of defense counsel’s role and has, in the context of at least one post-conviction investigation that was pending on a motion before the court, invited counsel to make an oral presentation to prosecutors. According to Sard, the Manhattan DA’s Office had a good working relationship with defense counsel, and the presentation was exceedingly professional.

Prosecutors seeking to establish processes for post-conviction investigations should also consider whether such claims implicate a defendant’s attorney-client or work product privileges, such that they should be required to waive them before an investigation will commence. Some offices may view a blanket waiver as a fair trade-off for prosecutors’ agreement to expend resources on investigating post-conviction claims of innocence. Indeed, the North Carolina Innocence Commission (which operates separately and independently of DA offices and the North Carolina judicial branch) requires a blanket waiver of the attorney-client and work product privileges, as well as of Sixth Amendment rights, before the Commission agrees to investigate a post-conviction claim of innocence. The Commission then reviews defense counsel’s trial file as part of their investigation. Commission member Branny Vickory opined that such waivers are helpful in distinguishing inmates who are actually innocent from those who were guilty but should have been charged with a different offense.

However, none of the participants with in-office CIUs actually required a blanket waiver, and Roundtable participants were in consensus that such waivers should not be required as a general matter, although it might be appropriate to request them in particular instances. For example, although the Dallas CIU does not require a blanket waiver, it has the flexibility to ask for one when it believes circumstances demand it. Dallas CIU Chief Wilson noted

one investigation that turned on what a defendant had told his defense counsel at trial, and in that instance the Dallas CIU requested that the defendant waive these privileges in order to be able to review trial counsel's entire file. Such a waiver was necessary to conduct a full investigation that might exonerate the inmate. Wilson noted that this flexibility also applied to an inmate's Fifth Amendment rights—they had, when circumstances dictated it, sought waiver of this right as well.

Non-law enforcement panelists uniformly agreed that it was not helpful to require a blanket waiver of the attorney-client and work product privileges before a post-conviction investigation could move forward. Bryan Stevenson, NYU Professor of Clinical Law and Executive Director of the Equal Justice Initiative, noted that waiver would not necessarily lead to greater transparency at the investigative phase because in many instances the inmates were incarcerated due to defense counsel's failures to fully develop a theory of the case or otherwise adequately defend the inmate at trial. He also cautioned that some defendants distrusted their defense counsel and would not have shared information with them—and in some instances may have spoken more freely with law enforcement. Defense attorney Jeffery Robinson of Schroeter, Goldmark & Bender also noted that a blanket waiver would not necessarily assist investigations. He opined that defense counsel also feel stung when they are told their clients may have been wrongfully convicted despite their defense efforts, and he voiced concern that a blanket waiver policy might lead counsel to paper their trial files with “new” documents that may or may not reflect what actually transpired at trial.

Innocence Project co-founder and co-director Barry Scheck echoed Stevenson's and Robinson's resistance to a blanket waiver. However, he also noted that in certain instances prosecutors had asked him—and he had agreed—to share his work product, including information about witnesses he had interviewed. In some cases, he had independently decided to provide privileged information to prosecutors about witnesses they ought to interview, in order to bolster his client's case of innocence. Overall, Scheck opined that requiring a blanket

waiver would run counter to the kind of successful investigative process that a CIU should strive to implement. Instead, he suggested that the goal of the CIU should be to form a long-term cooperative relationship with mutual trust on both sides, and he distinguished the CIU's work from the traditional adversarial relationship that exists at trial. As an example of the benefits that can flow from mutual trust, Scheck noted that he was working on a case with Jefferson Parish DA Paul Connick where he had agreed to a number of conditions that he would never ordinarily have agreed to—such as having prosecution experts interview his client on videotape. This level of trust arose because both parties had been sharing full information with each other over the course of a multi-year period.

## C. Publicizing Reforms: Internal and External Messaging

It is important for prosecutors to publicize these reforms, both so the public will see that their offices are committed to addressing issues raised by wrongful convictions and so prosecutors will have a chance to shape the dialogue about wrongful convictions, rather than having the messaging come solely from defense counsel and Innocence Projects. Such publicity breaks down into two broad categories: (1) promoting the values of a conviction integrity unit within the office, and (2) publicizing these reform efforts to the media and general public. Both of these publicity efforts are discussed below.

### 1. Promoting “Buy-In” Within an Office

DAs and office heads seeking to implement conviction integrity reforms must first work to publicize and promote the importance of these reforms within their office. Asking line prosecutors to “buy in” to these initiatives is an essential prerequisite to the success of these initiatives, given that the line prosecutors themselves will be charged with adhering to the office's policies. More fundamentally, a “buy-in” is necessary to inculcate in line prosecutors the values that CIUs represent. When an office commits to conviction integrity, the success of that commitment is no greater than the sum

of its parts. Embracing the values that conviction integrity reform represents will influence prosecutors' discretionary decisions, from charging to bail to sentencing. Thus, a successful conviction integrity program will affect the culture of the office and will go beyond simply mitigating the risk of wrongful convictions.

Of course, DA offices must be cognizant of the fact that line prosecutors may resist and resent implementation of a CIU and its proposed reforms. At the front-end, CIUs focus on a prosecutor's ethical and professional duties, and any proactive reforms they suggest can be viewed as questioning the integrity of the line prosecutors in an office. In the post-conviction context, they raise doubts about a prosecutor's prior work, even when that work resulted in a hard-fought and hard-won conviction. Thus, there is the potential for line prosecutors and the CIU to develop an antagonistic and distrustful relationship.

During the implementation phase, DA offices must take concrete steps to foster a harmonious and cooperative relationship between the CIU and line prosecutors. Several possible strategies can help promote this buy-in. First, consistent with the recommendation that an office head set the right "tone from the top," he or she must make clear that the success of the CIU and its reforms is a top office priority that will require cooperation on the part of line prosecutors. Second, DA offices must be sensitive to the aforementioned concerns and suspicions that line prosecutors may have about a CIU. Thus, office heads must also communicate that conviction integrity reform is actually meant to *assist* and complement the work done by line prosecutors in the prosecution of their cases because its policies will assist them in identifying potential problems or challenges at an earlier stage of their cases, thus giving them an opportunity to address them. For example, checklists can help identify potential problems at an earlier phase of the investigation, thus enabling a prosecutor to correct them before the eve of trial. Third, a DA's office can promote buy-in by appointing a seasoned, well-respected prosecutor to head a CIU. This sends an obvious message that, not only is the success of the CIU a high priority, but it will be run by a prosecutor who

will take these reforms seriously and who has the respect of the line prosecutors in an office. Lastly, an office should also educate prosecutors regarding the benefits of a CIU. A DA's office should spend time convincing its prosecutors that CIUs are necessary by communicating information about wrongful convictions, the danger of false confessions, and issues surrounding limitations of identification and forensic evidence. Prosecutors should be educated that the issues raised by wrongful convictions were not simply isolated ones that occurred outside their jurisdictions. In short, a CIU should conscientiously seek to foster a collaborative, not combative, approach with the prosecutors in the office.

The Roundtable participants uniformly agreed on the need to promote an office buy-in, and their suggestions broke down into the strategies discussed above. For instance, Manhattan DA Cyrus Vance took an important first step in promoting a buy-in by appointing Sard, an experienced and respected prosecutor with substantial trial experience. Her appointment immediately created an air of legitimacy to the CIU and the reforms that it eventually implemented. Of course, it is not necessary for the head of a CIU to be an experienced prosecutor; Dallas CIU Chief Russell Wilson was a defense attorney in Dallas before his appointment. Office prosecutors knew and respected him, which legitimized the Dallas CIU's work despite his lack of experience as a prosecutor. In fact, his predecessor, Michael Ware (as well as the Dallas DA himself, Craig Watkins) was a defense attorney before joining the office. In short, whether the CIU head comes from the prosecution or defense side, it is essential that he or she is respected and held in high regard by the line prosecutors in the office.

Participants also agreed that it was important to promote the idea that the CIU was actually a key resource for line prosecutors in the execution of their job duties—not an institution to be viewed with suspicion. At the front-end, Bonnie Sard promoted this cooperative process by responding to line prosecutors' concern about using a formal *Brady/Giglio* "checklist" that ticked off boxes for each type of discovery disclosure. When line prosecutors resisted this categorical approach, the CIU agreed to frame it as a questionnaire instead. This

compromise reflected the Manhattan CIU's desire to promote best practices and educate prosecutors while remaining sensitive to the fact that prosecutors retain flexibility in how they handle their cases. Sard described her approach as emphasizing that the CIU is not "Big Brother," but is a resource to help rather than hinder prosecutors. At the back-end, Sard continues to emphasize that, in the context for reinvestigating closed cases, the goal is never to criticize prior work—it is to serve the greater goal of protecting the integrity of the Manhattan DA's Office. Moreover, Sard also sought to "normalize" the reinvestigation process, noting that over time, the more reinvestigations that occur, the more accepted they become.

Finally, participants agreed on the importance of educating line prosecutors about the CIU's work and why it is important. For instance, Santa Clara DA Jeff Rosen noted that his office had exonerated individuals in the past, but he did not believe the office had taken the opportunity to sufficiently discuss the issues that led to the exoneration and to use them as a credible teaching moment that would help educate line prosecutors, not to mention normalize the reinvestigation and exoneration process, which would in turn de-stigmatize and legitimize a CIU's work.

## **2. Publicizing Reform Efforts to the Public**

It is also important to publicize conviction integrity-related reform efforts outside the prosecutor's office by speaking directly to the public, which include the media and, most importantly, the community of witnesses, victims, jurors, and voters. As more exonerations occur, wrongful convictions—and a prosecutor's role in securing these convictions—will continue to receive media coverage. Rightly or wrongly, the anti-wrongful conviction movement has swept the country and will continue to do so. In responding to the public perception that there is an "epidemic" of wrongful convictions, prosecutors must be proactive rather than reactive. They must inform the public about the conviction integrity reforms that their offices are implementing in order to counter the notion that prosecutors are sitting

on their hands, waiting for Innocence Projects to uncover wrongful convictions.

In furtherance of these efforts, prosecutors should consider hiring a media advisor and setting aside funding to roll out reforms to the public. The media obviously influence public opinion, so it is essential that the media focus on a prosecutor's conviction integrity reform efforts, not just on wrongful convictions and exonerations. Manhattan DA Cyrus Vance has taken this approach, and he opined that he wanted his and other offices to make their reforms more marketable as media products, just as the Innocence Project had a well-packaged media product. Santa Clara DA Jeff Rosen also agreed with including a media component, noting that his office tried to influence the public dialogue by providing the media with accurate news stories about the good work his office has done in the area of conviction integrity. In addition, Rosen noted the importance of educating and publicizing prosecutors' conviction integrity work at law schools. As an example, he noted that the head of the Santa Clara CIU teaches a course at Santa Clara Law School about the role of a prosecutor and what the job is like. This, Rosen thought, could help to develop a positive perception amongst law students that prosecutors are committed to pursuing justice in the course of their job duties.

Aside from promoting their message to the media, prosecutors should consider whether to partner with defense counsel and institutions such as The Innocence Project to promote conviction integrity reforms. The defense bar and Innocence Project groups are obviously committed to the concept of conviction integrity, albeit from a different perspective. Thus, many defense lawyers likely would be willing to help prosecutors promote their conviction integrity work, particularly if their assistance means that, going forward, this would result in greater institutional reforms regarding how prosecutors investigate and prosecute cases.

For instance, prosecutors should consider reaching out to major criminal defense associations, such as the National Association of Criminal Defense Lawyers ("NACDL"), to promote conviction integrity activity. Roundtable participant Jeffery Robinson of Schroeter, Goldmark & Bender offered to

*"When an office commits to conviction integrity, the success of that commitment is no greater than the sum of its parts. ... a successful conviction integrity program will affect the culture of the office and will go beyond simply mitigating the risk of wrongful convictions."*

connect prosecutors with NACDL members who might vocalize support for conviction integrity-related reforms being implemented in DA offices. Robinson suggested that DAs offices could also consider reaching out directly to defense lawyers in their communities to jointly issue a statement exalting a given conviction integrity-related reform as an example of how the criminal justice system should function. In fact, Robinson suggested that defense counsel had an obligation to promote these reforms, given that they were vocal in advocating for them in the first instance. Relatedly, Robinson noted that he would not hesitate to endorse the practices of a DAs office that conducted a conviction integrity review that indicated the correct person was in fact convicted, so long as the review was conducted properly and served as a model of how prosecutors should perform their duties.

Innocence Project co-founder and co-director Barry Scheck said he too was willing to help spread the message about DA offices that implemented conviction integrity-related reforms. In general, he noted that his approach to exonerations is that they are learning moments for the entire criminal justice community. When exonerations occur, he wants the “lion’s share” of credit to go to the local DA office that worked to make it happen. As an example, when Dallas County exonerated a number of individuals, he wanted DA Craig Watkins and then-Dallas CIU head Mike Ware to speak at the press conferences, because the credit for the exonerations redounded to their hard work.

The non-law enforcement participants were also open to the idea of partnering with DA offices to promote reforms that did not always result in or relate to wrongful convictions. For instance, Bryan Stevenson, Professor of Law at New York University and Executive Director of the Equal

Justice Initiative in Montgomery, Alabama, agreed that defense counsel can and should partner with DA offices to publicize proactive front-end reforms and to recognize DA offices that have worked to implement these types of conviction integrity reforms and initiatives. In fact, Stevenson suggested reframing the focus on metrics other than the number of exonerations an office had. He wanted the public to know about other policies that offices were implementing, such as creating lists of best practices. As a general matter, he was more interested in these types of efforts, because he felt that they would have the broadest impact in changing prosecutorial conduct and achieving greater reliability and integrity in convictions, as opposed to wrongful convictions, which can create an immediate splash in the headlines but not push real behavioral reform.

Scheck also echoed Stevenson’s observations, and even noted that sometimes it was the smaller reforms that made a difference in showing a DA office’s commitment to changing the way they operate. For instance, he praised the Manhattan CIU’s approach of assigning post-conviction motions claiming innocence to new prosecutors for investigation, as opposed to having the initial trial prosecutor review the paperwork. So long as the policy showed the legal community that a prosecutor was being fair and giving a defendant a fair shake, this was important to him. Scheck also stated that he wanted first to work with DA offices to push these reforms because he viewed them as having the institutional resources to make real changes to the system; once they moved forward to establish conviction integrity reforms, Scheck thought the defense bar could also be pushed to act more responsibly as well.



# Reforms That Prosecutors Can Implement In Partnership With Other Law Enforcement Agencies

Prosecutors should also seek to partner with other law enforcement agencies, such as police departments and forensic labs, to implement conviction integrity efforts. Although they may lack the formal authority to control these agencies, this should not discourage reform efforts. Because of the important role that both the police and forensic lab analysts play in assisting prosecutors in investigating and prosecuting crimes, these actors should also be made aware of the importance of conviction integrity reforms and the roles that they can play in decreasing the likelihood that wrongful convictions will occur.

## A. Police Departments

Prosecutors and police officers both play important roles in developing and prosecuting criminal cases, and cooperation and communication between the two law enforcement agencies can lessen the likelihood that problems will arise during the course of an investigation and prosecution. Accordingly, DA offices seeking to implement conviction integrity initiatives should seek to partner with their local police departments on the various reforms in order to ensure that police investigative tactics and techniques are not compromising the integrity of a given criminal case.

## 1. Coordinating Investigations

One important step prosecutors can take is to become involved at an earlier phase of the case, when the police are conducting proactive investigations. This will allow prosecutors to assist the police in avoiding errors, including constitutional errors, before they occur.

Some Roundtable participants cited particularly deep working relationships between prosecutors and police in their jurisdictions. Suffolk County DA Conley noted that, in Massachusetts, the DA has statutory authority to “direct and control” homicide investigations. This authority means that the DA is immediately notified and involved at the inception of the case, and a prosecutor responds to the scene and communicates with homicide detectives conducting the field investigation. Conley noted that the statutory provision has led to increased and extraordinary communication and cooperation between his office and the police. For example, detectives who serve in the Boston Police Homicide Unit do so only by joint agreement between the police commissioner and the DA. In addition, because his office directs and controls homicide investigations and authorizes all arrests of suspects charged with murder, full and frank discussions about case strategy between prosecutors and the police are encouraged and occur with regularity. Given the recent successes in homicide investigations that have been generated by this high level of communication, other units in the Boston Police Department have voluntarily become more communicative and cooperative, including the Sexual Assault and Youth Violence/Gang units.

J. Scott Thomson, the Camden, New Jersey Police Chief, also advocated for greater cooperation between prosecutors and police. He noted that in New Jersey, each county has a prosecutor who is the chief law enforcement officer of the county and who reports to the State Attorney General (“AG”). While the AG sets policy for uniform application of criminal procedures, the prosecutor has charging authority for his or her jurisdiction. While there was previously a somewhat adversarial relationship over charging decisions in major cases, an unintentional side effect of the economic downturn—

*“DA offices seeking to implement conviction integrity initiatives should seek to partner with their local police departments on the various reforms in order to ensure that police investigative tactics and techniques are not compromising the integrity of a given criminal case.”*

*“... officers are generally not informed of the outcome of hearings in which they are involved, much less whether a judge issues an adverse credibility determination against them ... better communication would lessen the perception that, once an arrest is made, the case is ‘over.’”*

the reduction in staff of nearly all of the Camden police department’s homicide unit—forced Thomson to rely more heavily on work done by, and in conjunction with, the Camden County Prosecutor’s Office. This led to a closer working relationship with the prosecutor and his staff. Assistant prosecutors are now regular attendees at Camden Police’s daily “10 am Huddle,” where the preceding day’s major crimes are reviewed. Because of improved communications, Thomson noted that prosecutors are now participants in the investigative decision making process (including obtaining evidence and testimony). This has been beneficial both for the prosecutor’s office and for his detectives. Finally, he noted that this partnership has allowed prosecutors to critique police tactics designed to obtain evidence or make arrests *before* they become problematic legal issues; this has led to less negative case law, stronger, more prosecutable cases, as well as a greater understanding by officers of the complexities involving charging decisions and the trial process. Ultimately, the actions of those on the front lines are more congruent with case law and the Constitution through this collaborative effort.

Chuck Wexler, Executive Director of the Police Executive Research Forum (“PERF”), also agreed that increased investigative partnerships would produce better criminal cases. He noted that sometimes there is a lack of clarity over who is “in charge of” criminal cases—ADAs or the police—and prosecutors tend to focus on the certainty of convictions, while police are preoccupied with identifying who is responsible for a crime, building a case, and then making an arrest. To the extent that prosecutors and police can work in tandem, with policies and procedures that complement each other’s work, this will improve the quality and integrity of criminal cases, as well as the long-term relationships between the two agencies. Wexler also noted that increased cooperation results in greater trust and sharing of information about investigations as they move forward.

## **2.**

### **Training and Educating Police Officers**

In addition to solidifying investigative partnerships between DA offices and police departments, conviction integrity initiatives should also include prosecutor-led training and education of police officers about the legal constraints relating to the investigation and prosecution of criminal cases. Police officers are often privy only to a small slice of the life of a criminal case—from investigation to arrest—and often lack an understanding of the procedural complexities of the pretrial and trial proceedings that follow. Educating officers about a prosecutor’s ethical and disclosure obligations, as well as providing feedback about a case that has proceeded past the arrest phase, can increase officers’ understanding of the importance of their role in securing convictions. Finally, prosecutors should offer training about their ethical and disclosure obligations to ensure that police officers are cognizant of these obligations when investigating a criminal case.

Roundtable participants presented several ideas regarding how prosecutors could train police as part of conviction integrity initiatives, which are discussed in detail in the subsections below.

#### **a.**

##### **General Training on Pretrial and Trial Processes**

Training police regarding how a criminal case proceeds through the courts can help conviction integrity initiatives by better educating police about how their investigative actions play out in the courtroom. This training can range from capitalizing on court events as “educational moments” regarding police tactics (such as court hearings regarding improperly obtained confessions and search-and-seizures) to having police observe direct and cross-examination to see how the legal process critiques and scrutinizes the panoply of police activity.

Roundtable participants uniformly endorsed police training on pretrial and trial processes. For instance, Camden, New Jersey Police Chief J. Scott Thomson noted that very few of his officers have an opportunity to see inside a courtroom and as such lack comprehension of the criminal process that follows the arrest. He suggested training

programs that would focus on the trial process, including giving direct testimony and being subject to cross-examination.

Katherine Lemire, Counsel to the Police Commissioner for the City of New York—herself a former prosecutor—echoed Thomson’s comments. She thought officers would benefit from courtroom-related training, including sitting in on court proceedings to see what cross-examination looks like. She also noted that officers are generally not informed of the outcome of hearings in which they are involved, much less whether a judge issues an adverse credibility determination against them. She suggested that better communication would lessen the perception that, once an arrest is made, the case is “over.”

Darrell Stephens, Executive Director of the Major Cities Chiefs Association, suggested conducting joint “post-mortems” on cases that go poorly and cases that are successful in order to help police officers understand how their actions contributed to both failures and successes. Stephens also emphasized that police departments are willing to make reforms, and that this type of joint review would be useful to promote a “buy in” of the concept of improving the integrity of convictions in a given DA’s office.

Dawn Weber, Chief Deputy District Attorney in the Denver DA’s Office, agreed that training officers on the complexities of the trial process would be useful. She suggested integrating officers into the trial process—especially on motions where prosecutors are defending questionable police tactics—to provide an understanding of how officers’ decisions can affect trial strategy. She also suggested that officers receive a comparative education on the evolution of police procedures, comparing the practices of earlier eras that have now been subject to judicial scrutiny.

## **b.** **Educating Police Officers on *Brady* Obligations**

Prosecutors should also work to educate police officers about *Brady* and *Giglio* disclosure obligations for two important reasons. First, prosecutors have an obligation to disclose *Brady* material that is in the possession of law enforcement involved in their

cases. However, prosecutors can never disclose what they do not receive in the first place. Second, educating law enforcement about the legal concept and significance of exculpatory information and, more generally, inculcating in them a culture of total disclosure of information can contribute to an office’s larger program of conviction integrity reforms.

Again, Roundtable participants offered several ideas. Katherine Lemire has trained law enforcement on *Brady* obligations and suggested a collaborative approach between DA offices and their local police departments, including having prosecutors conduct lectures on *Brady* concepts. Jefferson Parish DA Paul Connick agreed, noting that his office conducted regular training sessions, both in its offices and at police headquarters, to keep the police department abreast of case developments and to emphasize the importance of working with prosecutors so that they do not create unnecessary problems that result in the retrial of cases. Connick also noted that these sessions were not about finger pointing but about having the police officer see the importance of doing things the right way. With that goal in mind, he routinely asks police officers about problems they are encountering in specific cases and seeks feedback on the effectiveness of his presentations.

Branny Vickory, DA for the 8th District of North Carolina, emphasized the need to train younger officers on the need to record their investigations in some form. His experience was that, when preparing officers for trial, they often failed to include information in the case file that would explain or document their decision-making process, not because they were trying to avoid making certain disclosures to defense counsel, but more typically due to the pressure of heavy caseloads and the failure of agencies to stress quality of the investigation over “speed,” *i.e.*, the need to move on to the next investigation. Vickory noted that this practice was not taught during law enforcement training, and he suggested that prosecutors needed to have more direct interaction with junior officers doing the actual case investigations in order to ensure that they were exercising best practices. Finally, Vickory noted the importance of front-end education regarding *Brady*. In North Carolina, the relevant discovery statutes mandated a form of

open file discovery, but law enforcement was often slow to deliver their records to the prosecutor, thus making it hard for DA offices to engage in timely disclosure. As a result, the state legislature enacted harsher sanctions, including making it a felony for a police officer to fail to turn over discovery.<sup>21</sup>

Kristine Hamann, the Executive Assistant District Attorney of New York's Special Narcotics Prosecutor's Office and chair of the Best Practices Committee, also endorsed a collaborative approach to training officers on *Brady* and other ethical obligations. Working together with New York State's police agencies, the Best Practices Committee developed discovery, *Brady*, and *Giglio* training for police officers. This training can be taught by District Attorneys and the police, either together or separately. The goal of this training is to partner with police agencies, both large and small, to educate them on their ethical obligations and to standardize such training across the state.

### **C. Providing Feedback on Wrongful Convictions**

In the same way that officers should be informed of the results of hearings and trials that flow from their police work, DA offices should also inform police officers about any wrongful convictions that arise out of investigations and arrests they conducted. Just as prosecutors can learn from wrongful convictions, and thereby seek to avoid mistakes or actions that contributed to their development, so can police. Again, the idea is that wrongful convictions should be viewed as a teaching moment for all law enforcement agencies.

At the Roundtable, former Ramsey County DA Susan Gaertner noted that when she launched her office's post-conviction DNA review of closed cases, she involved the police immediately, meeting with leadership from all the Ramsey County police departments to explain why the DNA review was being conducted and how it would work. As the review progressed, she would also ask the police to get additional information or reinvestigate cases to locate old

evidence. Although she did not conduct case-specific post-mortems, she did note that her office's review project led to two major reforms in Ramsey County: (1) changes to the procedures used for eyewitness identification, and (2) a uniform evidence retention policy. Dawn Weber noted that, during her office's post-conviction review of DNA in closed cases, her counterpart at the Colorado District Attorney's Office kept the state police in the loop about cases that could potentially lead to exonerations. Likewise, she was prepared to open lines of communication with the Denver Police Department in the event her post-conviction review of a given case started to raise questions about the validity of the conviction (although to date this had not happened).

### **3. Videotaping Custodial Interrogations**

Another area of reform that DA offices can pursue is the videotaping of custodial interrogations. This practice has gained widespread acceptance across a number of jurisdictions.<sup>22</sup> The main effect of videotaping is to make confessions even more powerfully probative. A videotape of a confession typically eviscerates defense arguments of coercion or compulsion and will generally be dispositive evidence on suppression motions. A video is also the most powerful form of confession evidence. Finally, videotaped confessions can protect the police from civil liability while simultaneously operating as a deterrent against inappropriate interrogation practices. Videotaping confessions thus renders confession evidence more reliable and reduces the risk that a conviction will be obtained based on a false confession.

Nearly all of the Roundtable participants endorsed and came from jurisdictions that either videotaped custodial interrogations or were participating in pilot programs designed to test the feasibility of the practice.<sup>23</sup> Notably, Roundtable participants' experience has been that, after initial

<sup>22</sup> See <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/PDDEPTLIST.pdf> (updated August 4, 2009) (last visited on June 11, 2012).

<sup>23</sup> While the NYPD does not routinely videotape custodial interrogations, Katherine Lemire, Counsel to the Police Commissioner for the State of New York, noted that the NYPD was currently participating in a pilot program exploring the use of this technique.

<sup>21</sup> See N.C. Gen. Stat. 15A-903(d).

discomfort or resistance, police departments have accepted this reform because of a view that it actually improved their investigations. Chuck Wexler, Executive Director of PERF, stated that, when the suggestion was made approximately six or seven years ago to start videotaping interrogations, Boston Police Department homicide detectives were initially opposed to it. However, as time went on, they saw how videotaping could help them by eliminating defense arguments of witness coercion and the risk of civil liability. Suffolk County DA Conley agreed with Wexler's assessment, noting that, while no one wants to be told what to do regarding their investigative procedures, the key to implementing videotaping in the Boston Police Department was having prosecutors explain the reasons for the reform and encouraging implementation; over time, the detectives eventually saw the merits of videotaping and endorsed the practice as well.

Santa Clara County DA Jeff Rosen was one of the majority of participants practicing in a jurisdiction that videotapes custodial interrogations of suspects who have been charged with, or have been suspected of committing, a violent crime (as defined by statute). The police departments in his jurisdiction have created written guidelines for the recording of custodial interrogations, which include the following:

- (1) Recordings should be done whenever possible when conducting a custodial interrogation of a suspect who has allegedly committed a qualifying offense (defined by state statute);
- (2) *Miranda* warnings should always be included on every recording of an interrogation;
- (3) Officers should fill out a form indicating that they have conducted a recorded custodial interrogation, even if only to note the suspect's refusal to be recorded. The form will provide useful information to prosecutors in complying with future discovery obligations; and
- (4) If it is not possible to record a custodial interrogation due to, *inter alia*, equipment failure, lack of equipment, or a suspect's refusal to cooperate unless recordation is suspended, officers should write a report explaining these circumstances. See Appendix C.

The above guidelines mirror recommendations recently made by a number of commissions appointed to study the causes of wrongful convictions.<sup>24</sup>

#### 4. Eyewitness Identification Reforms

Another major reform area that DA offices should focus on involves eyewitness identification procedures. Eyewitness identification generally involves either a photo array or an in-person lineup administered by the police, often before the prosecutor has become involved in investigating the case. Eyewitness identification is a potentially problematic area, both because there is a growing body of scientific literature questioning its reliability and because it is the largest single contributing factor to wrongful convictions.<sup>25</sup>

Based on the discussion at the Roundtable, it appears that the "best practice" in this area is for lineups and photo arrays to be conducted double blind and sequentially. In a double blind procedure, the administering officer does not know which person in the lineup or array is the actual suspect. In this way, it is impossible for that officer to influence the witness, deliberately or not. In sequential administration, suspects are presented to the witness one at a time rather than all at once. Some studies have shown sequential administration to mitigate false positive identifications by making identifications less relative and more absolute.

24 See CCFJ Final Report at 34-39 (2008), available at <http://www.ccfaj.org/documents/CCFJFinalReport.pdf> (last visited on June 11, 2012); Thomas P. Sullivan, "Preventing Wrongful Convictions—A Current Report From Illinois," 52 *Drake L. Rev.* 605, 607-8 (2004); Timothy Cole Advisory Panel on Wrongful Convictions: Report to the Texas Task Force on Indigent Defense at ii, 46-70 (August 2010), available at <http://www.txcourts.gov/tidc/pdf/FINALTCAPresearch.pdf> (last visited on June 11, 2012); Final Report on the New York State Bar Association's Task Force on Wrongful Convictions at 6, 104-112 (April 4, 2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (last visited on June 11, 2012); Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process at 11-23 (2006), available at <http://apps.americanbar.org/crimjust/committees/innocencebook.pdf>, (last visited on June 11, 2012); Pennsylvania Report of the Advisory Committee on Wrongful Convictions at 5, 107-27 (September 2011), available at <http://jsg.legis.state.pa.us/resources/documents/ftp/documents/9-15-11%20rpt%20-%20Wrongful%20Convictions.pdf> (last visited on June 11, 2012).

25 Garrett, *supra* note 2.

*"Roundtable participants' experience has been that, after initial discomfort or resistance, police departments have accepted [the videotaped confession model] because of a view that it actually improved their investigations."*

*“when North Carolina changed its law to require sequential, double blind procedures . . . smaller counties in the state did not encounter great difficulty in changing their policies.”*

That is, witnesses do not feel pressure to pick the person among the whole array who is most similar to the perpetrator, but instead compare each individual in the lineup or array to the actual perpetrator. Many Roundtable participants, including representatives from Santa Clara County, California; Suffolk County, Massachusetts; Dallas County, Texas; and Ramsey County, Minnesota, noted that the police departments in their counties implemented sequential double blind procedures in their jurisdictions and considered this reform to be a best practice.

**a.**  
**Sequential Double Blind Administration**

At the Roundtable, Suffolk County DA Dan Conley described how he convened a Task Force on Eyewitness Evidence (the “Task Force”) for the purpose of reviewing the investigative process for cases in which eyewitness identification was a significant issue and recommending appropriate reforms in the means and manner of investigation. The Task Force, which was co-chaired by Boston Police officials and Suffolk County prosecutors and also included members of the Boston defense bar, made a number of recommendations for improving eyewitness identification procedures, including using sequential double blind procedures to administer in-person line ups and photo arrays.

Santa Clara DA Jeff Rosen and former Ramsey County DA Susan Gaertner also advocated for this reform. Rosen’s predecessor in office had worked with the Santa Clara County police departments to implement these procedures, and he noted that there was no initial resistance to this reform—the police departments were genuinely concerned with ensuring that they were using scientifically sound policies and were not jeopardizing their criminal cases. Gaertner noted that when she sought to implement these reforms in Ramsey County, some police departments were initially resistant based on their belief that the administration would in practice prove unworkable, but she was able to convince them otherwise by rolling out the reforms on a pilot program basis throughout Ramsey County.

Darrell Stephens, Executive Director of the Major Cities Chiefs Association, also supported the use of sequential double blind procedures for in-person

lineups and photo arrays because the blinded process was important to avoid any implication of unconscious bias, as well as to remove any defense argument that the identification was somehow faulty or flawed. In addition, both he and North Carolina 8th District DA Branny Vickory addressed the suggestion that smaller police departments would not be able to administer lineups and photo arrays in this fashion. Stephens stated that, when North Carolina changed its law to require sequential, double blind procedures, he observed that smaller counties in the state did not encounter great difficulty in changing their policies. Likewise, Vickory noted that the biggest concern in his jurisdiction was that smaller police departments would be overly burdened. However, he was pleasantly surprised at how well the police were able to adjust.

Ramsey, Suffolk, Santa Clara, and Dallas Counties all have written procedures governing the administration of sequential double blind lineups. While each county’s procedures had slight, non-material variations, they all generally adhere to the following non-exhaustive guidelines:

- (1) The lineup or photo array administrator must not be given any information about the identity of the suspect, and the investigating detective is not allowed in the room during the administration of the line-up;
- (2) Lineups and photo arrays are to be shown sequentially, not simultaneously;
- (3) When assembling a lineup or photo array, the suspect and “fillers” should match the witness’ description of the suspect;
- (4) Witnesses should be instructed that (a) it is just as important to clear innocent persons as it is to identify the suspect; (b) the person who committed the crime may or may not be in the line-up; and (c) even if an identification is made, the entire line-up will be shown to them;
- (5) The administrator should ask witnesses to describe, in their own words, how confident they are of their identification; and
- (6) Lineup and photo array procedures should be documented in writing, including whether identification (or non-identification) was made and the source of all photographs and persons used in the lineup or photo array.

See, e.g., Police Chiefs' Association of Santa Clara County Line-Up Protocol for Law Enforcement, attached as Appendix D.<sup>26</sup>

Finally, the sequential double blind guidelines described above have been endorsed by a number of national and state commissions that have studied wrongful convictions.<sup>27</sup>

## **b.** **Simultaneous Double-Blind Administration**

Police departments in New York State have opted for a slightly different practice. Working with the Best Practices Committee, they have developed new, innovative, and standardized identification procedures. The goal of these procedures is to create fair and neutral processes for eyewitness identifications. Kristine Hamann noted that the Best Practices Committee and its police partners want to be sensitive to the fact that eyewitness identification reforms had to be workable for both the NYPD and the smaller jurisdictions throughout the state.

With these goals in mind, Hamann stated that the Best Practices Committee reached out to smaller jurisdictions and discussed the possible range of reforms with District Attorneys from across New

York State, as well as with smaller police departments. Based in part on these conversations and a review of the relevant research, the Sub-Committee recommended the use of simultaneous double-blind or blinded procedures. In general, the administrator will assemble photos in a folder to be presented to the witness. After giving the witness specific instructions to prevent the witness from looking to the administrator for guidance, the administrator will then stand behind the witness while the photographs are being viewed. Hamann also noted that in rural areas with smaller police forces, it was unavoidable that an administrator would sometimes know the identity of the suspect. However, the guidelines for the procedures and training of police officers emphasized that the administrator's knowledge of the suspect should not inadvertently or purposefully influence the witness.

## **c.** **Considerations for Smaller DA Offices**

Based on the experience of Roundtable participants, administering sequential double blind lineups and photo arrays has not been as burdensome as initially thought. Indeed, in the case of photo arrays, there will likely be little burden associated with assembling a photo packet of the suspect and fillers. Of course, smaller police departments may have to think creatively to find a true double blind administrator, such as using office or staff personnel, as is done in some police departments that are in DA Branny Vickory's district. However, if smaller DA offices and police departments are concerned about administrative burdens, they should consider phasing in the procedure through participation in pilot programs in conjunction with larger offices across the state or county, at least insofar as the reforms are applied to photo arrays.

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26 See also Suffolk County Report of the Task Force on Eyewitness Evidence (July 2004), available at <http://www.suffolkdistrictattorney.com/press-office/reports-and-official-correspondance/report-of-the-task-force-on-eyewitness-evidence/> (last visited on June 11, 2012); Ramsey County Resources for Criminal Justice Professionals regarding Eyewitness Identification Procedures, available at <http://www.co.ramsey.mn.us/attorney/SPDNA.htm> (last visited on June 11, 2012); Dallas County Police Department Forms Regarding Blind Sequential Photographic Line-Ups (2009), available at <http://crimeblog.dallasnews.com/archives/2009/03/dallas-police-to-begin-using-s.html> (last visited on June 11, 2012).

27 See CCFAJ Final Report at 27-28 (2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (last visited on June 11, 2012); Final Report on the New York State Bar Association's Task Force on Wrongful Convictions at 10-12, 45-73 (April 4, 2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (last visited on June 11, 2012); Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process at 23-45 (2006), available at <http://apps.americanbar.org/crimjust/committees/innocencebook.pdf>, (last visited on June 11, 2012); Pennsylvania Report of the Advisory Committee on Wrongful Convictions at 5, 21-82 (September 2011), available at <http://jsg.legis.state.pa.us/resources/documents/ftp/documents/9-15-11%20rpt%20-%20Wrongful%20Convictions.pdf> (last visited on June 11, 2012).

*“... post-conviction DNA testing helps prosecutors fulfill their commitment both to exonerating the wrongfully convicted and to ensuring that the right perpetrator is identified and apprehended.”*

## B. Forensic Labs

Reforming the field of forensic science has been the subject of a huge volume of research, writing, and study. However, it was not a primary focus of discussion at the Roundtable, nor is it a focus of this Report. Instead, the Roundtable and this Report focus on reforms that prosecutors can effectuate with the cooperation of forensic labs. Two main possibilities emerge: working with crime labs to develop evidence retention policies and developing policies addressing DNA hits that are found in reinvestigations of closed cases.

### 1. Evidence Retention Policy

There was general consensus amongst Roundtable participants that DA offices should work with their forensic labs to develop a uniform evidence retention policy for two reasons. First, preservation of evidence would allow inmates the opportunity to seek DNA testing to prove they were wrongfully convicted. Second, evidence retention would provide an opportunity for DA offices to apprehend the right individual in the event a wrongful conviction occurred.

The Roundtable participants agreed on the importance of preserving evidence in order to be able to conduct meaningful post-conviction investigations of DNA-based claims of actual innocence. Chuck Wexler, Executive Director of PERF, noted that one reason Dallas County produced so many exonerations was that its crime lab had preserved a substantial amount of evidence that could later be tested. Russell Wilson, chief of the Dallas CIU, agreed with this observation, noting that Dallas' crime lab saved roughly 30,000 rape kits with various kinds of DNA evidence, some of which were eventually tested in response to post-conviction DNA requests. Bonnie Sard, chief of the Manhattan CIU, echoed Wexler and Wilson's observations. She noted that the Manhattan crime lab had a backlog of approximately 17,000 rape kits that were all eventually tested. As a result, her office received very few requests for post-conviction DNA testing.

Former Ramsey County DA Susan Gaertner also emphasized the need for an evidence retention

policy. Her office reviewed 116 cases to see whether misidentification was a critical issue and whether DNA or other biological evidence existed that could be tested. After finding 3 cases for potential review, only 1 case could move forward with DNA testing—evidence from the other 2 cases had been disposed of in the ordinary course of cleaning out evidence retention rooms. Shortly thereafter, Gaertner worked to implement the Ramsey County Uniform Evidence Retention Policy.

The Policy includes the following written guidelines for evidence retention, which can serve as a model for DA offices seeking to implement similar reforms:

- (1) In uncharged cases involving violent crimes (such as homicides and criminal sexual assault), DNA evidence should be kept permanently;
- (2) In charged cases involving violent crimes, evidence should be retained until a defendant's sentence has expired, unless the prosecutor agrees to an earlier disposition. Where identity of the perpetrator was at issue, the prosecutor may not agree to early destruction without first notifying the defendant and defense counsel to provide them with an opportunity to object;
- (3) For trial exhibits held by the clerk of court, the clerk must seek approval from the prosecutor prior to early disposition of the evidence. Exhibits containing fingerprint or DNA evidence cannot be disposed of without first giving notice to the defendant and defense counsel to provide them with an opportunity to object; and
- (4) For evidence held by law enforcement, they must seek approval from the prosecutor prior to early disposition of the evidence. Exhibits containing fingerprint or DNA evidence cannot be disposed of without first giving notice to the defendant and defense counsel to provide them with an opportunity to object.<sup>28</sup>

<sup>28</sup> See Ramsey County Resources for Criminal Justice Professionals regarding Eyewitness Identification Procedures, available at <http://www.co.ramsey.mn.us/attorney/SPDNA.htm> (last visited on June 11, 2012).

## 2.

### DNA Hits in Closed Cases

Prosecutors should also work to establish policies regarding post-conviction DNA testing in closed cases. These policies are important for two reasons. First, any CIU that investigates claims of actual innocence will likely encounter requests for post-conviction DNA testing. These requests may result in “new” DNA tests suggesting that an individual or individuals other than the defendant were present at the crime scene. This information will obviously be of importance to the prosecutor conducting the investigation, so it is imperative that procedures exist that will allow this information to be communicated to the CIU in a timely fashion. Second, and more importantly, post-conviction DNA testing helps prosecutors fulfill their commitment both to exonerating the wrongfully convicted *and* to ensuring that the right perpetrator is identified and apprehended. While CIUs should strive to exonerate the innocent, they must also work to identify and prosecute the correct person for the crime.

As requests for post-conviction DNA testing grow, and as DNA testing capabilities become more sophisticated such that previously untestable materials become amenable to testing, it is likely that prosecutors will encounter the following scenario: DNA profiles from more than one individual may sometimes be found at a crime scene. When forensic lab analysts identify these profiles, they will generally enter them into CODIS. Once this occurs, there is a possibility that the “new” profile will be linked to an individual whose identity was unknown at the time of the crime. Thus, it is possible that a previously unknown DNA profile from a closed case will identify an individual who was not actually the suspect charged and convicted of the crime. In these instances, the question of the newly identified individual—and his or her relationship to the crime scene and the crime—may raise questions about whether a DA’s office has convicted the right person.

In order to ensure that its office was committed to both exonerations and convictions of the right people, the Manhattan CIU established a policy that uses CODIS hits in closed cases to determine whether a wrongful conviction has occurred. The policy includes the following guidelines:

- (1) The Office of the Chief Medical Examiner directly notifies the Manhattan DA—not the NYPD—of all newly discovered DNA matches, including non-suspect DNA matches;
- (2) In pending cases, the prosecutor assigned to the case is made aware of the non-suspect DNA match and will disclose this information to the suspect-defendant in the course of discovery;
- (3) In closed cases, the Forensic Sciences/Cold Case Unit (“FSCCU”) will review the case file to understand the significance of the new match, the connection between the new match and the case, and whether the defendant was aware at the time of conviction of this DNA evidence; and
- (4) The Office will then decide the proper course of action depending on where on the *Brady* spectrum the material falls.  
*See* Appendix A, Ex. 1.

## Conclusion

This Report has provided a list of feasible and effective measures to avoid wrongful convictions that are based on empirical evidence that includes the on-the-ground use of these measures by reform-minded prosecutors around the country. A prosecutor’s office that adopts the top ten list of best practices discussed in this Report demonstrates a commitment to the highest ideal that all of our nation’s prosecutors should seek: justice in all cases and convictions with integrity.



# Appendix A

## **Manhattan DA's Office Materials**

# Exhibit 1.

## Post-conviction Case Review and Re-investigation of Cases

All incoming letter claims of innocence on behalf of convicted defendants, and all CPL 440 motions will be reviewed by CIP Chief. This will insure uniformity in our responses, and allow us to track the nature and viability of such motions.

### 440 Motions

1. All 440 motions are forwarded to CIP Chief for review.
  2. CIP Chief will initial all such motions upon review, and forward motions for response as appropriate.
  3. Motions claiming actual innocence, newly discovered evidence that bears on innocence, or other “red flags<sup>1</sup>” will be forwarded to a trial division supervisor in the bureau that handled the case and will be reviewed with particular scrutiny. If necessary, such motions will be assigned to an ADA other than the original trial ADA.
  4. Motions requesting scientific testing will be reviewed by Martha Bashford or Melissa Mourges, Chiefs of the Forensic Sciences/Cold Case Unit (FSCCU).
  5. List of “red flag” cases will be maintained by CIP. ADAs handling such cases are to provide update(s) to CIP. CIP will track responses and outcomes of such cases.
3. If at any point, CIP determines that the re-investigation is complete and that no further action should be taken, the defendant will be advised of this conclusion via letter, and will be informed that should he wish to pursue this claim further, he should do so by filing a motion pursuant to CPL 440.10
  4. While the rare case (e.g., a true DNA exoneration) may be resolved without substantial judicial oversight, others can only be resolved through litigation. Those cases should be referred to the Court for appointment of counsel and a hearing to resolve the issues. The People will request that the Court deem the defendant’s letter a 440 motion and ask the Court to treat it as such.

### Non-440 Claims of Actual Innocence

1. All post-conviction claims of innocence raised in any form other than a CPL 440 motion will be forwarded to CIP Chief.
2. CIP Chief will review all such claims, and enter them into database. CIP Chief will review with particular scrutiny claims of actual innocence based upon the following grounds: misidentification, informant/CI lying, alibi, witness

recantation, and newly discovered evidence that bears on innocence. With respect to claims which do not survive this first level of scrutiny, CIP Chief will send a letter to the defendant stating that no further action will be taken and should he wish to pursue the claim, he should do so by filing a motion pursuant to CPL 440.10. Should there be strong indicia that the defendant is actually innocent, the case will be assigned to one or more ADAs to investigate the case and who will in turn report back to CIP Chief. Investigative steps taken may include interviewing the defendant, other witnesses, and submitting evidence for additional forensic testing.<sup>2</sup>

### Plea vs. Trial

1. Claims made on behalf of defendants who pleaded guilty and who now, either via letter or 440 motion, claim innocence will require a higher standard to garner CIP review.
2. In rare circumstances CIP will initiate a review of a compelling claim of innocence made by a defendant who has pleaded guilty.

<sup>1</sup> Red flag issues include misidentification, witness recantation, informant/CI lying, and meaningful claims of alibi

<sup>2</sup> DANY policy is to view post-conviction requests for DNA testing liberally. In addition to agreeing to DNA testing in any case in which the results will be dispositive of the issue of guilt, we will also agree to DNA testing in cases in which the results would be informative as to any question strongly related to the issue of guilt or innocence.

## Re-investigations

1. Many post-conviction claims of innocence may be resolved by reviewing the file, appellate briefs, or addressing any open issues with the ADA who handled the case. Others may require a more thorough examination. Each case will be sui generis.
2. As a matter of general policy, CIP will not assign for re-investigation 440 motions or letter claims from defendants who, at the time of their conviction (either by plea or trial), knew or should have known the basis of their current claim. Nor will CIP assign for re-investigation such claims where a defendant now disavows his trial testimony and proffers a different theory of innocence.
3. Should there be strong indicia that the defendant is actually innocent, 2-4 ADA's will be assigned to re-investigate the case.
4. Case will be reinvestigated under the supervision of CIP Chief.
5. Case will be presented to Working Committee (or several members), who will make a recommendation to the DA.

## Breakdown By Category of 440 Motions

Immigration consequences	123
Ineffective assistance of counsel	69
Constitutional violation	62
Duress, misrepresentation, fraud	34
Newly discovered evidence	22
Actual innocence	21
False evidence	18
Improper conduct outside of the record	18
No jurisdiction	10
Evidence violated constitutional rights	9
Illegal sentence	8
Mental disease/defect	6
Trafficking	1

## Post-conviction Case Review and Re-investigation of Cases

All incoming letter requests and CPL 440 motions for post-conviction DNA testing on behalf of convicted defendants will be forwarded to a Chief of the Forensic Sciences/Cold Case Unit ("FSCCU"). This will ensure that all such requests are handled in a fair and uniform manner.<sup>3</sup>

FSCCU will review all such requests and verify the existence of the evidence. If the evidence has been lost or destroyed, FSCCU will notify the defendant via letter to that effect. In cases where the request has been made pursuant to a CPL 440 motion, FSCCU will file with the appropriate court a response detailing the efforts made to locate the evidence.

If the evidence is located, FSCCU will examine the nature of the evidence and its suitability for testing. If the evidence has been stored or handled in a manner rendering it unsuitable for testing or severely reducing the likelihood of obtaining meaningful results, FSCCU will notify the defendant and the Court as detailed above.

In cases where the evidence is suitable for testing, FSCCU will review the significance of the evidence in the context of the case. FSCCU will consent to post-conviction DNA testing in any case in which the results will be dispositive of the issue of guilt, or would likely be informative as to any question strongly related to the issue of guilt or innocence.<sup>4</sup> For example, FSCCU received a request in a case that is more than 30 years old for testing of the handle of a knife (the murder weapon) which had been handled by several people at the crime scene, handed to witnesses at trial, had an evidence sticker taped to the handle, and was passed by a court officer to every member of the jury, with the judge admonishing the jury to hold the knife by its handle. FSCCU did not consent to testing. However, in that

<sup>3</sup> This memorandum provides only internal guidance within the New York County District Attorney's Office. It is not intended to, and does not, create any rights, substantive or procedural, in favor of any person, organization, or party; and it may not be relied upon in any matter or proceeding, civil or criminal. Nor does it place any limitations on the lawful prosecutorial prerogatives of the District Attorney and his staff.

<sup>4</sup> FSCCU's consent to testing is not a concession that the absence of the defendant's DNA meets the standard for vacatur of the conviction pursuant to CPL 440.10 (1)(g).

same case, FSCCU agreed to test the inside band of a hat which fell off the killer's head as he fled the premises. Of course, where a defendant's request is in letter form and FSCCU does not consent to testing, the defendant can file a motion and request that the Court order it.

Where possible, such testing will be performed by the Office of the Chief Medical Examiner ("OCME"). Under no circumstances will FSCCU consent to DNA testing at an unaccredited lab.

### Plea Cases

If the defendant's conviction was by plea of guilty, FSCCU will only consent to DNA testing where the results of the testing, if it excluded defendant, would prove actual innocence.

## Non-Suspect DNA Matches

The Office of the Chief Medical Examiner ("OCME") notifies our Office of all DNA matches to Manhattan cases. Occasionally, a notification will include a non-suspect DNA match, where one person is listed as the named "suspect," but a different person has been identified as the source of DNA on a particular piece of evidence.

### Notifications of DNA Matches on Pending Cases

When a non-suspect DNA match occurs on a pending case, the assigned ADA will be made aware of this and, in consultation with the Chief of the Forensic Science and Cold Case Unit ("FSCCU"), will investigate and review the significance (or lack thereof) of the match in the context of the case. Of course, the non-suspect match information will be disclosed to the suspect defendant as discovery.

### Notifications of Post-Conviction Non-Suspect DNA Matches

As is standard practice, OCME also notifies our office of non-suspect DNA matches on closed cases. The notifications indicate a DNA match between a piece of evidence that was submitted at the time of the crime and a particular individual.

The non-suspect matches fall into four general categories:

1. Those which are obviously *Brady* material, such as a non-suspect DNA match that tends to exculpate the convicted defendant.
2. Those which are obviously not *Brady/Giglio* material, such as a match to another victim from the case.
3. Those which do not appear to be *Brady/Giglio* material, but in hindsight it is not possible to determine what a defense attorney would have done with the information at the time of the trial. (For example, a match to a consensual partner of victim, friend, patron of bar etc.)
4. Those for which the significance is not apparent from the notification or a review of the file, and the ADA is no longer available or doesn't recall the case.

Upon receipt of such a notification, FSCCU will review the case file and/or confer with the Assistant who originally handled the case or an Assistant from the Bureau in which the case was handled. The review will include i) the significance of the evidence itself (ie what is the evidence and why was it tested); ii) the connection between the source of the DNA and the case (ie who is this person and what is his or her relationship to the victim, the defendant, or the case); iii) whether the defendant was aware at the time of the conviction that there was DNA evidence that did not match him or her.

In any case that falls into the "obviously *Brady* material" category above, the FSCCU Chief will notify the Chief of the Trial Division and the Chief of the Conviction Integrity Program for further investigation.

For cases that fall into categories 2, 3 and 4 above, once the review is complete, the Assistant will notify in writing the defendant and/or the last known attorney of record and the court of the DNA non-suspect match. The notification will include an explanation of the significance of the non-suspect match and of the relationship between the now-known source of the DNA to the case.<sup>5</sup> Where possible, the notification will include whether the defendant was notified during the pendency of the case that his DNA was not found on the evidence in question.

<sup>5</sup> In certain circumstances, the notification to the defendant or his attorney will not name the person who is the source of the DNA, but will nevertheless describe his or her relationship to the case.

# Exhibit 2.

## Cooperation Agreement Checklist

### 1. Potential Cooperator's Criminal History

- a. NYSID sheet with out of state/federal information.
- b. Summary of uncharged crimes committed by potential cooperator, including approximate dates, locations, underlying facts.
- c. Copies of UF 61s, arrest reports or factual write-ups of prior cases.
- d. Summary of any cases pending against cooperator.

### 2. Potential Cooperator's Present Status with Parole/Probation

- a. Name of parole officer and his assessment of cooperator and cooperator's compliance.
- b. Results of contact with Parole/Probation Supervisor regarding the agency's willingness to allow cooperator to work pursuant to a cooperation agreement. Distinguish between cooperator as a testifying witness and as working in field—they may agree that he can testify in a pending case but are not likely to agree that he can have contact with criminals and contraband.

### 3. Factual Summary of Cooperator's Present Case

- a. Include name of defense attorney and judge.
- b. Case status and age.
- c. Cooperator's current bail status.

### 4. History of Plea Offers in Present Case

- a. For both cooperator and any co-defendants.
- b. Include plea counter-offers and rejections of plea offers.

### 5. History of Cooperator's Prior Cooperation Efforts/Relationship with Law Enforcement

- a. Include cooperator's prior experience as merely a source of information for detective/police officer, as a paid, registered or cooperating informant in pro-active work, or as testifying witness.
- b. Whether pursuant to written agreement or any form of agreement involving quid pro quo.
- c. Include cooperator's experience as informant while incarcerated.
- d. Include jurisdiction, police or prosecution agency, handler's or contact's name, prosecutor's name.

### 6. Investigative Plan for Cooperator

- a. Identify police officer/investigator who will be cooperator's handler and provide that individual's experience:
- b. Provide a brief proposal of the investigative plan (how the cooperator will be utilized, both in the immediate future and over long term).

## Please Be Prepared To Discuss the Following In Detail:

### 7. History of Debriefings

- a. Number of debriefings, length
- b. Who present

### 8. Cooperator's Biography/ Full Personal History

- a. Where born and raised, schools attended, performance therein
- b. Employment History
- c. Composition of Family
- d. Medical Condition and History
- e. Psychiatric Condition and History
- f. Hospitalizations and Medications
- g. Immigration History and Status
- h. Marriages and children
- i. Military Service
- j. Gang affiliations
- k. History of Civil Judgments
- l. Tattoos and their meaning.

# Exhibit 3.

## ECAB Questions for Police Officers

### The source of the officer's information:

#### Is this an assigned arrest? Is this an arrest in which another officer told you what happened? If so:

Which supervisor assigned it to you?

Which PO told you what happened?

Did you speak with that PO in person?

Did they see what happened or learn information from another source?

Did you speak in person with the victim and/or witnesses?

Were any of your conversations over the phone or through an interpreter?

Did you learn anything from paperwork?

#### Did you see the crime, make the arrest, or find the property yourself? If so:

What part of the crime/arrest did you see?

What part was told to you by others?

Who was the first PO to see the defendant?

When did you first see the defendant?

Was the defendant in custody? Whose?

Who physically stopped the defendant?

Who physically handcuffed the defendant?

Who frisked or searched the defendant?

### 9. Cooperator's Motivation(s)

### 10. Target or Co-Defendant's Background and Criminal History

### 11. Brief Summary of Serious Crimes Witnessed by Cooperator as Non-Participant.

- a. Cases/incidents other than the case presently pending against cooperator.

### 12. Detailed Account of Corroboration

- a. If investigative plan is for cooperator to do field work, corroboration of his information regarding location, target(s), criminal activity as developed by police/DA's Office.
- b. If cooperator is to testify in pending case, account of corroboration from other witnesses/evidence that tends to connect defendant to crime.

### 13. Evaluation of Cooperator as Potential Witness

- a. Evaluate his potential effectiveness as a witness, in terms of whether he is articulate, intelligent, communicative, and has ability to withstand cross.
- b. Include special factors affecting jury (history of sex or child abuse crimes, terrorist activities, etc.)

### 14. Risk/Safety Analysis

- a. Accounting of cooperator's enemies, past conflicts, or other incidents that may make him a danger for police/undercover to work with in the field.
- b. Analysis of danger posed to cooperator and cooperator's family by virtue of his entering into agreement.
- c. Proposed plan for security of cooperator and family pending cooperation and in event of disclosure of his status.

### **Details of the recovery of property:**

Who was the first person to see the property?

Who was first person to touch it?  
("finder" of the property)

Where was the property when it was first retrieved?

Describe the circumstances

What did he/she do with the property?

How did you learn of the recovery?

List every person who touched it

How did property get to the precinct?

Where is the property now?

Has the voucher paperwork been completed?

Who filled out the voucher paperwork?

Who is listed as the "finder" of the property on the paperwork? Is that accurate?

### **Additional questions in civilian cases:**

Which PO first spoke to the victim and witnesses?

Where and when did you first see the victim and witnesses?

Did you speak in person with the victim and witnesses? Where and when?

Were any conversations with the victim and witnesses over the phone or through an interpreter?

Did you learn any information from police paperwork?

Did you learn any information about what the witnesses saw by speaking with other officers?

### **In every case:**

Was any information obtained from a confidential informant?

Which other police officers were on the scene of the arrest?

Which other police officers were present when the property was found?

Which other officers were present at the show-up?

Which supervisors were there?

Now officer let me read to you the facts in the complaint which you are swearing to so you can be sure that they are accurate:

# Exhibit 4.

## **I. Misidentifications, Non-Identifications and Other Suspects**

1. Has anyone identified someone other than the defendant as the perpetrator of the crime in any of the following?
  - A. Photo display
  - B. Photo array
  - C. Street encounter/show up
  - D. Line-up
  - E. Non-police arranged viewing
  - F. By name
  - G. Other
2. Has anyone failed to identify the defendant as the perpetrator of the crime in any of the following?
  - A. Photo display
  - B. Photo array
  - C. Street encounter/show up
  - D. Line-up
  - E. Non-police arranged viewing
  - F. Other
3. Has anyone indicated that defendant did not commit the crime?
4. Did the police stop, question or arrest any suspect other than defendant in connection with this crime?
5. Did the police suspect any person other than the defendant as the perpetrator of this crime?
6. Did the police conduct any of the following identification procedures with another suspect in connection with this case?
  - A. Photo array
  - B. Show up
  - C. Line-up
  - D. Other
7. Is there scientific or other evidence that tends to implicate someone else?

8. Is there scientific or other evidence that fails to implicate the defendant under circumstances in which it would be expected to implicate him?

## **II. WASU**

1. Has any witness received social services from WASU?
2. Has any witness received counseling from WASU?
3. Have you personally reviewed the WASU file and notes?
4. Has any witness received services or counseling from the Northern Manhattan Office?

## **III. Material Variances in Witness's Statements (including such statements made to WASU)**

1. Has any witness/cooperator ever:
  - A. Denied witnessing the crime?
  - B. Denied that the crime occurred?
  - C. Denied that the defendant committed the crime?
  - D. Provided a version of events that corroborates, in whole or in part, the version given by the defendant?
  - E. Overstated or understated the facts of the crime?
  - F. Provided a version of events that varies materially from his/her expected trial testimony?
  - G. Denied participating in the crime?
  - H. Minimized his/her role in the crime?

## **IV. Benefits to a Witness or Third Party (Express or Tacit)**

1. Has any witness been:
  - A. Offered or given a reduced plea?
  - B. Offered or given immunity?
  - C. Offered or given a non-prosecution agreement?
  - D. Offered or given a reduced sentence?

- E. Offered or given a letter to other law enforcement detailing his or her assistance?
  - F. Offered or given a letter to other law enforcement making a recommendation on his or her behalf?
  - G. Given money in connection with the witness's testimony or cooperation?
  - H. Paid expenses or fees (incl. witness fees)?
  - I. Offered or received immigration assistance?
  - J. Relocated or received housing assistance?
  - K. Other benefit
2. At the request of, or on behalf of a witness, has any third party been:
- A. Offered or given a reduced plea?
  - B. Offered or given immunity?
  - C. Offered or given a non-prosecution agreement?
  - D. Offered or given a reduced sentence?
  - E. Offered or given a letter to other law enforcement detailing his or her assistance?
  - F. Offered or given a letter to other law enforcement making a recommendation on his or her behalf?
  - G. Given money in connection with the witness's testimony or cooperation?
  - H. Paid expenses or fees (including witness fees)?
  - I. Offered or received immigration assistance?
  - J. Relocated or received housing assistance?
  - K. Other benefit

## **V. Known Acts Which Adversely Affect Credibility**

1. Does any witness have a criminal history?
2. Does any witness have a pending criminal charge?
3. Are you aware of any witness that has engaged in past acts that reflected dishonesty (regardless of whether the act constituted a crime or resulted in an arrest or conviction)?
4. Are you aware of any information that would tend to cast doubt on a witness's ability to accurately perceive, recall, or relate events he/she has witnessed?
5. Are you aware of any witness involved in this case against whom there has been a judicial adverse credibility finding?
6. Are any police officers involved in the case on modified duty?

## **VI. Mental and Physical Health Issues**

1. Does any witness have a mental health condition which might impair the witness's ability to perceive, recall or recount the events about which the witness is expected to testify?
2. Does any witness have a physical health condition which might impair the witness's ability to perceive, recall or recount the events about which the witness is expected to testify?

## **VII. Bias or Motive to Fabricate**

1. Does any witness have pending, or is a witness contemplating, a civil lawsuit arising out of the subject matter of the testimony?
2. Does any witness have a relationship or past history with the defendant that would tend to bias the witness against the defendant?

## Brady and Giglio Information

When reviewing information acquired during the course of an investigation, Assistants must be mindful to identify all information that may be subject to discovery and disclosure obligations. *Brady* and *Giglio* information should be disclosed regardless of an Assistant's assessment of its materiality. Following is a non-exhaustive list of common types of information that typically should be disclosed to the defense.<sup>6</sup>

### Misidentifications and Non-identifications

Misidentifications, that is, identification by a witness of someone other than the defendant as the perpetrator of the offense in any form (photo displays, line ups or street encounters), *regardless of any explanation*, should always be considered information that tends to exculpate the accused and should be disclosed promptly to the defense. This is true whether the identification takes place in a police-arranged procedure or otherwise. For example, a witness's statement that he observed the perpetrator of the offense on the street at a time when the person observed could not have been the defendant is a misidentification and should be disclosed.

Non-identifications, that is, the failure of a witness to identify the defendant as the perpetrator of the offense in any form should also be considered information that tends to exculpate the accused and should be promptly disclosed to the defense

### Prior Inconsistent Statements

Prior inconsistent statements of witnesses must be disclosed to the defense; the timing and nature of the disclosure depends in large part on the nature of the inconsistency. Typical and minor inconsistent statements are disclosed in the discharge of the *Rosario* obligation and in compliance with C.P.L. §§ 240.44 and 240.55. However, where the inconsistency goes to defendant's guilt or innocence, the information should be disclosed promptly in accordance with the principles governing *Brady* disclosures.

### Material Variances in Witness's Statements

Some witness's statements evolve over time during the course of the investigation or, sometimes, even during the course of a single interview. For example, a witness may initially deny witnessing or being the victim of a crime, or may initially deny participating in criminal activity. To the extent that these variances exist, they should be disclosed in the same manner as that described above for prior inconsistent statements. Assistants must document these variances when they take place, even though they might justifiably believe that the earlier statements are, in fact, untrue. Exculpatory or impeaching information is not exempt from disclosure merely because it can ultimately be explained away at trial.

### Non-Recorded Brady and Giglio Material

Assistants must disclose *Brady* and *Giglio* material to the defense regardless of whether the material has been memorialized in a document or some other form. Accordingly, when an Assistant acquires information in an interview or conversation with a witness, investigator or informant, which has not been documented and may be subject to disclosure, the Assistant must promptly, accurately and thoroughly memorialize that information so that it is preserved and may be disclosed in a timely manner

<sup>6</sup> This memorandum provides only internal guidance within the New York County District Attorney's Office. It is not intended to, and does not, create any rights, substantive or procedural, in favor of any person, organization, or party; and it may not be relied upon in any matter or proceeding, civil or criminal. Nor does it place any limitations on the lawful prosecutorial prerogatives of the District Attorney and his staff.

### **Benefits to a Witness or Third Party**

Any benefit that a witness receives in connection with the witness's testimony must be disclosed in accordance with the principles governing *Giglio* disclosures. This includes any of the following:

- Consideration offered to the witness in connection with a criminal proceeding, such as a reduced plea, an agreement to confer immunity, an agreement to recommend a reduced sentence, or a letter to other law enforcement entities detailing the witness's assistance or making recommendations on his behalf.
- Monetary benefits to the witness, including:
  - Payment of rewards
  - Payment of expenses or fees
  - Relocation or housing assistance
  - Pending or contemplated lawsuits arising out of the subject matter of the testimony
- Any agreement to intercede on the witness's behalf in connection with an immigration proceeding or status (for example, assistance with U-Visa certification.)
- Housing or relocation assistance for the witness.
- Any of the above, provided to a third party at the witness's request or on the witness's behalf.

### **Known But Uncharged Criminal Conduct**

Although C.P.L. §§ 240.44 and 240.55 require the disclosure of a "record of judgment of conviction" and the "existence of any pending criminal action against" as to any witness, to the extent that information is known to the prosecutor (C.P.L. § 240.55 (1) (b) & (c)), in fact, the duty to disclose prior acts of misconduct, which can be used to impeach a witness, goes beyond the record of prior convictions and pendency of a case. Known acts of misconduct by a witness that can be used to impeach the witness's credibility should be disclosed to the defense even if they have not resulted in conviction of a crime. This would include, if known, criminal conduct underlying an arrest and criminal charge that were not adjudicated on the merits and resulted in a

dismissal or conviction of a non-criminal offense. It would also include known acts of criminal conduct which did not result in an arrest but are known to the Assistant, such as those based on admissions made by the witness during debriefings. Such information should be disclosed in accordance with the principles underlying *Giglio* disclosures.

### **Mental and Physical Health Issues**

When an Assistant has reason to believe that a witness may have a mental or physical health condition that might impair the witness's ability to perceive, and subsequently recall and recount the events about which the witness testifies, the Assistant should make appropriate inquiries of the witness to ascertain and document those issues. The Assistant will also have to make appropriate efforts to acquire the records relating to the diagnosis or treatment of the condition. In most cases, at the very least, the Assistant should bring these matters to the attention of the Court for an *ex parte, in camera* review to determine if the information must be disclosed to the defense and, what, if any, limits will be imposed on its use at trial.

# Exhibit 5.

## Identification Case Checklist

(This ID Checklist must be used in all cases in which the identity of the perpetrator of the crime is, or potentially will be, at issue)

### I. Statements by the Defendant

1. Defendant's statements to police
2. Police interview of defendant
3. ADA interview of defendant

### II. Required Case Information

1. Victim(s) name and contact details
2. Witness name(s) and contact details
3. ECAB witness interview
  - A. In person
  - B. By phone
4. Detailed description of perpetrator (Including: unusual markings/characteristics e.g. distinctive accent, scars, tattoos, hairstyle, unusual teeth such as missing or crooked teeth, gold caps or crowns etc.)
5. Description of struggle and possible injuries (if applicable)
6. List of objects that might have the fingerprints or DNA of the perpetrator
7. Location of video cameras in area of crime or of perpetrators flight/approach

### III. Required Police Reports

1. Original complaint report
2. Arrest report
3. Buy report.
4. DD-5s pertaining to viewing of photographs and lineups

5. Sprint report
6. Vouchers
7. Lineup form
8. Photo array form
9. Photograph of lineup
10. Arrest report
11. Arrest photo
12. Precinct photo

### IV. Police Personnel Information (including name and precinct)

1. Police Officer(s) who interviewed witness
2. Police Officer(s) who invited witness to array/line-up
3. Police Officer(s) who transported witness to ID procedure
4. Police Officer(s) present for viewing of photos/line-up
5. Other Police Officer(s) involved in case

### V. Line-up/Photo Array Details

1. Details of prior identification procedures (Including PIMS, Photo Manager, canvasses and arrays, etc.)
2. Details of line-up (Including requests and exact words used by witness)

### VI. Information Regarding First Responder to Crime

1. Date
2. Name
3. Phone no.
4. Original description of perpetrator

## VII. ECAB Instructions to Arresting Officer

1. Obtain buccal swab of defendant for DNA (where appropriate)
2. Measure and weigh the defendant
3. Photograph defendant standing
4. Photograph unusual markings/characteristics (tattoos, scars, injuries, teeth etc.)
5. Voucher *as arrest evidence* the defendant's clothing, wallet and pocket contents
6. Voucher *as arrest evidence* the defendant's mobile communication device (Including cell phone, iPad, pager etc.)

## VIII. Investigative Techniques

### A. Search Warrants:

1. Defendant's home (For clothes/jewelry worn during crime, proceeds of crime, weapon used during crime etc.)
2. Defendant's body (To be considered, for example, if the defendant was injured. To be done by member of ME's office)

### B. Subpoenas:

1. Video footage (Footage of the incident, or of the perpetrator's arrival on or departure from the scene, etc.)
2. Defendant's Metrocard history
3. Defendant/Victim's phone records (Including calls, cell site information, and text messages and photographs that are stored on the phone. Note: stored voicemails require eavesdropping warrant)
4. Defendant's work records, with attendance records
5. Defendant's school records
6. Defendant's E-Z Pass history
7. Defendant's social networking sites
8. Defendant's jail phone records

9. Defendant's jail phone calls
10. 911 tape and SPRINT report

### C. Other investigative techniques:

1. Obtain defendant's jail visitor logs
2. Obtain prior dates of incarceration for defendant
3. Interview probation/parole officer (Including ascertaining whether defendant visited probation/parole officer at or around time of crime.)
4. Google search on defendant and witnesses
5. Check Crimestoppers database and PD tip log
6. Fill out "Identification Evaluation Sheet" (Located in the Felony ECAB Manual appendix)
7. Search for patterns from other commands similar to this crime
8. In multiple defendant cases, check how defendants know each other (E.g., Have they ever been arrested together, lived in the same building, attended school together, been housed in the same correctional facility, etc. (Including cell phone, iPad, pager etc.)



# Appendix B

District Attorneys  
Association of the  
State of New York

## **“The Right Thing”**

*Ethical Guidelines  
for Prosecutors*

2011

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*This handbook is intended to provide general guidance to prosecutors by expressing in writing the long-standing commitment of New York’s District Attorneys and their assistants to ethical prosecution and the protection of the rights of victims, defendants and the public. This handbook summarizes aspirational principles, as well as ethical obligations created by statute, case precedent, and duly authorized rules of professional conduct. It is not intended to, and does not, create any rights, substantive or procedural, in favor of any person, organization, or party; it may not be relied upon in any matter or proceeding, civil or criminal. Nor does it create or impose any limitations on the lawful prerogatives of New York State’s District Attorneys and their staffs.*

## Dear Colleagues:

This Handbook collects in one place the most significant cases and rules that govern ethical behavior by prosecutors in this state. It reflects our long-standing commitment to ethical prosecution and to the protection of the rights of victims, defendants and the public. Our ethical principles are described in a practical and meaningful way that will help prosecutors in their daily work. The Handbook supplements existing ethics training that is conducted by both the New York Prosecutors Training Institute (NYPTI) and individual District Attorneys. District Attorneys may use the Handbook as a foundation upon which additional protocols and procedures may be added, or as a supplement to their existing ethical trainings and requirements.



The Ethics Handbook was developed by the District Attorneys Association's Ethics Committee and the Best Practices Committee. They are subcommittees of the District Attorneys Association's Committee on the Fair and Ethical Administration of Justice, which is chaired by District Attorney William Fitzpatrick of Onondaga County. D.A. Fitzpatrick's leadership sparked the idea and spurred forward the endeavor that led to the creation of this booklet. I know it will prove to be extremely useful in all of our offices, whether rural, suburban or urban.

The primary author of the Handbook is Philip Mueller, Chief Assistant District Attorney in the Schenectady District Attorney's office. His vision for the Handbook is displayed on every page and his strong knowledge of the subject matter provides support for his powerful words. Tammy Smiley of Nassau County, Wendy Lehman formerly of Monroe County, and Lois Raff of Queens County helped with editing the handbook. Kristine Hamann of

the Office of Special Narcotics and Chair of the Best Practices Committee nudged the Handbook forward to completion. David Cohn of New York County, Mike Coluzza of Oneida County, Michael Flaherty of Eric County, Chana Krauss of Putnam County, Robert Masters of Queens County, Rick Trunfio of Onondaga County and Joshua Vinciguerra of NYPTI all contributed to various parts of the Handbook.

I know you will find that the Ethics Handbook is a practical, easy-to-understand outline of the ethical obligations that we must uphold as prosecutors in New York State.

Best Regards,

Derek Champagne  
President  
DAASNY  
July 2011

# “The Right Thing”

The prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty...whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to do “the right thing.” Defense counsel protect their clients’ interests and legal rights. Judges protect the parties’ rights and the public’s interest in the proper resolution of pending cases. But it’s not their job to find the truth, decide who should be charged, or hold the perpetrator accountable. Only prosecutors are given the freedom—and with it the ethical duty—to promote all of these vital components of “the right thing.”

## What does this mean?

It means we—you—have great power to alter the lives of many people: people accused of crimes, people victimized by crimes, their families and friends, and the community at large. A criminal charge may be lifechanging to an accused or a victim; it must never be taken for granted. Handle it like a loaded gun; never forget its power to protect or harm. It means we keep an open mind. Not every person who is suspected should be arrested, not every suspect who is arrested should be prosecuted, not every case should be tried, and not every trial should be won. We have the freedom, and with it, the ethical duty not to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant’s guilt. Even then, none of us—not

the police, the witness, the prosecutor, the judge, nor the juror—is omniscient or infallible. Like all lawyers, we have an ethical duty to zealously advocate for our client. But unlike other lawyers, the client we represent is the public, whose interests are not necessarily served by winning every case. A guilty verdict serves our client’s interest only if the defendant is in fact guilty and has received due process.

It means we seek the truth, tell the truth, and let the chips fall where they may. We serve our client’s interest when we respect the rights of the accused, when we leave no stone unturned in our search for the truth, and when the jury’s verdict reflects the available evidence. When we win, we can sleep at night because the outcome—with its awesome consequences—is the product of our best effort and the fairest system humans have devised. When we lose, we can sleep at night for the same reason.

It means we succeed when the innocent are exonerated, as well as when the guilty are convicted.

It means each of us has a duty to know the ethical rules that govern our conduct, and to remain alert to the myriad and often subtle ethical challenges that arise in our work.

It means that district attorneys and their senior staff must set the tone, emphasize the primacy of ethical conduct, instruct junior prosecutors in these principles, and monitor their compliance.

These core principles, which at once define what it means to be a prosecutor and make it the best of jobs, are also reflected in mandatory rules of professional conduct. Violations can ruin the lives and reputations of innocent suspects, cheat victims of their chance at justice, and endanger the public. Such dire consequences to others justify dire consequences to prosecutors who act unethically. Ethical violations expose prosecutors to formal discipline including: censure, suspension and disbarment; casespecific sanctions, such as reversal of convictions, preclusion of evidence, and dismissal of charges; and employment sanctions, including damaged reputation, loss of effectiveness, demotion, and termination. Fortunately, compliance with ethical rules requires only that we know the rules, recognize that they define rather than restrain our mission, and anticipate challenges. This handbook was created by New York’s prosecutors to help you meet these challenges.

## Unethical Conduct: Consequences For Others

### The Defendant

*“The prosecutor...enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of ‘the People’ includes the defendant and his family and those who care about him.”* *Lindsey v. State*, 725 P.2d 649 (WY 1986) (quoting *Commentary On Prosecutorial Ethics*, 13 *Hastings Const. L.Q.* 537-539 [1986]).

A prosecutor’s worst nightmare is not losing a major case or watching a dangerous criminal go free, it’s convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice. Unethical behavior by a prosecutor increases the risk that an innocent person will be convicted. The consequences for the defendant are obvious: incarceration, destruction of reputation, separation from family and friends, and extended damage to employability.

But the damage done by unethical behavior is not limited to innocent defendants or to defendants who are convicted. All defendants, innocent and

guilty alike, are entitled to the presumption of innocence, the benefit of reasonable doubt, and due process. Unethical behavior by a prosecutor can render these fundamental rights illusory. And defendants who are ultimately acquitted can nevertheless suffer irreparable harm from unethical prosecution: loss of freedom, employment, reputation, sense of security, and trust in government.

### The Defendant’s Family

Convicted defendants facing sentencing often bolster their pleas for leniency by citing the damage their incarceration will do to their families. This collateral damage from crime and punishment is real and can be devastating—the heartbreaking separation from a defendant who is also a parent, a spouse or a child; financial destitution of a family; and public shame. Coming from a guilty person fairly convicted, this argument is hollow because the defendant has victimized his or her own family. But if the conviction was procured by your unethical behavior as a prosecutor, the destruction of the defendant’s family will be on your head.

### The Victim and the Victim’s Family

Unethical behavior by a prosecutor can re-victimize crime victims, the very people we strive to protect. Convicting an innocent person means that the guilty person is left unpunished and any sense of “closure” is a sham. Convicting a guilty person by unethical means, subjects the victim and his or her family to the agony of seeing the conviction overturned, being dragged through a second, painful trial, or even watching the perpetrator go free.

Crime forces people from outside the court system into a strange and frightening world in the role of “victims.” Some have already suffered horrific losses. The ordeal of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being cross-examined, having his or her credibility attacked, and waiting in suspense through jury deliberations may be the second-most harrowing experience of a victim’s life. It leaves most victims and their families thinking: “I never want to go through that again.” Now imagine having to call the victim or the victim’s family to tell them that, because of your own

unethical behavior or that of another prosecutor in your office, they must go through it all again, their ordeal was wasted, the wrong person was convicted, or the right person was convicted but will now get a second chance to evade responsibility. Worse yet, imagine having to explain that, because of the gravity of the prosecutorial misconduct, there will be no retrial, only a dismissal with prejudice, and that the perpetrator will go free.

### Your Community

*“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.”* *Hurd v. People*, 25 Mich. 405, 416 (1872).

Conviction of an innocent person leaves the community exposed to future crimes by the guilty person. Also, the conviction will usually be seen by the police as “closing the book” on the crime, making it much less likely that the guilty person will ever be found.

Conviction of a guilty person, if tainted by unethical prosecutorial behavior, exposes the community to the tremendous expense, waste, and risk of a reversal and retrial.

But the damage potentially caused to the community by a prosecutor’s unethical behavior goes beyond the particular case. The public’s trust in the integrity of the justice system is impaired when there is a perception that law enforcement does not follow basic rules of fairness. Witnesses may refuse to come forward or may feel justified in withholding evidence or giving false testimony, if they feel that prosecutors are corrupt. Jurors may be reluctant to serve or may bring with them into the deliberation room a crippling mistrust of the law enforcement community.

## Unethical Conduct: Consequences For You

We prosecutors hold people accountable for their actions. We are, in turn, accountable for ours. In the criminal justice system, with its multitude of actors, motivated adversaries, high stakes, and sentences lasting years, any unethical behavior by a prosecutor is likely to be discovered. Violations of your ethical obligations will expose you, your cases, your office, and your District Attorney to dire consequences. Unethical behavior by one prosecutor, if unpunished, can poison the atmosphere in an entire office. Moreover, your unethical conduct can cause the District Attorney public embarrassment and possible electoral defeat. Just as there are many levels of culpability for professional misconduct, there are many consequences for unethical actions.

### You May Be Censured, Suspended, or Disbarred

Violations of ethical rules governing the conduct of attorneys, including prosecutors, are overseen by the supreme courts of the state. Under the rules set out by each appellate division, those courts have empowered permanent committees on professional standards to investigate allegations of misconduct and “censure, suspend from practice or remove from office any attorney...guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.” Judiciary Law § 90(2).

### You May Lose Your Job

You are not expected to win every case, but you are expected to conduct yourself ethically in every case. Your unethical conduct can lead to your dismissal or demotion. • A written reprimand may be placed in your permanent file.

### You May Be Fired or Demoted by the Next District Attorney

If your unethical behavior embarrassed the prior D.A., you will probably be fired by his or her successor. Even if your misconduct never became public, a new D.A. finding indications of unethical conduct in your personnel file or in oral reports from senior staff or other sources may consider you a liability.

## Your Case May Suffer a Variety of Sanctions

These include damaging delays, preclusion of evidence, negative inference instructions to the jury, dismissal with prejudice, and reversal of a conviction.

## You May Be Criminally Prosecuted

You could be prosecuted under state law, for example, for suborning perjury, obstructing justice, or official misconduct, or under federal law for deprivation of rights under color of law. *See* 18 USC § 242; *Dennis v. Sparks*, 449 U.S. 24 (1980); *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981).

## You May Be Sued Civilly For Damages

To ensure their independent judgment and zealous advocacy, our law confers absolute immunity from civil liability upon individual prosecutors acting in their role as advocates for the state. You may have only qualified immunity, however, when acting outside your role as an advocate, for example, when performing investigative functions. More importantly, personal immunity from civil prosecution does not diminish your ethical duties or shield you, in extreme cases, from criminal liability.

## You Will Lose Your Reputation and Effectiveness

You will spend years building your reputation for integrity in the community of judges, defense attorneys, police, potential jurors, and fellow prosecutors. You can lose it all by a single act of unethical behavior. With diminished reputation comes diminished effectiveness. Judges have a hundred ways to punish a prosecutor whom they suspect of unethical conduct; they don't need to prove it or even accuse you, and most times there will be no appeal. Your credibility with members of the defense bar will affect your ability to negotiate plea and cooperation agreements, as well as the civility of your practice and your enjoyment of your job. No case is worth your reputation.

## You'll Know

You didn't become a prosecutor to get rich or take the easy path. You did it because you know right from wrong and it's important to you to be on the side of right. Remember this when you're tempted to cut an ethical corner; even in the unlikely event that it stays hidden for your entire career, you'll still know, and it will rob you of the self-esteem that is your work's most valuable reward.

## Rules of Fairness and Ethical Conduct

Our ethical duties as prosecutors derive from and are defined by many sources. These include, of course, the Rules of Professional Conduct codified at Title 22, Part 1200 of the New York Code of Rules and Regulations ("NYCRR"). These mandatory rules are also construed by advisory ethics opinions issued by bar associations. But we are wise not to view our ethical duties as limited by the Rules of Professional Conduct. They are also shaped by procedural statutes and case law, including, for example, the *Brady* and *Giglio* doctrines enforcing a defendant's constitutional right to a fair trial, discovery rules under Criminal Procedure Law Article 240 and the *Rosario* rule. To be sure, not every mistake made by a prosecutor in applying these doctrines, and not every error in judgment, can fairly be deemed a breach of ethical obligations. But deliberate violations of these rules of fairness, or willful ignorance of them, are ethical failures.

### a. Rules of Professional Conduct, 22 NYCRR Part 1200

Effective April 1, 2009, the Chief Judge of the Court of Appeals and the Presiding Justices of the Appellate Division adopted new *Rules of Professional Conduct* to replace New York's *Code of Professional Responsibility* and bring our state's ethical rules more in line with the American Bar Association's *Model Rules of Professional Responsibility*. Although all of the *Rules of Professional Conduct* apply to prosecutors, some have little relevance to criminal prosecution because they regulate the private practice of law, fees, and relationships with individual

clients. Most of the new Rules have similar counterparts in the old Code, causing the chairman of the committee that drafted the new Rules to opine that “the new rules represent a fine tuning of the existing code of professional responsibilities in New York so that the obligations remain exactly the same....” (Steven Krane, Esq., chairman of the New York State Bar Association’s Committee on Standards of Attorney Conduct, quoted in the *New York Law Journal*, 12/17/09).

The complete *Rules of Professional Conduct* can be accessed through the websites of the New York Prosecutors Training Institute (“NYPTI”) and the New York State Bar Association. If you confront specific issues involving any of these mandatory ethical rules, you should review the text of the rule itself and relevant advisory opinions issued by the state or local bar associations.

For your day-to-day practice, however, most ethical principles underlying the Rules can be distilled to a few common sense principles of fairness and professionalism:

### Be Prepared

You must acquire “the legal knowledge, skill, thoroughness and preparation necessary for the representation.” (Rule 1.1).

### Be On Time

You must “act with reasonable diligence and promptness” (Rule 1.3). You must not “neglect a legal matter entrusted to” you (Rule 1.3), or “use means that have no substantial purpose other than to delay or prolong a proceeding...” (Rule 3.2).

### Tell The Truth

You must be candid about the facts and the law with judges, opposing counsel and others. In representing the People, you must not “knowingly... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law [you] previously made to the tribunal”; “fail to disclose to the tribunal controlling legal authority” not already cited by opposing counsel; “offer or use evidence that [you] know is false” (Rule 3.3); or “knowingly make a false statement of fact or law to a third person” (Rule 4.1). When communicating

with unrepresented persons, you must not misrepresent your role in the matter (Rule 4.3). You must not make a false statement in an application for membership to the bar (Rule 8.1) or “concerning the qualifications, conduct or integrity of a judge” or judicial candidate (Rule 8.2). If you learn of false testimony or other fraud upon the court, you must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal” (Rule 3.3[b]). In an *ex parte* proceeding, you must disclose to the court all material facts, including adverse facts, that will enable the court to make an informed decision (Rule 3.3[d]).

### Don’t Reveal Secrets

With certain exceptions, you must not “knowingly reveal confidential information to the disadvantage of a client” (Rule 1.6). This rule is drafted with the private practitioner and client in mind, but maintaining confidentiality is even more important for prosecutors than for private attorneys. Careless or unauthorized disclosure of the sensitive information we routinely acquire can cost lives, compromise investigations, and ruin reputations. Some unauthorized disclosures—notably, of grand jury proceedings—are punishable as felonies (Penal Law § 215.70).

### Don’t Prosecute Without Probable Cause

As a prosecutor, you are specifically forbidden to “institute, cause to be instituted or maintain a criminal charge when [you] know or it is obvious that the charge is not supported by probable cause” (Rule 3.8[a]). If you come to know that a pending charge is not supported by probable cause, you must act appropriately to dismiss or reduce the charge, or advise a supervisor with the authority to do so, regardless of who caused the charge to be instituted (Rule 5.2). The breadth of the term “maintain” and the objective component of Rule 3.8[a] (“or should have known”) highlight the importance of the initial screening process for charges or indictments in place in each District Attorney’s office, as well as the ongoing review of charges by prosecutors familiar with and exercising substantial control over each case. Moreover, even *with* probable cause, you must not present, participate in presenting,

or threaten to present criminal charges solely to obtain an advantage in a civil matter (Rule 3.4[e]).

### **Don't Make Frivolous Arguments**

You must not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” A claim is “frivolous” if it is knowingly based on false factual statements, if it is made for no purpose other than delay, or if it is “unwarranted under existing law.” Attorneys may, however, argue in good faith for an extension, modification, or reversal of existing law (Rule 3.1).

### **Comply With Procedural and Evidentiary Rules**

When appearing before a tribunal, you must not “intentionally or habitually violate any established rule of procedure or of evidence” (Rule 3.3[f][3]). When questioning a witness in court, you must not “ask any question that [you have] no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person...” (Rule 3.4[d][4]).

### **Be Fair**

For example, you must not: advise a witness to hide or leave the jurisdiction to avoid testifying; knowingly use false testimony or evidence; pay or offer to pay compensation to a witness contingent on the content of the witness’s testimony or the outcome of the case; or, act as an unsworn witness in a proceeding and assert personal knowledge of material facts (Rule 3.4). You must not communicate directly or indirectly with a person represented by another lawyer, about the subject matter of that representation, unless you have the lawyer’s consent or are otherwise legally authorized to do so (Rule 4.2).

### **Be Courteous and Respectful**

When appearing before a tribunal, you must not “engage in undignified or discourteous conduct ... [or] conduct intended to disrupt the tribunal”; or “fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.” (Rule 3.3).

### **Protect The Integrity of Courts and Juries**

In an adversarial proceeding, you must not engage in unauthorized *ex parte* communications with the judge or his or her staff regarding the merits. During a litigation, whether or not you are a participant, you must not engage in or cause another to engage in prohibited communications with a sitting juror or prospective juror or a juror’s family members. After the litigation ends, you must not communicate with a juror if this has been prohibited by the court or if the juror has expressed a desire not to communicate, and you must not communicate with a juror in a misleading, coercive or harassing manner, or in an attempt to influence the juror’s action in future jury service. You must promptly reveal to the court any improper conduct by a juror or by another toward a juror, venire person, or members of their families (Rule 3.5).

### **Try Your Case In The Courtroom, Not The Media**

Rule 3.6 (“Trial Publicity”) is long and complex, and is perhaps the ethical rule most likely to trip up the unwary prosecutor. The public’s intense interest in crimes committed in their communities, which is reflected in media attention, combined with the propensity of some defense attorneys to try their cases in the press, may tempt you to provide the media with more information than you should. The general rule is that a lawyer participating in a criminal or civil proceeding “shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” (Rule 3.6[a]). Rule 3.6[a] includes a list of categories of statements to the media deemed likely to materially prejudice a criminal proceeding, and a list of statements that can properly be made; read it before speaking with the media. Any statement announcing that a particular person has been charged with a crime must be accompanied by a statement that the charge is merely an accusation and that the defendant is presumed innocent unless and until proven guilty (Rule 3.6).

### Comply With Disclosure Rules

All lawyers are ethically bound to disclose any evidence which they have “a legal obligation to reveal or produce.” (Rule 3.4[a][1],[3]). As a prosecutor, you must also make timely disclosure to the defense of all evidence or information known to your office that “tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence,” unless relieved of this obligation by a protective order (Rule 3.8[b]; see CPL § 240.50).

### Trust Jurors, Trust Your Advocacy, Trust The Truth

Lawyers who do not trust jurors to act reasonably, intelligently and justly, or don't trust their own ability to help jurors make sense of conflicting evidence, tend to make ethical errors. The villain in the courtroom drama *A Few Good Men*, played by Jack Nicholson, famously declared: “You can't handle the truth!” He was wrong. The truth, when presented in a calm, coherent and engaging manner, has a compelling power of its own. Jurors take their duty seriously and want to find the truth. Many of the ethical principles cited above (“tell the truth,” “be fair,” “comply with procedural and evidentiary rules,” “comply with disclosure rules,” etc.), are aimed at restraining attorneys from substituting their own judgments about guilt or innocence, credibility, or what evidence should be considered, for the judgments of courts and jurors. Prosecutors should focus their advocacy, not on suppressing discordant evidence, but on helping jurors put it in its proper perspective.

### Keep Doing Justice After A Conviction

Our ethical duties do not end when a defendant is convicted. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted, keeping in mind that no person or system is infallible and that exonerating the innocent is as important as convicting the guilty. The scope and exact nature of our post-conviction duties, however, are currently in flux. *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319- 2322 (2009); *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009); and *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

### Obey The Law

Attorneys are ethically bound to avoid deceit and misconduct in their personal as well as their professional activities. You must not engage in: “illegal conduct that adversely reflects on [your] honesty, trustworthiness or fitness as a lawyer;...conduct involving dishonesty, fraud, deceit or misrepresentation;...conduct that is prejudicial to the administration of justice;...[or] any other conduct that adversely reflects on [your] fitness as a lawyer.” (Rule 8.4[b,c,d,h]).

### When In Doubt, Reach Out

The ethical principles summarized here, although straightforward in theory, will often prove difficult to apply in the complex factual circumstances you will confront. You must stay watchful for ethical issues that may arise in subtle ways. When in doubt, seek guidance from supervisors, colleagues, bar association advisory opinions or other resources. Senior lawyers have probably confronted and resolved the same ethical issues that seem new and vexing to you. Rule 5.2 (“Responsibilities of a Subordinate Lawyer”) highlights the value of seeking advice, while making clear that, in the end, you are responsible for your own ethical conduct, regardless of what anyone else may tell you. A lawyer is bound by the *Rules of Professional Conduct* even when acting at the direction of another person (Rule 5.2[a]), but a subordinate lawyer does not violate the *Rules* if he or she “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” (Rule 5.2[b]).

### Provide Guidance

Any law firm, including a District Attorney’s Office (Rule 1.0[h]), must make “reasonable efforts” to ensure that all lawyers in the office conform to the Rules of Professional Conduct, and must “adequately supervise” the work of all employees. Senior and supervisory prosecutors have an ethical duty to “make reasonable efforts” to ensure that subordinates act ethically. See Rules 5.1 (“Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers”) and 5.3 (“Lawyer’s Responsibility for Conduct of Nonlawyers”).

b.

### **Brady and Giglio: The Constitutional Right to a Fair Trial**

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the prosecution in a criminal trial must disclose to the defense, upon request, material, exculpatory information. Failure to disclose such information may violate due process if the evidence is material to either guilt or punishment, “irrespective of the good faith or bad faith of the prosecution.” See also *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979). In *Giglio v. United States*, 405 U.S. 150, 174 (1972), the Court made clear that *Brady* information includes not only information directly related to the crime, but also, under some circumstances, information that would negatively affect the credibility of a prosecution witness.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the prosecution must disclose *Brady* information even if the defense has not specifically requested it. In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Court held that prosecutors have an affirmative duty to learn of, as well as to disclose, favorable evidence known to “others acting on the government’s behalf in the case, including the police.” This duty to disclose pertains to all exculpatory and impeachment “information,” including oral information, and not merely to written materials or documents. It applies, moreover, not only at the trial stage, but also to pretrial suppression hearings. See *People v. Williams*, 7 N.Y.3d 15 (2006).

This obligation to disclose exculpatory and impeachment evidence is a product exclusively of the defendant’s “fair trial” guarantees inherent in the fifth, sixth, and fourteenth amendments to the Constitution. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Thus, *Brady* “does not direct disclosure at any particular point of the proceedings.” *People v. Bolling*, 157 A.D.2d 733 (2d Dept. 1990). Accord *People v. Fernandez*, 135 A.D.2d 867 (3rd Dept. 1987); *People v. Coppa*, 267 F.3d 132, 135, 139-144, 146 (2d Cir. 2001). Rather, the People’s obligation to disclose *Brady* material is satisfied when the defendant has been given “a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People’s witnesses or as evidence during his case.” *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987). Thus, it

follows, “the concerns of *Brady* are not implicated during grand jury proceedings.” *People v. Reese*, 23 A.D.3d 1034, 1036 (4th Dept. 2005).

Because the right to *Brady* material is a product of a defendant’s fair trial guarantees, the Supreme Court has also held that, at least in regard to impeachment material, a defendant who pleads guilty has no right to disclosure. *United States v. Ruiz*, 536 U.S. at 625. Our Court of Appeals has not addressed this issue, and the appellate divisions are not in harmony. Given this uncertainty, and the absence of any higher authoritative state decision, a prosecutor may determine, in accord with the law in his or her department, whether to disclose certain materials prior to accepting a guilty plea. Disclosure, of course, will never be error.

The failure to disclose impeachment or exculpatory information, when constitutionally required, can result in the reversal or vacatur of a conviction, or other sanctions, even if that failure was inadvertent. A knowing or willful failure to disclose such information is an ethical violation. *Rules of Professional Conduct* 3.4[a][1] (“a lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce”); 3.4[a][3] (“a lawyer shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal”); 3.8[b] (“a prosecutor...shall make timely disclosure to counsel for the defendant...of the existence of evidence or information known to the prosecutor... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence”).

Innumerable judicial decisions and scholarly articles have sought to define what information is “material” within the meaning of the *Brady* doctrine, what is exculpatory, at what juncture in the case disclosure must be made, how rigorously the prosecutor must seek out exculpatory information, how damaging the impeachment information or important the prosecution witness must be to invoke *Giglio*’s disclosure requirement, and what sanctions will be imposed for various failures to disclose. Obviously, particularized research and factual analysis are required to address the specifics of each prosecution.

**c.**

### **CPL Article 240: Statutory Discovery Obligations**

Criminal Procedure Law Article 240 describes the materials you must disclose to defense counsel, regardless of whether they inculpate or exculpate the defendant. CPL § 240.20 describes materials you must disclose early, generally within 15 days after the defense makes a written demand for them. CPL § 240.44 requires you to disclose, at pretrial hearings, the relevant prior statements and the criminal convictions of and pending charges against any witnesses you call at the hearings. CPL § 240.45 codifies the *Rosario* rule (discussed below) and requires disclosure at trial, before opening statements, of similar information concerning any witnesses you wish to call at the trial. CPL § 240.50 allows you to seek a protective order denying, limiting, conditioning, delaying or regulating discovery for good cause, including the protection of witnesses. Your failure to provide discovery required under CPL Article 240, even if inadvertent, may cause the court to impose whatever sanction it deems necessary to cure any prejudice that the nondisclosure or late disclosure caused to the defendant. A deliberate failure to meet your discovery obligations under CPL Article 240 can constitute an ethical violation. *Rules of Professional Conduct* 3.4[a][1], [3]

**d.**

### ***Rosario* and CPL §§ 240.44 & 240.45: Discovery Concerning Prosecution Witnesses**

Under *People v. Rosario*, 9 N.Y.2d 286 (1961) and CPL §§ 240.44 and 240.45, you must give the defense any prior written or recorded statement of a witness whom you intend to call at trial or a pretrial hearing, which statement is in your possession or control, and which concerns the subject matter of the witness's testimony. At pretrial hearings, you must turn this material over upon request after the witness's direct examination and before the start of cross-examination. CPL § 240.44. In a jury trial you must turn it over—even without a request—after the jury has been sworn and before opening statements. CPL § 240.45(1); *People v. Smith*, 63 A.D.3d 508 (1st Dept. 2009). In a bench trial, you

must do it before submitting any evidence. CPL § 240.45(1). Once again, these deadlines do not mean that you should wait for the last minute to meet your obligations.

*Rosario* violations, even if inadvertent, can lead to a new trial or new pretrial hearing if the defendant shows a reasonable possibility that the nondisclosure materially contributed to the conviction or the denial of suppression following a pretrial hearing. CPL § 240.75. A knowing or willful *Rosario* violation is an ethical breach. *Rules of Professional Conduct* 3.4[a][1],[3].

**e.**

### **Political Activity by Prosecutors**

The District Attorneys Association of the State of New York (“DAASNY”) has adopted a *Code of Conduct for Political Activity*. This Code recognizes the civil rights of a prosecutor, as an individual citizen, to vote, join a political party, contribute money to political organizations, attend political events, sign political petitions, and participate in community and civic organizations that have no partisan purpose. However, to avoid compromising the integrity of their office and the appearance of conflicts with their professional responsibilities, district attorneys and their assistants are forbidden to be members or officers of any organization or group having a political purpose. Prosecutors generally may not speak at political functions, publicize their attendance at such functions, or act in a manner that could be interpreted as lending the prestige and weight of their office to a political party or function. Of course, a prosecutor who is running for election or reelection is permitted to campaign on his or her own behalf. District Attorneys and their assistants may not endorse political candidates, except that in some counties assistants may be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed.

Prosecutors may not coerce or improperly influence anyone to give money or time to a political party, committee or candidate; they may not engage in political activity during normal business hours or use office resources; and they may not misuse their public positions to obstruct or further the

political activities of any political party or candidate. Furthermore, in some localities, all government employees, including prosecutors, may also be subject to local laws concerning political activity, such as the New York City Conflict of Interest Rules. For additional details, consult the *Code of Conduct for Political Activity*, which is reproduced in the appendix to this handbook.

## Conclusion

Ethical principles are the essence of criminal prosecution, not a burden upon it. Compliance with ethical rules requires that we know the rules, remain vigilant, remember the diverse public interests we have sworn to serve, and remind one another that we became prosecutors to do “the right thing.”

## Resources

The new *Rules of Professional Conduct*, NYCRR Part 1200, can be accessed through the websites of the New York Prosecutors Training Institute (“NYPTI”), [www.nypti.org](http://www.nypti.org), and the New York State Bar Association, [www.nysba.org](http://www.nysba.org). Additional local rules of the Appellate Divisions may cover specific areas of lawyer conduct not covered in the statewide rules. These include, for the First Department, 22 NYCRR Parts 603 - 605; for the Second Department, 22 NYCRR Parts 691 and 701; for the Third Department, 22 NYCRR Part 806; and for the Fourth Department, 22 NYCRR Part 1022. These too can be accessed through the NYSBA website.

The District Attorneys Association of the State of New York (“DAASNY”) maintains a Committee For The Fair And Ethical Administration Of Justice, whose Ethics Subcommittee is staffed with experienced prosecutors from District Attorney offices across the state. DAASNY’s Ethics Subcommittee is authorized to consult with and render advisory opinions to local prosecutors who refer questions of ethics to the Subcommittee on a prospective or retrospective basis. The Ethics Subcommittee can be reached through DAASNY’s website, [www.DAASNY.org](http://www.DAASNY.org).

Bar Associations also have ethics committees which issue nonbinding, advisory opinions to guide attorneys and courts on issues of professional conduct. Hundreds of advisory opinions by the Committee on Professional Ethics of the New York State Bar Association are indexed and accessible through the NYSBA website. You can also check the New York City Bar Association ([www.nycbar.org](http://www.nycbar.org)), the New York County Lawyer’s Association ([www.nycla.org](http://www.nycla.org)), the Nassau County Bar Association ([www.nassaubar.org](http://www.nassaubar.org)), and the American Bar Association’s Ethics Committee ([www.abanet.org](http://www.abanet.org)).

The New York Prosecutors Training Institute (“NYPTI”) is an invaluable resource that provides on-line and regional training sessions on prosecutors’ ethical obligations, *Brady, Rosario*, statutory discovery and prosecutorial misconduct. NYPTI’s online Prosecutor’s Encyclopedia, at <https://pe.nypti.org>, gives easy access to these and a host of other resources, including summaries of, and links to, New York State Bar Association ethics opinions relevant to prosecutors. The National District Attorneys Association (“NDAA”), [www.ndaa.org](http://www.ndaa.org), has provided ethical guidance to prosecutors in its publications: *National Prosecution Standards and Commentaries* (3d ed.); and *Doing Justice: A Prosecutor’s Guide to Ethics and Civil Liability* (2nd ed.).

Helpful treatises include Simon’s *New York Code of Professional Responsibility Annotated* (Thompson-West 2007); the ABA/BNA *Lawyers’ Manual on Professional Conduct* (multivolume loose-leaf service also available in the Westlaw database “ABA-BNA-MOPCNL”, and on LEXIS under “Secondary Legal” and the “BNA” database); and the *Restatement (Third) of the Law Governing Lawyers*, by the American Law Institute. Cornell Law School provides online access to its American Legal Ethics Library ([www.law.cornell.edu/ethics](http://www.law.cornell.edu/ethics)).

## Appendix

District Attorneys' Code of Conduct for Political Activity The office of District Attorney, under the Constitution and laws of New York State, is an elected position. District Attorneys must regularly submit their record of performance to the electorate. The District Attorney is therefore involved directly in the political process. Thus, it is reasonable and proper for District Attorneys and members of their staffs to engage in activities that do not compromise their office's efficiency or integrity or interfere with the professional responsibilities and duties of their offices.

### District Attorneys May Engage In the Following Conduct:

1. Register to vote themselves, and vote.
2. Have membership in a political party.
3. Contribute money to political parties, organizations and committees.
4. Attend political/social events.
5. Participate in community and civic organizations that have no partisan purposes.
6. Sign political petitions as an individual.
7. In order to demonstrate public support for the nonpartisan nature of the District Attorney's office, a District Attorney should consider accepting the endorsement of more than one political party when running for office.
8. District Attorneys are entitled to criticize those policies that undermine public safety and support those policies that advance it, by freely and vigorously speaking out and writing on criminal justice issues and the individuals involved in those issues.

### District Attorneys and Assistants Shall Not:

1. Be a member or serve as an official of any political committee, club, organization or group having a political purpose.
2. Endorse candidates, except that Assistant District Attorneys shall be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed.
3. While attending a political/social function, District Attorneys or Assistant District Attorneys shall not speak at such functions; they shall not publicize their attendance at such functions; nor shall they act in a manner which could be interpreted as lending the prestige and weight of their office to the political party or function. However, this shall not prohibit normal political activity during the course of a campaign year.
4. Coerce or improperly influence any individual to make a financial contribution to a political party or campaign committee or to engage in political activities.
5. Except as otherwise provided, engage in any political activity during normal business hours or during the course of the performance of their official duties or use office supplies, equipment, facilities or resources for political purposes.
6. Misuse their public positions for the purpose of obstructing or furthering the political activities of any political party or candidate. The above activities are reasonable and ethical, and are consistent with the impartiality of the District Attorney's office.

The above activities should also help District Attorneys maintain a sense of public confidence in the non-partisan nature of the District Attorney's office. Such conduct also guarantees the constitutional rights of prosecutors and their assistants in the exercise of their elective franchise. Candidates for the office of District Attorney shall abide by these rules.

# Appendix C

## **Recording of Violent Suspect Statement Protocol**

Santa Clara County  
Police Chiefs' Association

## Policy Statement

Electronic recording of custodial interrogations of violent felons increases public trust in law enforcement and protects against unwarranted claims by suspects of coercion and other Constitutional violations.

### Electronic Recording

The members of the Santa Clara County Police Chiefs' Association (the "Association") agree that in a violent-felony (*see* Attachment A) case the entire custodial interrogation of a suspect (juvenile and adult) should be electronically recorded. The recording should include the recitation of Miranda rights. There is no requirement that suspects be informed they are being recorded.

#### A. Feasibility.

The Association recognizes that it is not always feasible to record an in-custody suspect in a violent-felony case. Some, although not all, of the problems that may prevent recording include: (1) equipment failure; (2) lack of equipment; (3) operator error; (4) excessive background noise; (5) inadequate staffing; (6) refusal by the suspect to cooperate unless the recording is terminated. If the interview is not recorded an explanation should be included in a report.

#### B. Digital recording.

If digital-recording technology is used, the original media source for storing the digital file will either be retained as evidence or the digital file will be transferred to permanent storage media such as a CD or DVD disk. If the digital recording device utilizes proprietary software, a copy of the originally captured file will be stored along with a converted file in a commonly used file format that can be easily heard or viewed. Once the originally captured interview file is permanently stored, the original media source can be erased and reused.

Chief Don Johnson,  
Los Altos Police Department  
Chair, Police Chiefs' Association of  
Santa Clara County

## Attachment A

### Violent Felony, Penal Code section 667.5(c)

1. Murder or voluntary manslaughter
2. Mayhem
3. Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) of (4) of subdivision (a) of Section 262
4. Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
5. Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
6. Lewd acts on a child under the age of 14 years as defined in Section 288.
7. Any felony punishable by death or imprisonment in the state prison for life.
8. Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5 [1] or 12022.55.
9. Any robbery.
10. Arson, in violation of subdivision (a) or (b) of Section 451.
11. The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
12. Attempted murder.
13. A violation of Section 12308, 12309, or 12310.
14. Kidnapping.
15. Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.
16. Continuous sexual abuse of a child, in violation of Section 288.5.
17. Carjacking, as defined in subdivision (a) of Section 215.
18. A violation of Section 264.1.
19. Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code
20. Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
21. Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
22. Any violation of Section 12022.53.
23. A violation of subdivision (b) or (c) of Section 11418.



# Appendix D

## **Line-Up Protocol For Law Enforcement**

Police Chiefs' Association  
of Santa Clara County

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**LINE-UP PROTOCOL**

**FOR**

**LAW ENFORCEMENT**

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**Police Chiefs' Association  
of  
Santa Clara County**

**MEMBERS**

- **CALIFORNIA HIGHWAY PATROL**  
Captain Amanda Snowden
- **CAMPBELL POLICE DEPARTMENT**  
Chief Greg Finch
- **GILROY POLICE DEPARTMENT**  
Chief Denise Turner
- **LOS ALTOS POLICE DEPARTMENT**  
Chief Tuck Younis
- **LOS GATOS POLICE DEPARTMENT**  
Chief Scott Seaman
- **MILPITAS POLICE DEPARTMENT**  
Chief Dennis Graham
- **MORGAN HILL POLICE DEPARTMENT**  
Chief David Swing
- **MOUNTAIN VIEW POLICE DEPT.**  
Chief Scott Vermeer
- **PALO ALTO POLICE DEPARTMENT**  
Chief Dennis Burns
- **SAN JOSE POLICE DEPARTMENT**  
Chief Chris Moore
- **SAN JOSE STATE UNIVERSITY POLICE**  
Chief Pete Decena
- **SANTA CLARA COUNTY DISTRICT ATTORNEY'S OFFICE**  
D.A. Jeffrey Rosen
- **SANTA CLARA COUNTY SHERIFF'S DEPARTMENT**  
Sheriff Laurie Smith
- **SANTA CLARA POLICE DEPARTMENT**  
Chief Kevin Kyle
- **SUNNYVALE DEPARTMENT OF PUBLIC SAFETY**  
Interim Chief Dayton Pang

*C. J. Younis (PMT CHAIR) FOR CHIEF TURNER*  
Denise Turner

Chair, Police Chiefs' Association of Santa Clara County

*10-13-11*

Date

*TUCK YOUNIS, CHIEF OF LOS ALTOS*

# Line-Up Protocol

## Introduction

Valid eyewitness identifications are crucial to solving crimes and convicting criminals. Law enforcement agencies nationwide and the U.S. Department of Justice<sup>1</sup> are always looking to improve the process of obtaining reliable identification. There are two small but significant changes that add reliability to the eyewitness identification process. Complying with these new procedures will ensure better results. It will mean more guilty people are properly identified. Failure to comply with these new procedures will make even good identifications more likely to be rejected in court.

**One**, whenever possible, ideally, the officer conducting any photo or live line-up should not know the identity of the suspect; the officer who doesn't know the suspect from the fillers cannot influence the process.

**Two**, line-ups will be conducted sequentially and not simultaneously. The officer will show the witness only one photo or one person at a time.

**Three**, whenever possible, the line-up procedure should be video or audio-taped for evidentiary purposes.

**Four**, line-ups, either live or photographic, shall be presented to one witness at a time. Witnesses should not be allowed to share information about the line-up, and they should be isolated from one another when making identifications.

## Eyewitness Identification Protocol

Continue applying current protocol for eyewitness identification with the following two exceptions.

**One**, wherever possible, the officer conducting a line-up should not know the identity of the suspect. It is recognized that in some cases this will simply not be possible because no other appropriate officer is available. In these cases, the investigating officer can conduct the line-up using extreme care not to communicate the identification of the suspect in any way. While it is not fatal to a case for the investigating officer to conduct his or her own line-up, the case will be stronger and less vulnerable to courtroom second-guessing if it is done by an officer who does not know the identity of the suspect. Therefore, wherever possible, an officer who does not know the identity of the suspect should conduct the interview.

**Two**, in all cases, show the witness the photos or persons comprising the line-up *sequentially* not *simultaneously*.

<sup>1</sup> *Eyewitness Evidence* National Institute of Justice, U.S. Department of Justice, Office of Justice Programs, NCJ 178240.

## How to Conduct a Sequential Line-Up

**First**, comport with current training and policies concerning line-ups while making the following changes.

**Second**, assemble the suspect or suspect's photo and at least five fillers in the normal manner. If it is a live line-up then secure the suspect and at least five fillers in the normal manner. Make sure the witness cannot see either the suspect or the fillers. Arrange the six in random order. Record this order.

**Third**, admonish the witness in compliance with current training and policies:

- (1) He/she will be asked to view a set of individual photographs.
- (2) It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.
- (3) Individuals may not appear exactly as they did on the date of the incident as head and facial hair are subject to change.
- (4) The person who committed the crime may or may not be shown.
- (5) Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
- (6) The procedure requires that the investigator ask the witness to state, in his or her own words, how certain he or she is of any identification.

In addition, instruct the witness that:

- (7) Photos/persons will be viewed one at a time.
- (8) Photos/persons will be presented in random order.
- (9) The witness may take as much time as needed in making a decision about each person before moving on to the next one.
- (10) The witness should identify the person who committed the crime, if present.
- (11) All persons will be presented, even if an identification is made.
- (12) If the witness wishes to view the photos/persons again, he or she may do so.

**Fourth**, conduct the sequential line-up as follows:

- (13) Confirm that the witness understands the nature of the sequential procedure.
- (14) Present each photo/person to the witness separately in a previously determined and random order.
- (15) Remove each photo/person before presenting the next one.
- (16) Record both positive identification and non-identification results in writing, including the witness' own words regarding how sure he/she is.
- (17) Ask the witness to sign and date the results.
- (18) Document, in writing, the lineup procedure, including:
  - (a) Identification information and source of all photos/persons used;
  - (b) Names of all persons present at the lineup;
  - (c) Date and time of procedure.
- (19) If more than one witness is to view the same line-up, then make sure that the witnesses have been separated from one another during the line-up process so that they cannot communicate with one another.
- (20) If more than one witness is to view the same line-up, then make sure the order of the photos or individuals in the line-up array changes between each witness. This will prevent any possibility of witnesses telling each other which number was picked.

## Frequently Asked Questions

### (1) Why are we doing this?

Law enforcement jobs are hard enough, so no one wants to make it harder. These changes will require more work in some cases. Nonetheless, they are worth it because according to exhaustive studies conducted under the supervision of law enforcement agencies nationwide and the Department of Justice and reviewed by our Office of the District Attorney, these new procedures will make our eye-witness identifications more reliable. If they are more reliable, we're going to apprehend more guilty criminals. Also, since these are the procedures recommended by the Department of Justice, if we fail to follow them without valid reason, cases are going to be attacked in court.

**(2) Why do we need to get an officer who doesn't know the identity of the suspect to conduct the line-up?**

The DOJ study found that even the most experienced officer can inadvertently give subconscious hints to the witness to identify the suspect. This can result in false identification. This change brings us in line with other professionals. For example, doctors who are conducting medical research never know whether their patient is receiving the new experimental drug or a placebo. This way they can never be accused of influencing the results. By using these new protocols we will bring our practice in line with other professionals.

**(3) Why are sequential lineups supposed to be any better than the normal ones?**

By studying cases where DNA has proven that innocent people have been convicted, we have learned that there are many causes of false convictions. One cause - cases of good witnesses honestly but falsely making an identification. Exhaustive studies have found that witnesses are much more likely to identify the guilty suspect if the lineup is sequential. Under traditional simultaneous lineups, some witnesses will inadvertently begin to compare the photos to one another instead of comparing the photo to their memory. Consequently, the identifications are not as reliable as those conducted sequentially.

**(4) Do I use the same procedure for live lineups as photo lineups?**

Yes.

**(5) Does this change the way I conduct in-field show-ups?**

No. Since in-field show-ups are used to show the witness a single suspect apprehended near the scene, there is no danger of the witness making comparisons. In general, of course, lineups are preferable to show-ups. If probable cause exists for an arrest, it is rarely advisable to conduct a show-up instead of a line-up unless other factors outweigh the value of a line-up.

**(6) What happens if the witness picks out the very first photo/person? Do I continue with the rest?**

Yes. Note the witness' identification and degree of certainty, but show the witness all the photos/persons.

**(7) If the witness wants to see a particular photo again, may I show it?**

Yes, but you must show all the photos/persons again in random order. In other words, if the witness says, "I want to see number three again," you should tell the witness that you will show all the photos/persons again. The witness can spend as much and as little time on any one photo/person that he or she wants.

**(8) Can a witness compare particular photos if he or she wants to?**

No. The witness can only look at one photo/person at a time. Make sure that you remove one photo/person before showing a new one.

**(9) Why video or audio tape the line-up procedure?**

Juries have come to expect to see as much of police procedures as they can, and when there is no recording defendants can make all sorts of unfounded allegations against the police or prosecutors. Finally, a recording allows an officer to catch important details that might have been missed while he or she was busy conducting the actual line-up.

**(10) Why do we have to shuffle the order of the suspect and filler between line-ups?**

A case was recently reversed in California where latter investigation revealed that all the witnesses were instructed by the first witness to pick out a particular number suspect in the line-up. Neither the police nor the prosecutors knew about this fraud, but we can easily prevent it from happening again by simply shuffling the deck.

## Santa Clara County Identification Form

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*Agency name/case number*

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*Investigator presenting lineup*

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*Others present during identification*

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*Date/Time*

---

*Witness name/DOB*

Order of photographs shown:

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Witness admonition. Should be read verbatim prior to displaying the sequential lineup.

- a. You will be asked to view a set of individual photographs
- b. It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.
- c. Individuals may not appear exactly as they did on the date of the incident as head and facial hair are subject to change.
- d. The person who committed the crime may or may not be shown
- e. Regardless of whether an identification is made, the police will continue to investigate the incident.

In addition, instruct the witness that:

1. Photos/persons will be viewed one at a time
2. Photos/persons will be presented in random order
3. You may take as much time as needed in making a decision about each person before moving on to the next one.
4. You should identify the person who committed the crime, if present.
5. All persons will be presented, even if an identification is made.
6. If you wish to view the photos/persons again, you may do so but you will be shown all of the photos again, and not any particular one.



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## About the Center

The Center analyzes important issues of criminal law, particularly focusing on prosecutorial power and discretion. It pursues this mission in three main arenas: academia, litigation, and public policy debates.

### Academia

The Center's academic component researches criminal justice practices at all levels of government, produces scholarship on criminal justice issues, and hosts symposia and conferences to address significant topics in criminal law and procedure. Recent projects have included:

Publication of *Prosecutors In the Boardroom: Using Criminal Law To Regulate Corporate Conduct* (Anthony S. Barkow & Rachel E. Barkow eds., NYU Press, 2011), a book composed of papers written in connection with the Center's first annual major conference, Regulation by Prosecutors.

Publication by the Center's Faculty Director, Rachel E. Barkow, of a comprehensive empirical survey of criminal law enforcement responsibility in the states, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011).

Publication by Rachel E. Barkow addressing the tension between expertise and politics on sentencing commissions, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599 (2012).

A conference on New Frontiers in Race & Criminal Justice.

Co-hosting a panel discussion on Alternatives to Incarceration: The Use of Drug Courts in the Federal and State Systems.

### Litigation

The litigation component uses the Center's research and experience with criminal justice practices to inform courts in important criminal justice matters, particularly in cases in which exercises of prosecutorial discretion create significant legal issues. Recent representative cases include:

*Missouri v. Frye*, 132 S.Ct. 1399 (2012). The Supreme Court cited and quoted an article by the Center's Faculty Director, cited the Center's amicus brief, and relied extensively on the Center's research in its majority opinion in *Missouri v. Frye*, which—along with its companion decision in *Lafler v. Cooper*—recognized the importance of effective assistance of counsel at the plea bargaining stage.

*United States v. Gupta*, No. 09-4738-cr (2nd Cir. argued December 14, 2011). This case is pending before the Court of Appeals for the

Second Circuit. The Center filed an amicus brief arguing for reversal of a previous Second Circuit ruling that employed the “triviality exception” to reject Gupta's claim that his Sixth Amendment right to a public trial had been violated. Meeting en banc to reconsider the case, the Second Circuit invited the then-Executive Director of the Center, Anthony Barkow, to participate in the oral argument.

*Brown v. Plata*, 131 S.Ct. 1910 (2011). The Center, joined by 30 leading criminologists, filed an amicus brief defending a three-judge panel order that directed the State of California to reduce prison overcrowding to 137.5 percent of design capacity in order to alleviate unconstitutional conditions in its prison system. The brief marshaled empirical evidence that shows that California and other states had reduced prison populations without adversely affecting public safety. The Supreme Court affirmed the decision below.

### Public Policy

The public policy component applies the Center's criminal justice expertise to improve practices in the criminal justice system and the public dialogue on criminal justice matters, and includes communication with elected and appointed public officials and with the media. Members of the Center have testified before Congress, the United States Sentencing Commission, and state legislative bodies about criminal justice matters. They have been quoted extensively in the media and have published editorials on a range of criminal justice topics.

To learn more about the Center, please visit our webpage at [www.prosecutioncenter.org](http://www.prosecutioncenter.org).