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Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

DANNY COLON AND ANTHONY ORTIZ,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE*
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
AT NEW YORK UNIVERSITY SCHOOL OF LAW
IN SUPPORT OF DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

As this Court announced over 30 years ago in *People v. Cwikla*, 46 N.Y.2d 434 (1979), and reaffirmed in *People v. Novoa*, 70 N.Y.2d 490 (1987), it is fundamental that a prosecutor must disclose to a defendant any agreement—express or tacit—to provide a benefit to a cooperating witness in exchange for testimony. Such disclosure is essential to satisfy the constitutional mandate of due process and ensure that a defendant receives a fair trial. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A prosecutor's failure to disclose such an agreement fundamentally hinders the defendant's ability to prepare for trial. Nondisclosure also keeps the jury from assessing fairly a cooperating witness's credibility before it determines the innocence or guilt of a defendant.

The rationale for disclosure of an agreement with a cooperating witness is straightforward: the testimony of such a witness may be colored by the promise that he will receive some benefit in exchange. As this Court has explained:

> Where a promise of leniency or other consideration is held out to a self-confessed criminal accomplice for his co-operation, there is grave danger that, if he be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest .... It requires no extended discussion ... to establish that the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in

> evaluating the worth of his testimony. The failure to disclose an "understanding" or a promise cannot but seriously impair the jury's ability to pass upon this vital issue ....

People v. Savvides, 1 N.Y.2d 554, 557 (1956).

Nondisclosure of tacit agreements is even more pernicious to a defendant and the criminal justice system than nondisclosure of express agreements. It is widely recognized that ambiguity inherent in a tacit agreement can create strong incentives for a cooperating witness to testify in a manner that the witness believes will increase the likelihood that a prosecutor will reward his testimony. *See, e.g., United States v. Bagley*, 473 U.S. 667, 683 (1985) ("The fact that the [witness's] stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction."); *Bell v. Bell*, 512 F.3d 223, 245 (6th Cir. 2008) ("[T]acit agreements may be *more* likely to skew the witness's testimony.... When a witness is ... led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the greater the reward.") (*en banc*) (Clay, J., dissenting) (emphasis in original); R Michael Cassidy, *"Soft Words of Hope:"* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1154 (2004) ("The more uncertain the inducement, the greater the witness's incentive to

tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."); Daniel J. Capra, *Secret Deals Between Prosecutors and Witnesses*, N.Y.L.J., July 12, 1991, at 3 ("an informal, contingent agreement could actually be more inducive of false testimony than a formal agreement, precisely because details remain to be negotiated and the witness would expect those details to be determined in direct relation to the favorability of his testimony").

Despite this Court's unequivocal command in *Cwikla* and *Novoa* that tacit—not merely express—agreements between a prosecutor and a cooperating witness must be disclosed, this requirement has proven difficult in practice for prosecutors to follow and for courts to enforce. Some commentators have remarked that prosecutors in New York and elsewhere have at times engaged in gamesmanship in order to avoid reaching an understanding or agreement with a witness that would trigger the disclosure requirement. *See, e.g.*, Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 548 (2006) (remarking that it is "virtually impossible to identify clear and consistent norms of compliance"); Cassidy, *supra* p. 2, at 1132 ("*Giglio* has created an incentive for prosecutors to make representations to an accomplice witness that are vague and open-ended, so that they will not be considered a firm 'promise' mandating disclosure."); Capra, *supra* p. 3, at 3 ("Prosecutors have

occasionally tried to escape disclosure obligations by coming to some sort of understanding that is argued to be something short of an 'agreement' with the witness."). The failure of prosecutors to deliver favorable information to the defense as required by *Brady* and New York authority has been cited as a basis for wrongful convictions in a recent study conducted by the New York State Bar Association. *See* FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 6-7, 19 (Apr. 4. 2009), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=25997&TEMPLATE=/CM/ContentDisplay.cfm (last visited Sept. 3, 2009) [hereinafter "Wrongful Convictions Report"].[1]

This case presents a valuable opportunity for this Court to clarify when a tacit agreement exists between a prosecutor and a cooperating witness to provide benefits to the witness in exchange for testifying against a defendant. Here, the Appellate Division, First Department disagreed with the Supreme Court and concluded that the prosecution had reached a tacit agreement to relocate the

[1] The study concluded that 53 people were wrongfully convicted and determined that "government practices, by police or prosecutors, were possible causes of the wrongful convictions in over 50% of the cases." Wrongful Convictions Report at 19. Further, the study found that "[t]hese [government] practices include ... the failure of the prosecutor to deliver favorable information to the defense pursuant to the New York State and Federal constitutional due process principles as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and earlier New York authorities." *Id.* Based on "a sampling of recent published or otherwise available decisions, including the Appellate Division's decision in this case, the study concluded that disclosure violations persist "despite the clarity and longevity of the *Brady* rule." *Id.* at 26.

cooperating witness's grandparents in exchange for the witness's testimony. *People v. Colon*, 55 A.D.3d 444, 445 (1st Dep't 2008). According to the Appellate Division, nondisclosure of this tacit agreement was "improper."[2] *Id.* However, the Appellate Division affirmed the trial court's conclusion that no tacit agreement was reached concerning, *inter alia*, the prosecution's undisputed involvement in an unrelated narcotics case against the cooperating witness. *Id.* at 446. The Appellate Division was wrong. These inconsistent and inaccurate results reached demonstrate the lack of clarity in the governing legal standard. Reported decisions since *Cwikla* and *Novoa* likewise confirm that New York prosecutors have had difficulty understanding when the tacit agreement disclosure obligation is triggered, and courts have similarly wrestled with where to draw the line between conduct that gives rise to a tacit agreement for *Brady* disclosure purposes and conduct that does not.

In reviewing the rulings below, this Court can and should establish a test that is fair, comprehensive, and easy to administer for New York prosecutors

[2] The Appellate Division ultimately concluded that the nondisclosure was immaterial and therefore declined to order a new trial. 55 A.D.3d at 445-46. This brief addresses only the appropriate legal framework for determining whether a tacit agreement exists, not the question of whether the nondisclosure was material. The Center notes, however, that a prosecutor's failure to disclose a tacit agreement with a cooperating witness is an error that can often be compounded where a prosecutor affirmatively elicits false testimony from the witness to the effect that no benefits were promised or received and/or reaffirms that point in her closing argument to the jury. Nor does the brief address the alleged nondisclosure of two other points, an inoperable gun in the cooperating witness's hotel room or the cooperating witness's probation department records, both of which are the subject of factual and procedural disputes. (*Compare* Resp't Br. at 103, 124, *with* Defs.' Br. at 23-24, 58-59.)

and judges alike. The rule proposed in this brief for identifying when a tacit agreement has been reached regarding benefits conferred on a cooperating witness is objective and would result in more consistent pre-trial disclosure of tacit agreements between prosecutors and cooperating witnesses. As such, the approach detailed below will improve the fairness of trials—a goal shared by all stakeholders in the criminal justice system—while providing guidelines that are not unduly onerous for prosecutors to follow or for courts to enforce.

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law (the "Center") respectfully submits this brief in support of Defendants-Appellants. The Center, based at New York University School of Law, 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. In general, the Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues. Prosecutors' decisions regarding the application of *Brady* and its progeny are among the most significant they make and thus fall squarely within the Center's ambit.

The Center's litigation program, which consists of filing briefs in support of both the government and defendants, seeks to bring the Center's empirical research and experience with criminal justice and prosecution practices

to bear in important cases in state and federal courts throughout the United States. The Executive Director of the Center, Anthony S. Barkow, was a federal prosecutor for 12 years and worked in two United States Attorneys' Offices, including the United States Attorney's Office for the Southern District of New York, and in the United States Department of Justice in Washington, D.C.

This appeal concerns a prosecutor's disclosure obligation under *Brady* and its progeny to disclose benefits received by cooperating witness as a result of a tacit—*i.e.*, non-explicit—agreement between a prosecutor and a cooperating witness. The Center believes that doctrinal complexities and ambiguities and institutional pressures can make the application of *Brady* and its disclosure obligation difficult, even for experienced prosecutors. The Center is interested in establishing clear standards for disclosure for state prosecutors in New York that will increase prosecutors' professional performance of their duties as well as help guarantee the right of criminal defendants to a fair trial. Moreover, the Center has an interest in promoting adherence to prosecutors' disclosure obligations and seeks to advance a clear and robust disclosure rule related to tacit agreements that will deter offices from withholding impeachment evidence from the defense or circumventing *Brady* by resorting to conduct that arguably falls short of the current definition of tacit agreements. *See* Point II *infra*. Thus, this case presents an issue important to the Center's mission.

ARGUMENT

I. FURTHER GUIDANCE FROM THIS COURT IS WARRANTED TO CLARIFY WHAT CONDUCT GIVES RISE TO A TACIT AGREEMENT BETWEEN A PROSECUTOR AND A COOPERATING WITNESS FOR *BRADY* DISCLOSURE PURPOSES

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court of the United States held that due process requires disclosure of "evidence favorable to an accused ... where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." "[N]ondisclosure of evidence affecting credibility," the Court subsequently held, "falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972). Thus, the prosecutor's obligation to disclose an agreement with a cooperating witness is rooted in the "[t]he concept of fairness embodied in the Due Process Clauses of the State and Federal Constitutions ...." *People v. Novoa*, 70 N.Y.2d 490, 496 (1987). Applying this principle, this Court has concluded that "[t]he existence of an agreement between the prosecution and a witness, made to induce the testimony of the witness, is evidence which must be disclosed under *Brady* principles." *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979).

Under New York law, both express and tacit agreements must be disclosed. For example, this Court held in *Cwikla* that disclosure was required because "there was ... a *tacit understanding* between the witness and the prosecution, or at least so the witness hoped." 46 N.Y.2d at 441 (emphasis added).

Similarly, in *Novoa*, this Court reaffirmed that "[i]t is not the form of a promise, or any label the parties may affix to it, that triggers the prosecutor's duty of disclosure. Rather, the obligation arises from the fact that the prosecutor and the witness have reached an understanding in which the witness's cooperation has been exchanged for some *quid pro quo* on the part of the prosecutor." 70 N.Y.2d at 497.[3]

On this point, New York is in accord with six United States Circuit Courts of Appeal, including the Second Circuit. *See Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009) ("[W]e conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal—explicit or tacit. There is no logic that supports distinguishing between the two."); *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (same) (*en banc*); *Wisehart*, 408 F.3d at 323-24 (same); *Alderman v. Zant*, 22 F.3d 1541, 1554 (11th Cir. 1994) (same); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) (same); *DuBose v. Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980) (same).

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[3] As this Court held in *Novoa*, the significance, or lavishness, of a promise is not relevant to whether or not disclosure must be made; that is an issue of credibility for the jury to consider. 70 N.Y.2d at 497. *Cf. Wisehart v. Davis*, 408 F.3d 321, 324 (7th Cir. 2005) (remarking that disclosure may be required of "the definite benefit that is neither a quid pro quo nor lavish, yet permits an inference that the witness's testimony would be affected", such as, the silent exchange of $500 from a prosecutor to a cooperating witness because the witness "might think either that his acceptance of the money had created an obligation to cooperate with the prosecution or that he should cooperate out of gratitude") (Posner, J.).

Although the disclosure of tacit agreements with cooperating witnesses has been mandated in New York for 30 years, implementing this constitutional requirement on a consistent basis has proven difficult in practice.[4] *See, e.g.*, *People v. Banfield*, 194 A.D.2d 330 (1st Dep't 1993) (reversing and remanding for a new trial because nondisclosure was improper: "we are persuaded that certain statements by a member of the District Attorney's office to a prosecution witness indicating that a decision on his part to testify for the prosecution would be instrumental in their working out a 'favorable disposition' on pending charges constituted a promise which served as a *quid pro quo* for the witness' cooperation"); *People v. Lewis*, 174 A.D.2d 294, 295, 299 (1st Dep't 1992) (reversing the denial of a motion to vacate conviction and concluding that nondisclosure was improper where the prosecutor admitted that he expressed that he would call the witness's cooperation to the attention of prosecutors in another office, where there was a pending charge against the witness). Prosecutors have struggled to determine what conduct gives rise to a tacit agreement and must be disclosed to the defendant to enable him to prepare for trial. Similarly, lower courts have wrestled with the identification of tacit agreements in order to enforce the disclosure rule.

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[4] Federal case law provides little guidance on this point. The Supreme Court of the United States "has provided ... no specific instructions on how *Giglio* applies to tacit agreements." *Bell*, 512 F.3d at 244 (Clay, J., dissenting). *See also* Capra, *supra* p. 3, at 3 ("Whether a deal has been struck is often a difficult question.").

In particular, prosecutors and judges have grappled with two questions: (1) whether a subjective or objective standard applies in determining if the witness had an expectation of a benefit sufficient to trigger a disclosure obligation; and (2) the significance, if any, of benefits provided after the trial in which the cooperating witness testifies. Regarding the first question, a subjective standard would impose broader disclosure obligations and thus theoretically appear to strengthen a defendant's right to disclosure of exculpatory and/or impeachment material. However, it would place prosecutors in the untenable situation of complying with obligations that depend on divining the subjective mindset of a cooperating witness. Thus, perversely, a subjective standard could lead to less disclosure, not more; accordingly, the Center recommends application of an objective standard. The second question implicates two issues: first, the need to preserve a prosecutor's ability independently to assist a cooperating witness after the witness has completed testifying, and second, the need to ensure that benefits provided after the trial in which the cooperating witness testifies can be taken into account on appeal to determine whether or not a tacit agreement existed at the time the witness testified.[5]

[5] *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006), *rev'd*, 512 F.3d 223 (6th Cir. 2008), is an example of how courts outside of New York have also struggled to grapple with this question. A divided appellate panel concluded that disclosure was required where the cooperating witness approached the prosecution about testifying against the defendant; the prosecutor's meeting notes referenced the witness's parole eligibility status; a different prosecutor in the same office

With regard to the first question, New York courts have disagreed on whether a subjective or objective standard should apply. In *People v. Conlan*, 146 A.D.2d 319 (1st Dep't 1989), Supreme Court and Appellate Division, Second Department employed subjective and objective standards, respectively, and reached opposite conclusions regarding whether disclosure was required. The cooperating witness in *Conlan* was a "career criminal" being held in New Jersey on unrelated charges. *Id.* at 324-25, 330. When the witness expressed unease about the charges against him in New Jersey the prosecutor's colleague encouraged the witness "to come to New York, urging in a general fashion that everything would be all right." *Id.* at 327.

Applying a subjective standard, the Supreme Court concluded that the witness's "repetition of his trust in [the prosecutor's colleague] was not a sufficient reason to infer that the witness had an expectation of a benefit, nor could a deal be premised, as [the colleague] believed it to have been, on the 'tone' of the conversation between him and [the witness]." *Id.* at 329. Applying an objective standard, the Second Department reversed, stating that "[i]t is certainly not

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elected not to prosecute four pending criminal counts; and the prosecutor wrote to the parole board on the witness's behalf after the trial.

However, when the Sixth Circuit considered the case *en banc*, a majority of the *en banc* panel reversed, concluding that disclosure was not required. 512 F.3d at 233-34. "A witness's expectation of a future benefit, the *en banc* Court held, "is not determinative of the question of whether a tacit agreement subject to disclosure existed." *Id.* at 233. The dissent took issue with the majority's insistence on "something akin to a formal agreement before any evidence was subject to disclosure." *Id.* at 246 (Clay, J., dissenting).

reasonable to conclude that a career criminal ... would agree to assist the prosecution merely as a sign of good will" and concluding that the prosecutor's colleague "conveyed a tacit, albeit undefined, promise to [the witness] that his testimony in defendant's case would somehow be rewarded." *Id.* at 330-31.

With regard to the second question, the provision of benefits to a cooperator after trial has also engendered confusion in the Appellate Divisions. A comparison of *People v. Gayle*, 148 A.D.2d 307 (1st Dep't 1989), and *People v. Tellier*, 272 A.D.2d 347 (2d Dep't 2000), demonstrates this point. In *Gayle*, the defendant asserted that there was an understanding between a cooperating witness and the prosecutor's office that if the witness testified against the defendant, the prosecutor's office would dismiss an indictment charging the witness with an unrelated robbery. 148 A.D.2d at 307-08. The First Department remanded the case for a hearing because "[t]he very fact that the indictment" charging the witness with an unrelated robbery "was later dismissed *strongly suggests* that some arrangement had been made with her." *Id.* at 308 (emphasis added).

In *Tellier*, by comparison, at the time the cooperating witness testified in a prosecution involving state charges against the defendant, the witness was also working with federal prosecutors in connection with a possible prosecution against the same defendant. 272 A.D.2d at 348. After the state trial, the witness entered into a cooperation agreement with the federal prosecutors. *Id.* In exchange, he

was permitted to plead guilty to a lesser offense, he was not prosecuted for certain other crimes, and his cooperation was disclosed at his sentencing. *Id.* A majority of the Second Department concluded that no tacit agreement existed "at the time of the defendant's trial," despite the fact that the "[the witness] had talked to Federal prosecutors prior to the defendant's trial, when Federal charges against the defendant were under consideration."[6] *Id.*

These cases suggest that some prosecutors do not easily understand what conduct gives rise to a tacit agreement with a cooperating witness, and that some lower courts are struggling with how to identify the existence of such an agreement to enforce the *Brady* disclosure requirement. Particularly given the importance of timely disclosure to a defendant's ability to prepare a defense and therefore insure a fair criminal trial, clarity on this issue is critical.

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[6] In *Shabazz v. Artuz*, 336 F.3d 154, 163-65 (2d Cir. 2003), the Second Circuit interpreted federal law and concluded that the New York trial court did not clearly err in finding no tacit agreement requiring disclosure where the cooperating witnesses' trials were adjourned until conclusion of the defendant's trial and the witnesses thereafter received reduced sentences. "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Id.* at 165 (emphasis in original).

II. THIS COURT SHOULD ADOPT THE CENTER'S PROPOSED RULE THAT A TACIT AGREEMENT IS FORMED AND MUST BE DISCLOSED WHERE, PRIOR TO A COOPERATING WITNESS TESTIFYING, THE WITNESS HAS REASON TO BELIEVE THAT THE PROSECUTOR WILL OR HAS ASSISTED HIM IN RECEIVING A BENEFIT *AND* THE PROSECUTOR SUGGESTS SHE WILL OR HAS DONE SO *OR* ACTUALLY CONTACTS AN AGENCY OR THIRD PARTY FROM WHOM A BENEFIT WAS OR COULD BE OBTAINED

Further guidance from this Court regarding tacit agreements would improve consistency and fairness in disclosure practices. Prosecutors can best comply with their *Brady* obligations, and judges can best enforce such compliance, when clear and workable rules apply regarding when a prosecutor's actions rise to the level of agreement, whether tacit or express. To achieve such consistency, fairness and clarity, the Center proposes that courts infer the existence of a tacit agreement between a prosecutor and cooperating witness when:

1. a reasonable prosecutor would conclude that the cooperating witness has reason to believe prior to the witness testifying that the prosecutor will assist or has assisted him in receiving a benefit; *and*

2. prior to the witness testifying, the prosecutor either suggests she will provide or has provided a benefit to a cooperating witness, *or* actually contacts an agency or third party, regarding the cooperating witness, from whom a benefit was or could be obtained.[7]

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[7] References to the "prosecutor" include a member of the prosecutor's team "whose acts can be attributed to the prosecutor under applicable law." *See People v. Wright*, 86 N.Y.2d 591, 598 (1995) (concluding that the prosecutor had constructive knowledge of the cooperating witness serving as an informant for police on prior occasions and, thus, disclosure was required: "[t]he mandate of *Brady* extends beyond any particular prosecutor's actual knowledge"); *People v. Steadman*, 82 N.Y.2d 1, 8 (1993) ("A prosecutor's obligation ... to disclose *Brady* material [is] [a] dut[y] exercised by individual prosecutors and shared by the prosecutor's office as a

A. THE CENTER'S PROPOSED RULE IS CONSISTENT WITH *BRADY* AND ITS PROGENY AS WELL AS THIS COURT'S DUE PROCESS JURISPRUDENCE

The Supreme Court of the United States stated in *Brady* that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. Consistent with the Supreme Court's view, this Court has "long emphasized that [its] view of due process in this area is, in large measure, predicated upon 'elemental fairness' to the defendant, and upon concern that the prosecutor's office discharge its ethical and professional obligations."[8] *People v. Vilardi*, 76 N.Y.2d 67, 76 (1990) (citations omitted). *See also People v. Savvides*, 1 N.Y.2d 554, 556 (1956) ("[t]he administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach").

The current law on tacit agreements has been criticized by some commentators as leaving open the door to dealings between a prosecutor and a cooperating witness that deliberately thwart the disclosure trigger. *See, e.g.*, Gershman, *supra* p. 3, at 531 ("Prosecutors have violated [*Brady's*] principles so often that it stands more as a landmark to prosecutorial indifference and abuse than

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whole."). Also, references to the "witness" or "cooperating witness" include "a representative, such as counsel or a relative."

[8] This Court's establishment of a "Justice Task Force", co-chaired by the Honorable Theodore T. Jones, to examine wrongful convictions and to recommend reforms, is part of a long tradition of ensuring that the New York criminal justice system operates consistent with due process. *See* Joel Stashenko, *'Serious' Effort Vowed On False Convictions*, N.Y.L.J., July 15, 2009, at 1.

a hallmark of justice .... *Brady* actually invites prosecutors to bend, if not break, the rules, and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance."). By requiring broader disclosure, the rule proposed by the Center "ensures that material evidence which is in its possession and is exculpatory in nature is turned over to the defendant." *Novoa*, 70 N.Y.2d at 496. A fundamental aspect of a defendant's ability to adequately prepare for trial turns on the prosecution's timely disclosure of *Brady* material—that is, prior to the trial itself. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 675 n.6, 683 (1985) (remarking that "[by requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model" and that nondisclosure can "alter[] the course that the defense and the trial would have taken had the defense not been misled by the prosecutor[]").

Broad disclosure also "give[s] substance to th[e] constitutional right" of a defendant to a fair trial by increasing the possibility that tacit agreements may be admitted into evidence for juries to consider as part of their credibility determinations. *Novoa*, 70 N.Y.2d at 497 ("Once such an understanding has been reached, it is for the jury to determine how much value to assign it in terms of assessing the witness's credibility."); *Giglio*, 405 U.S. at 155 ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the cooperating witness's] credibility and the jury was entitled to know of it."). As

this Court has warned, "remit[ting] the impact of the exculpatory evidence to appellate hindsight ... significantly diminish[es] the vital interest ... in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence." *Vilardi*, 76 N.Y.2d at 77-89. Defining tacit agreements in a manner that reaches broadly and provides clear and workable parameters avoids this outcome.

B. THE CENTER'S PROPOSED RULE UTILIZES OBJECTIVE STANDARDS AS THE TRIGGER FOR DISCLOSURE, WHICH BENEFITS PROSECUTORS AND DEFENDANTS WHILE ADHERING TO NEW YORK LAW

The objective nature of the rule proposed by the Center for determining the existence of a tacit agreement between a prosecutor and a cooperating witness has significant benefits. First, it is fair to prosecutors who have the "special responsibility," *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000), of disclosing an agreement in the first instance. By examining only what a "reasonable prosecutor" would think about a cooperating witness's expectation or receipt of a benefit, the Center's proposed rule ensures that prosecutors are not placed in the untenable position of being forced to speculate whether a cooperating witness subjectively believes he has an agreement with the prosecution whereby he will receive or has received certain benefits in exchange for favorable testimony.[9]

[9] *Compare* Resp't Br. at 109 ("[P]rosecutors would be unable to determine what disclosure was required with any reasonable measure of confidence .... The requirement of at least a tacit understanding makes disclosure depend in principle on a fact ordinarily within the knowledge of

Moreover, because measuring the subjective understanding of a witness is difficult, prosecutors may error in making such determinations and thus erroneously fail to disclose information that should be disclosed or, even worse, engage in gamesmanship deliberately to avoid triggering a disclosure obligation. Finally, because prosecutors can face potential disciplinary sanctions for *Brady* disclosure violations, it would be unwise to rely on the subjective understanding of a cooperating witness in assessing whether a tacit agreement exists. *See* Wrongful Convictions Report, *supra* p. 4, at 31-35.[10]

Second, the Center's proposed rule conditions a finding of the existence of a tacit agreement on objectively measurable conduct by the prosecutor. Specifically, the second element would require a finding that the prosecutor either suggested to the cooperating witness that a benefit may be provided or was provided, or contacted a government agency or third party regarding the cooperating witness from whom a benefit was or could be obtained.[11]

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a prosecutor, and that is the proper rule."), *with Bell*, 512 F.3d at 233 (advocating disclosure of any evidence that "suggests that the witness actually harbors an expectation of favorable treatment, *regardless of whether the prosecution created such an expectation*") (Clay, J., dissenting) (emphasis added).

[10] *Cf.* ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, Formal Op. 09-454, at 1 (2009) (discussing a prosecutor's "separate obligations imposed by Rule 3.8(d)" of the Model Rules of Professional Conduct to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused ....").

[11] The Center's proposed rule also encompasses benefits provided to a cooperating witness prior to testifying because a reasonable prosecutor may conclude that the witness either feels obligated to return the favor to the prosecution or has a bias for the prosecution. This is consistent with

In this way, the prosecutor's disclosure obligation is tied to her affirmative actions vis-à-vis the cooperating witness. And, at the same time, an objective "reasonable prosecutor" standard in the first element forecloses any concerns about whether a prosecutor will fail to acknowledge a belief that the cooperating witness in fact expected or has received a benefit in exchange for testimony, even if pressed.

C. The Center's Proposed Rule Neither Restricts A Prosecutor's Power To Reward Truthful Testimony *Ex Post* Nor Does It Prohibit A Defendant From Using Post-Trial Benefits To Establish A Tacit Agreement

The Center's proposed rule addresses the two circumstances in which post-trial benefits may be relevant in deciding if a tacit agreement exists. First, a prosecutor can independently decide to reward truthful testimony provided by a cooperating witness after a defendant is convicted. Second, a cooperating witness's receipt of a post-trial benefit can be the product of a tacit agreement with the prosecution that existed prior to the witness's testimony against the defendant.

Regarding the first scenario, in the Center's view, prosecutors should not be chilled from unilaterally deciding to reward truthful testimony provided by a cooperating witness after a defendant is convicted. For example, after a cooperating witness testifies truthfully against a defendant, a prosecutor may choose to help a cooperating witness obtain alcohol treatment for substance abuse.

New York law. *See People v. May*, 228 A.D.2d 523 (2d Dep't 1996) (prosecutor conceding on appeal "that it erred in failing to disclose the arrangement" whereby the cooperating witness was promised and received leniency prior to testifying against the defendant).

A prosecutor may also decide it is appropriate, after a cooperating witness testifies at trial, to notify a judge who sentences the cooperating witness on unrelated charges that the witness previously helped the prosecution by testifying against a defendant.

Cooperating witnesses, whatever their costs and benefits, have become an integral part of the criminal justice system. This Court has observed that "[l]ong experience in granting leniency to 'co-operative' accomplices has undoubtedly shown the hazards in the practice to be more than offset by benefits to society in the detection and punishment of crime." *People v. Savvides*, 1 N.Y.2d 554, 557 (1956). But if prosecutors were required to disclose unilateral benefits provided to cooperating witnesses *after* defendants are convicted, then prosecutors might not provide such benefits out of fear that convictions that were secured might be vulnerable on appeal. Provision of such benefits should not be unduly chilled. Thus, the Center's proposed rule does not find a tacit agreement where a prosecutor rewards truthful testimony unilaterally and after-the-fact. In this first scenario, a reasonable prosecutor would not conclude that the cooperating witness had reason to believe that the prosecutor would assist him in receiving a benefit because the prosecutor neither made any non-explicit promise nor took any affirmative action to that effect.

Regarding the second scenario, a prosecutor should not be able to purposefully engage in conduct short of an express agreement before a cooperating witness testifies to avoid triggering the disclosure obligation and then provide a benefit to the witness after the defendant is convicted. As the Second Circuit has held, "a prosecutor may [not] circumvent his *Brady* obligations by failing to reduce to writing a plea agreement or a promise of leniency. Nor may a prosecutor avoid his duty of disclosure by phrasing a promise of favorable treatment in general terms." *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003). For the same reason, if a prosecutor suggested that she would provide a benefit sought by a cooperating witness *prior* to the witness testifying, a defendant should be entitled to use the receipt of a post-trial benefit to infer that a reasonable prosecutor would have concluded that the witness had reason to believe that the prosecutor would assist him in receiving a benefit.[12] This is consistent with the Second Circuit's recognition that "afford[ing] favorable treatment to a government witness, *standing*

[12] Requiring disclosure in this circumstance does not "unmoor" the disclosure obligation from the "existing requirement of an agreement," (Resp't Br. at 111) because a tacit agreement existed. The record here does not implicate so-called "unilateral benefits," *i.e.*, the provision of benefits by a prosecutor to a cooperating witness in the absence of a request by the witness and where the witness does not have any reason to believe that the prosecutor assisted in providing benefits. *See Reutter v. Solem*, 888 F.2d 578, 581-82 (8th Cir. 1989) (nondisclosure of the fact that the prosecution's star witness's sentence commutation hearing purposely was postponed until the conclusion of the trial he was testifying in constituted a *Brady* violation: "[t]he fact that there was no agreement ... is not determinative of whether the prosecution's actions constituted a *Brady* violation"). This Court can address unilateral benefits when a case presents the issue squarely.

alone, does not establish the existence of an underlying promise of leniency in exchange for testimony." *Id.* (emphasis added).

D. THE CENTER'S PROPOSED RULE RESPECTS THIS COURT'S PRECEDENT ON DISCLOSURE AND WILL NOT BE UNDULY DISRUPTIVE TO IMPLEMENT

Importantly, the Center's proposed rule is consistent with both *Cwikla* and *Novoa*, this Court's two seminal cases on disclosure. This Court held in *Cwikla* that the prosecutor should have disclosed his letter to the Parole Board on behalf of the cooperating witness after the initial trial resulting in the defendant's conviction and prior to the defendant's retrial. 46 N.Y.2d at 440-42. Under the Center's approach, the prosecutor in *Cwikla* would have been under an obligation to disclose his contact with the Parole Board since the cooperating witness requested he contact the Parole Board and he subsequently did so. Likewise, in *Novoa*, this Court held that the prosecutor should have disclosed that she told the witness that, if ever asked, she would inform the Special Prosecutor's Office, which had indicted the witness on unrelated charges, of his cooperation. 70 N.Y.2d at 494, 497-98. Under the Center's approach, disclosure would have also been required since the prosecutor stated that she would inform others of the witness's cooperation.

The Center's proposed rule does not pose a meaningful risk of a flood of reversals and new trials in criminal cases. Even if application of the Center's

proposed rule results in a finding that a tacit agreement existed between the prosecution and a cooperating witness, then the defendant must still show that the nondisclosure was material in order to obtain a new trial.[13] *See People v. Vilardi*, 76 N.Y.2d 67 (1990) (discussing the two-tiered approach in New York to determining whether reversal and a new trial is required to remedy a *Brady* disclosure violation).

Moreover, the Center's proposed rule will likely result in greater *pre-trial* disclosure of tacit agreements with cooperating witnesses, which is critical to enabling the defendant to prepare adequately for trial. As noted above, such broader disclosure would level what is perceived by some critics as an uneven playing field resulting from alleged prosecutorial gamesmanship that results in nondisclosure of tacit agreements. *See supra* at pp. 3-4, 16. It will also allow trial courts to determine if evidence of such tacit agreements is admissible and, if so, enhance juries' ability to render credibility determinations.

[13] As noted above, *see supra* n. 2, the Center takes no position on the proper legal standard for materiality.

III. THE CASE AT BAR CONFIRMS THE NEED FOR A CLEAR RULE THAT BROADLY DEFINES TACIT AGREEMENTS FOR *BRADY* DISCLOSURE PURPOSES

A. THE PROSECUTOR'S ASSISTANCE IN RELOCATING THE COOPERATING WITNESS'S GRANDPARENTS WAS A BENEFIT THAT SHOULD HAVE BEEN DISCLOSED

In this case, it is uncontrovered that cooperating witness Anibal Vera "expressed concern for his grandparents' safety" to the prosecutor before testifying; that the prosecutor and/or a member of her office interacted with the New York City Housing Authority ("NYCHA") regarding the relocation of his grandparents; that the District Attorney's Victim Service Agency received a copy of a letter from the Housing Authority to Vera's grandfather before Vera testified; and that "subsequent to Vera's trial testimony they were relocated." (B24-25; B540.)[14] The trial court concluded that disclosure of these facts was not required because there was no evidence that Vera "*specifically conditioned* his testimony on [the prosecutor's] promise to assist his grandparents relocate." (B24 (emphasis added).) By focusing on whether the testimony was "specifically conditioned" on the promise of relocation, the trial court applied a disclosure standard inconsistent with current law. *Cwikla*, 46 N.Y.2d at 441; *Novoa*, 70 N.Y.2d at 496-97. More

[14] The People conceded in their brief on this appeal that, out of concern for his grandparents' safety, Vera "suggested that he might refuse to testify unless his grandparents were relocated" and that "the District Attorney's office had had a role in attempting to relocate Vera's grandparents." (Resp't Br. at 86; *see also id.* at 121 (admitting that the prosecutor "took a minor administrative step to help protect them").) In fact, Vera's grandparents were relocated about two months after the trial of Colon and Ortiz concluded. (B767.)

fundamentally, if the trial court's disclosure standard was a correct statement of current law, tacit agreements would *never* have to be disclosed, a result obviously contrary to this Court's decisions in *Cwikla* and *Novoa*. By definition, a tacit agreement is not express and, therefore, a party to such an agreement could not "specifically condition" his testimony on the receipt of a benefit.[15]

The Appellate Division, First Department properly concluded that "[t]he prosecutor also failed to disclose the fact that she assisted in the relocation of a prosecution witness's grandparents." *People v. Colon*, 55 A.D.3d 444, 445 (1st Dep't 2008). This "omission[]," the Appellate Division held, "was improper." *Id.* (citing, *inter alia*, *Novoa*, 70 N.Y.2d at 498). Had the prosecutor disclosed this fact, the trial judge would have determined whether the evidence was admissible and, if so, jurors would have heard this information so that they could incorporate it in assessing Vera's credibility.

Although the Appellate Division understood that disclosure was required under *Novoa* and related cases, the prosecutor and the trial court did not believe a tacit agreement existed with Vera. A rule that more clearly—and broadly—delineates the elements of a tacit agreement would lessen these erroneous results. Here, the prosecutor affirmatively assisted in procuring a benefit

[15] *See* BLACK'S LAW DICTIONARY 1590 (9th ed. 2009) ("tacit": "[i]mplied but not actually expressed; implied by silence or silent acquiescence"); *id.* at 374 ("tacit contract": "[a] contract in which conduct takes the place of written or spoken words in the offer or acceptance (or both)").

for Vera by contacting NYCHA during Defendants-Appellants' trial.[16] Additionally, Vera had reason to know that the prosecutor was or would be assisting with the relocation of his grandparents; it is undisputed that he mentioned to the prosecutor his interest in his grandparent's relocation. Also, prior to Vera's testimony, the District Attorney's Victim Service Agency was copied on correspondence from NYCHA to Vera's grandfather, "indicating that the District Attorney's office must have contacted [NYCHA]." (Resp't Br. at 118.) The Center's proposed rule would have mandated disclosure.

B. THE PROSECUTOR'S INVOLVEMENT IN THE UNRELATED NARCOTICS CASE AGAINST THE COOPERATING WITNESS WAS A BENEFIT THAT SHOULD HAVE BEEN DISCLOSED

The prosecutor's involvement in Vera's unrelated 1992 narcotics case is another example of a tacit agreement that should have been disclosed. In 1990, Vera entered into a cooperation agreement in which he agreed to testify against Colon and Ortiz in exchange for pleading guilty to a lesser offense than a narcotics charge so that he would not incur a probation violation. (B16, 678-79, 681-82.) Prior to his testimony, Vera was arrested on narcotics charges and the same homicide prosecutor who reached the 1990 cooperation agreement with Vera appeared, conferred with the court and Vera's counsel, conveyed a plea offer, and

[16] Even if the prosecutor was not involved with the agency's relocation of Vera's grandparents or had no knowledge of the involvement of her office in that effort, under the Center's proposed rule, she would be deemed to have constructive knowledge for disclosure purposes. *See supra* n. 7.

later telephoned the narcotics prosecutor in charge of that case. (B26-27, 739-40, 751-52, 823; Resp't Br. at 113.) Vera thereafter received a sentence less than the maximum under New York law pursuant to a plea offer that remained valid, notwithstanding the fact that Vera jumped bail after the offer was made. (B27, 753-57.)

The trial court concluded, in a finding affirmed without explanation by the Appellate Division, 55 A.D.3d at 446, that no "understanding was reached between the parties that included [the prosecutor's] promise of assistance, explicit or otherwise, in any of Vera's future criminal cases" (B27.) This determination was erroneous under existing case law. *Cwikla* holds that a jury is entitled to know whether there was a "tacit understanding between the witness and the prosecution, *or at least so the witness hoped.*" 46 N.Y.2d at 441 (emphasis added).[17]

Disclosure of such facts would be required under the Center's proposed rule. In November 1992, the prosecutor with whom Vera cooperated affirmatively contacted the narcotics prosecutor assigned to this unrelated narcotics case regarding his status as a cooperating witness, before Colon and Ortiz's case went to trial. Additionally, a "reasonable prosecutor" would have believed that

[17] Under *Cwikla*, the ultimate disposition of Vera's unrelated narcotics case is irrelevant to whether he had reason to "hope" prior to testifying that the prosecutor would assist him in exchange for his testimony. Accordingly, the Supreme Court's conclusion that Vera's ultimate sentence was not a "benefit" because it was less than the maximum under New York law is irrelevant. (B27.)

Vera had reason to know that the prosecutor was helping him on his unrelated narcotics charge in exchange for his testimony against Colon and Ortiz for four reasons: Vera had previously reached a plea bargain with the same prosecutor in connection with an earlier offense; that same prosecutor conveyed the plea offer to Vera in his unrelated narcotics case; the trial against Colon and Ortiz did not begin until the summer of 1993, so the prosecutor in that case still needed Vera's assistance at the time she contacted the prosecutor in Vera's pending narcotics case; and the prosecutor's involvement in the narcotics case was out of the ordinary, given that she was assigned to another unit.

CONCLUSION

For the foregoing reasons, this Court should clarify the test for determining the existence of a tacit agreement as outlined above, reverse the Appellate Division, and remand for further proceedings.

Dated: New York, New York
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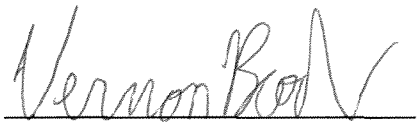

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