

# New York County District Attorney's Office Conviction Integrity Program



October 2015

## Overview and Objectives

- ▶ Created in March 2010
- ▶ Affirmative steps to prevent wrongful convictions
- ▶ Uniform process for the review and investigation of meaningful claims of innocence

## Components

- ▶ Program Chief and Senior ADA
  - ▶ Coordinate activities of Internal Working Committee
  - ▶ Supervise reinvestigations
- ▶ Internal Working Committee
  - ▶ Fifteen Senior ADAs
  - ▶ Subcommittees for best practices
- ▶ Outside Panel
  - ▶ Advises on policy matters and evolving issues in area of wrongful convictions

## Materials Attached

- ▶ Disclosure/Materiality Memorandum
- ▶ Brady/Giglio Memorandum
- ▶ Brady/Giglio Checklist
- ▶ Identification Case Checklist
- ▶ ECAB Questions for Police Officers

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DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK  
INTEROFFICE MEMORANDUM

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TO: All Assistant District Attorneys

FROM: Cyrus R. Vance, Jr. *CRV*

DATE: April 18, 2012

SUBJECT: Disclosure of Information Favorable to the Defense

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Senior Appellate Counsel Pat Hynes and Conviction Integrity Chief Bonnie Sard have made a small but important update to their existing guidance on disclosure of favorable information to the defense. The new versions of Pat's excellent outline and Bonnie's essential and practical memo are attached, and both are also located in the Conviction Integrity section of the intranet homepage.

In brief, the updated materials make clear that Assistants should disclose, without regard to materiality, any information tending to negate the guilt of the accused, mitigate the degree of the offense, impeach the credibility of a prosecution or reduce the sentence. This should be our practice notwithstanding *Kyles v. Whitley*, 514 U.S. 419 (1995), under which the federal constitution permits non-disclosure of information that is not material. New York courts define "material" information in this context as information that has either a reasonable possibility (if a specific request for the information was made by the defense) or a reasonable probability (if no such request was made) of changing the outcome of the proceeding. *People v. Fuentes*, 12 N.Y.3d 259, 263 (2009). Analysis of whether information is "material" should not affect disclosure decisions before or during trial, but should be reserved for post-conviction review, where an appellate court or court reviewing a collateral attack on the conviction will assess the materiality of the information alleged to have been withheld in light of the entire trial record.

Assistants should also keep in mind that the duty to disclose such information stems not only from *Brady*, but also from Rule 3.8(b) of the New York Rules of Professional Conduct. That rule provides in relevant part that prosecutors "shall make timely disclosure to counsel for the defendant . . . of the existence of evidence of information known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence." The rule, which is based on the ABA Model Rules of Professional Conduct, differs from the constitutional rule in two primary ways. First, it applies only to information "known to the prosecutor," while the *Brady* rule also applies to information in the possession of other law enforcement agencies involved in the case, and therefore requires prosecutors in every case to seek out favorable material from the law enforcement agencies involved in the investigation. Second, on its face at least, Rule 3.8 contains no materiality requirement. ABA Formal Opinion No. 09-454, discussed in Pat's outline, interprets the rule, among other things, as applying without regard to whether the information is material.

In short, Assistants should turn over whatever favorable information they find, regardless of their assessment of the importance of the information to the defense.

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**DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK**  
**INTEROFFICE MEMORANDUM**

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**TO:** All Assistant District Attorneys  
**FROM:** Bonnie Sard  
Chief of the Conviction Integrity Program  
**SUBJECT:** Brady and Giglio Information  
**DATE:** April 9, 2012

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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>1</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.

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<sup>1</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.

### **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.

### **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.

### **Brady/Giglio Checklist**

#### **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 there 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?

#### **VIII. Geaslen Material**

1. Is there any information tending to support defendant's suppression claim?