



Final Report of the New York State Bar Association's Task Force on Criminal Discovery

For the Consideration of the House of Delegates - December 1, 2014

Opinions expressed are those of the Section/Committee/Task Force preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee

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New York State Bar Association, Task Force on Criminal Discovery

Criminal Discovery Reform in New York State

REPORT AND PROPOSALS

Introduction

For forty years, reports and legislative proposals by experts and practitioners have urged New York State to reform its outdated and unfair criminal discovery rules. This Task Force seeks to break the logjams that have stalled these necessary changes.

We believe that five key measures can solve this protracted impasse, and finally restore New York's criminal justice system to a sound position within the national mainstream. The balanced framework for modernizing the discovery rules that we propose would result in a far more fair and reliable, yet fully workable, system. It would permit adequate case investigations, allow prompt and properly informed decisions on guilty pleas, lead to more orderly trials, and would minimize the risk of wrongful convictions. It would also provide the tools needed for courts, prosecutors, and defense lawyers to protect the witnesses upon whom the system depends and to whom it must afford security.

The first section of this report describes why large-scale reform of New York State's criminal discovery rules is needed. Section II sets forth the Task Force's specific recommendations for such changes. Section III contains additional recommendations for rectifying persistent problems involving inadequate disclosure of evidence and information favorable to the defendant (so-called "*Brady*" information) that have been widely noted, including by this Bar Association's Task Force on Wrongful Convictions. Section IV addresses issues regarding flow of information and discoverable materials from law enforcement agencies to prosecutors' offices. Finally, a minority of the Task Force has submitted a response to recommendations in our report, and the Task Force majority provides its reply to these dissenting views.

I. The Need for Criminal Discovery Reform

Calls for modernizing New York State’s highly restrictive criminal discovery system have been raised by other panels and groups for decades, but so far to no avail.¹ The current discovery rules are set forth in Criminal Procedure Law article 240, which was last significantly revised in 1979.

This Task Force agrees that overhauling criminal discovery in New York is urgently needed and long overdue. Currently people accused of crimes in this State are denied access to critical materials that are necessary for them to make informed decisions about their cases, to undertake proper investigations, to intelligently assess plea offers, to secure and use exculpatory evidence, and to adequately prepare for trial before the last minute. The prosecution is similarly denied adequate and timely discovery from the defense.

Dozens of other States have employed systems of broad access to both parties’ evidence at an early stage of criminal cases for many years. Such discovery rules are used in large and small States, States with large rural areas, States with huge urban concentrations, and States, like New York, with a combination of both. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark. New Jersey enacted expedited and liberalized criminal discovery in 1973; Florida did so in 1968. No State that has enacted more open discovery rules has later gone back to

¹ See “Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York” (2014), pp. 19-23 (discovery reform proposal renewed annually since 1994); The Legal Aid Society of New York City, “Criminal Discovery Reform in New York: A Proposal to Repeal CPL Article 240 and to Enact a New CPL Article 245” (2009); Commission on the Future of Indigent Defense Services, “Final Report to the Chief Judge of the State of New York” (2006), p. 24; The Spangenberg Group, “Status of Indigent Defense In New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services” (2006), pp. 77-83, 146-48; New York County Lawyers’ Association, “Discovery in New York Criminal Courts: Survey Report and Recommendations” (2006); Report to the New York State Assembly Codes Committee, “Criminal Discovery in New York State: Current Practice and Proposals for Change” (1991); Judicial Conference Report on CPL, “Memorandum and Proposed Statute Re Discovery: Opening Up Criminal Discovery in New York,” 1974 Session Laws of New York, pp. 1873-76; see also *People v. Copicotto*, 50 N.Y.2d 222, 226 (1980) (“the trial of a criminal charge should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial”); ABA Standards for Criminal Justice: Discovery, Standard 11-1.1 (3d ed. 1996); The Constitution Project, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel” (2009), pp. 77-79, 207; The Justice Project, “Expanded Discovery in Criminal Cases: A Policy Review” (2007); Mary Prosser, “Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities,” 2006 Wis. L. Rev. 541 (2006); Jenny Roberts, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases,” 31 Fordham Urb. L. J. 1097 (2004); Editorial, “Rampant Prosecutorial Misconduct,” *NEW YORK TIMES* (Jan. 4, 2014); Editorial, “Justice and Open Files,” *NEW YORK TIMES* (Feb. 26, 2012).

impose restrictive ones.² Most recently, Texas (2014) and North Carolina (2004) enacted open discovery statutes, and Ohio (2010) made its fairly broad discovery rules even more broad.

New York is so far outside the mainstream on this crucial issue that a leading treatise places it among the fourteen States that provide defendants in criminal cases with the *least* discovery in the nation: “Alabama, Georgia, Iowa, Kansas, Kentucky, Louisiana, *New York*, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming.”³ (As noted, Texas should now be removed from the list of “bottom fourteen” States.) This list actually *understates* New York’s restrictiveness on discovery, as several of these States have other procedures that result in the defense receiving crucial information, such as providing lists of witnesses’ names and addresses.⁴

New York’s restrictive discovery rules stand in stark contrast to its liberal discovery in civil proceedings. This State has long embraced the rationale of early and open discovery in civil matters, insisting that surprise is undesirable in litigation and that both parties should be entitled to know and develop all the relevant facts.⁵ Yet in criminal cases, where liberty is at stake, Criminal Procedure Law article 240 systematically blocks defendants, some of them innocent or over-charged, from

² Milton Lee, “Criminal Discovery: What Truth Do We Seek?,” 4 U.D.C. L. Rev. 7, 19 (1998); *see also* Janet Moore, “Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*,” 77 Brook. L. Rev. 1329, 1380-84 (2012).

³ 5 Wayne R. LaFare et al., Criminal Procedure §20.2(b), n.31 (3d ed. updated Dec. 2012). In May 2013, Texas enacted a new criminal discovery statute that requires disclosure by the State of, *inter alia*, “any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers . . . or any designated . . . tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action. . . .” and “any exculpatory, impeachment, or mitigating document, item, or information . . .,” beginning “as soon as practicable after receiving a timely request. . . .” *See* Tex. Crim. Pro. Art. 39.14(a), (h) (effective January 1, 2014).

⁴ In particular, among these “bottom fourteen” States, ten of them – unlike New York – have procedures that result in disclosure of witness information. Rhode Island requires the prosecution to disclose the names and addresses of all its intended trial witnesses. Georgia requires the prosecution to provide defense counsel with a confidential list of the addresses and telephone numbers of its intended trial witnesses. Iowa requires the prosecution to give notice of the name, occupation and testimony of each witness. In Kansas, the indictment or information must list the names of all “known” witnesses; and in Kentucky, South Dakota, Tennessee and Texas, it must list the names of all testifying grand jury witnesses. In Alabama and Virginia, the defendant has a right to a preliminary hearing at which the witnesses testify in the defendant’s presence. *See* Ala. Code §§15-11-1, 15-11-6; Ga. Super. Ct. R. 30.3; Ga. Code Ann. §§17-16-3, 17-16-21; Ia. R. 2.4(6); Kan. Stat. Ann. §22-3201(g); Ky. R. Crim. P. 6.08; R.I. R.Super.Ct. R.C.R.P. Rule 16(a)(7); S.D. C.L. §23A-5-18; Tenn. Code Ann. §40-13-107; Tex. Crim. Pro. Art. 20.20; Va. Code Ann. §19.2-183; *see also* Va. Code Ann. §19.2-228. This issue is discussed further below in Section II-A.

⁵ CPLR §3101(a) (requiring “full disclosure” of all non-privileged information in civil cases in New York State); *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968) (in civil cases, discovery must be given “of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity”); *see generally Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation”).

investigating, making informed decisions about plea offers, and formulating proper strategies prior to the start of the trial.

The feasibility and effectiveness of broad and early discovery in criminal cases have been well tested and clearly established. Open discovery helps innocent or over-charged defendants fairly prepare for trial. It also encourages guilty people to plead guilty earlier in the proceedings by showing them the evidence against them. When the defense lawyer is given the discovery materials promptly, he or she can then advise the defendant concerning the strength of the case and, when appropriate, demonstrate with tangible proof that accepting a plea is the person's best option.⁶

Expedited discovery is also beneficial as it causes prosecutors to review their own evidence at a much earlier stage of the case. This results in more appropriate and better-informed plea offers. If prosecution is found unmerited or the highest charges are deemed unfounded, the result will be quicker dismissal or reduction, resulting in more justice and cost savings.

Basic information in a criminal case that is routinely disclosed in every State with modern discovery rules is not discoverable at all in New York, or is turned over too late for the defense to use it to investigate and prepare. New York does not require that all non-privileged police reports regarding the investigation of the case be provided to the defense. It does not require that witnesses' names and contact information be disclosed prior to trial.⁷ Even the most important type of discovery for a criminal defendant, the written and recorded statements of the prosecution's

⁶ The relationship between early criminal discovery and timing of guilty pleas has not been the subject of rigorous studies, perhaps because most large States long ago adopted broad discovery. But prosecutors in jurisdictions that provide early and extensive pre-trial discovery have often reported that they have "no doubt" that it leads to more guilty pleas, since as one of them commented: "a defense attorney can better convince the [defendant] to take a plea. . . . [Discovery] avoids the concern that the DA is selling the defendant a bill of goods." On the administrative costs, prosecutors have made comments such as: "we hire a few people at minimum wage to copy all files (except for attorney work-product). Copies are put in a central depository and public defenders just come by a window and pick the material up." See Report to the New York State Assembly Codes Committee, "Criminal Discovery in New York State: Current Practice and Proposals for Change" (1991), pp. 79-82; accord The Justice Project, "Expanded Discovery in Criminal Cases: A Policy Review" (2007), p. 20 (quoting a North Carolina District Attorney regarding that State's adoption in 2004 of open discovery: "[Open discovery] is more likely to generate guilty pleas. If you have good evidence, the lawyer tells the client to plead guilty"); Janet Moore, "Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*," 77 Brook. L. Rev. 1329, 1383 & n.384 (2012) (summarizing interviews with North Carolina practitioners, including the Chief Resource Prosecutor of the North Carolina Conference of District Attorneys, by stating: "Full open file discovery appears to be increasing the speed and fairness of plea bargaining").

⁷ See, e.g., *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011).

witnesses (so-called “*Rosario* material”), does not need to be divulged until after the jury has already been selected and sworn at a trial.⁸

By that point, guilty plea offers have been rejected based upon mere guesswork about the possible evidence; and it is usually impossible to undertake useful investigations of the new information during trial. Defense lawyers are expected to have the skills of legal superheroes, who can suddenly review and react to a stack of paperwork, evaluate often surprising and previously unknown facts, and develop or alter trial strategies on the spot while jurors sit watching and with the client’s life in the balance. Surprise evidence like this can readily produce unreliable verdicts and wrongful convictions. Yet New York institutionalizes this unacceptable approach of “trial by ambush.”

New York’s discovery statute does not even direct prosecutors to disclose all known information and evidence that potentially shows the defendant is innocent or that supports a defense. Instead, it simply tells them without elaboration to follow constitutional requirements.⁹ Some prosecutors interpret this to mean that they need disclose only the limited category of “materially” exculpatory evidence – that is, just that exculpatory evidence which, in the prosecutor’s own opinion, would create a “reasonable probability” that the result of the proceeding would be different or “undermine confidence” in a conviction.¹⁰ This standard is inadequate because often prosecutors do not know the defense’s theory of the case at the time decisions about disclosure are made, so they may have little basis for making accurate “materiality” assessments. The discovery statutes in many other States reject this antiquated approach, which jeopardizes fair trials and reliable verdicts. They specifically require prosecutors to disclose *all* known exculpatory or mitigating information, without speculation as to whether it would be “material” to a jury’s finding of guilt.¹¹

⁸ CPL §240.45(1)(a).

⁹ CPL §240.20(1)(h).

¹⁰ See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001); *People v. Fuentes*, 12 N.Y.3d 259, 260 (2009); *People v. Vilardi*, 76 N.Y.2d 67, 77 (1990).

¹¹ See, e.g., Ariz. R.Crim.P. 15.1(b)(8); Cal. Penal Code §1054.1(e); Colo. R.Crim.P. 16 Part I (a)(2); Ill. S. Ct. R. 412 (c); Mass. R.Crim.P. 14(a)(1)(A)(iii); Md. R. 4-263(d)(5), (d)(6); Mich. CR 6.201(B)(1); Minn. R.Crim.P. 9.01 Subd. 1 (6); Tex. Crim. Pro. Art. 39.14(h); Wash. C.R.R. 4.7(a)(3); see also New York State Rules of Professional Conduct, Rule 3.8(b) (“Special Responsibilities of Prosecutors and Other Government Lawyers”); ABA Formal Opinion 09-454 (“Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense”); ABA Resolution 105D (adopted by the ABA House of Delegates, August 8-9, 2011) (urging federal, state, territorial and

In some counties of New York State, the District Attorneys have abandoned article 240 on their own. They voluntarily offer defendants forms of “open file” discovery early in the case. Significantly, a survey conducted by the New York County Lawyers’ Association found that “those boroughs [of New York City] with more liberal disclosure report the most universal satisfaction with the process *regardless of position within the system*.”¹² These District Attorneys have also jettisoned article 240’s inefficient and needless requirement that both parties file written “demands” to obtain routine discovery. They make discovery automatic, recognizing that few litigants will ever have a sound reason to forgo discovery. Eliminating this formulaic paperwork has saved defense lawyers, prosecutors, and the courts in these counties pointless burdens. But while these are salutary developments, the resulting unequal treatment of defendants statewide – where the quality of discovery and thus the fairness of the process depends on the arbitrary distinction of which county the offense allegedly occurred in – is troubling and undermines the idea of uniform application of the laws upon which public respect for fair law is based.

The Legislature last enacted major revisions to the discovery rules over thirty years ago, in 1979. Yet the criminal justice system has been transformed in several ways during that period, with major implications for discovery. Most fundamentally, criminal practice has been transformed from a “system of trials” into a “system of pleas” in recent decades, as the United States Supreme Court recently recognized when expanding criminal defendants’ rights to competent representation in the plea process. Plea negotiations have by now supplanted trials as “the critical point” in most cases.¹³ The exact boundaries of the Court’s decisions have not yet been fully established, but the transformation they recognized has obvious implications on discovery since defense lawyers are obligated to fulfill “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’”¹⁴ Giving meaningful advice about “advantages and

tribal governments to adopt disclosure rules for favorable information as described in ABA Formal Opinion 09-454, with detailed accompanying report).

¹² New York County Lawyers’ Association, “Discovery in New York Criminal Courts: Survey Report and Recommendations” (2006), p. 2 (emphasis added); *see also* The Spangenberg Group, “Status of Indigent Defense In New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services” (2006), pp. 77-83, 146-48.

¹³ *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (“plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system”) (emphasis in original).

¹⁴ *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1484 (2010); *accord Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of

disadvantages” of a plea offer normally presupposes, as a practical matter, that the lawyer actually has information about the witnesses and evidence that will be presented at trial. But article 240 does not guarantee the defense access to facts that facilitate proper advice. The “critical” decision that the vast majority of New York defendants must make devolves into a bare mathematical calculation involving potential sentence risks, with the defense lawyer able to say little more than that, in her past experience, the evidence at trial sometimes turns out to be strong and sometimes turns out to be weak.

The need for modernizing the discovery rules is also evident because other options for obtaining discovery have been virtually eliminated since 1979. Preliminary hearings at which some prosecution witnesses testified were commonplace in felony cases decades ago, and those hearings provided extensive discovery. Yet today preliminary hearings are all but extinct in most parts of the State. Defense subpoenas for items or documents possessed by police and prosecutors were routinely issued and complied with in past decades. But for at least the last dozen years, restrictions imposed by appellate courts have virtually ended that alternative discovery option.¹⁵ Only a legislative solution, therefore, can rectify the current crisis in New York criminal discovery.

While early and broad discovery would have enormous benefits, providing access to the prosecution’s evidence also could present increased opportunities for misuse of disclosed information. Finding the proper balance between affording timely disclosure of witness information – yet maintaining procedures that are adequate to protect witnesses as needed – is the persistent snag that has held back criminal discovery reform in New York for many years. The Task Force believes that this problem can be resolved.

II. The Task Force’s General Recommendations for Criminal Discovery Reform

Large-scale changes to Criminal Procedure Law article 240 are needed to make criminal discovery practice more fair and efficient, and to return New York State’s criminal justice system to

guilty pleas. . . . [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays. . . .”).

¹⁵ *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Bagley*, 279 A.D.2d 426 (1st Dept. 2001).

the mainstream nationally. The Task Force suggests that the Legislature enact five key changes in particular:

(1.) The defense should receive the early disclosure of witness information that is provided in other States. But several special procedures that go beyond those used in other States should also be enacted to assist courts, prosecutors, and defense lawyers in the shared goal of ensuring safety for witnesses. As a further counterpart of discovery reform, the penalties for the offenses of tampering with a witness and intimidating a victim or witness should be significantly enhanced.

(2.) The discovery available to defendants should include additional types of material and information, including: police reports; increased disclosure of evidence and information favorable to the defense; intended exhibits; greater disclosure of expert opinion evidence; witnesses' criminal history information; timely notice of potentially suppressible property; and search warrant information.

(3.) The defendant's obligations to provide reciprocal discovery for the prosecution should be considerably expanded.

(4.) The prosecution's disclosures should occur in a multi-stage time frame that prosecutors actually can meet.

(5.) For rule violations and lapses that inevitably will occur in any discovery process despite the parties' reasonable efforts to comply, courts should not penalize prosecutors or defense lawyers with "sanctions" but should simply "remedy" violations when they are significantly prejudicial.

The Task Force further recommends adoption of several other measures that would facilitate the goals of, and improve compliance with, the discovery statute. These proposals include: allowing discretionary discovery by court order; requiring "certificates of compliance" to be filed by lawyers (albeit ones that do not in themselves present a basis for litigation or for penalizing litigants); disclosure before trial of defendants' uncharged misconduct to be offered as substantive evidence; and certain changes to subpoena law and to the statutes concerning pre-trial notice of some kinds of suppressible evidence. On the other hand, the Task Force does *not* presently recommend that any statutory obligation to provide discovery prior to pleas of guilty be adopted. We now turn to explaining each of these recommendations.

A. Discovery of Witness Information – But With Several Special Procedures to Help Ensure Safety of Witnesses

1. *Witness Information Should Be Discoverable*

The several dozen States with modern criminal discovery rules have recognized that it is critical that both parties receive enough information through discovery to locate witnesses as necessary (barring circumstances that justify a protective order). This means exchanging their names and addresses.¹⁶ Many other States also have rules that require the prosecution to disclose names or addresses of witnesses on the indictment or otherwise.¹⁷ The Task Force agrees with this nationwide consensus. But we recommend that, in the alternative to disclosing a person’s address, the prosecution should be permitted to provide “adequate alternative contact information.” Moreover, only the business addresses, not the home addresses, of police officers, governmental officials, and expert witnesses should be discoverable.

This uniform modern discovery practice derives from the bedrock legal principle that witnesses “belong” to neither party. A fundamental rule in this country is that both sides in the case

¹⁶ See Alaska R.Crim.P. 16(b)(1)(A)(i); Ariz.R.Crim.P. 15.1(b)(1); Ark.R.Crim.P. 17.1(a)(i); Cal.Pen. Code §1054.1(a); Colo.Crim.P.R. 16, Part I (a)(1)(VII); Conn.R.Super.Ct.Crim. §40-13(a); Fla.R.Crim.P. 3.220(b)(1)(A); Hawaii R. Penal P. 16(b)(1)(i); Idaho R.Crim.P. 16(b)(6); Ill. Sup.Ct.R. 412(a)(i); Me.R.Crim.P. 16(b)(2)(C); Md.R. 4-263(d)(3), 4-262(d)(2)(B); Mass.R.Crim.P. 14(a)(1)(A)(iv); Mich.Ct.R. 6.201(A)(1); Minn.R.Crim.P. 9.01 Subd. 1, (1)(a); Miss.U.R.C.C.C. 9.04(A)(1); Mo.R.Crim.P. 25.03(A)(1); Mont. Code Ann. §46-15-322(1)(a); Neb.Rev.Stat. §29-1912(1)(d); Nev. Rev. Stat. Ann. §174.275; N.H.R.Super.Ct. 98(C)(1) (names not addresses); N.J.Crim.R. 3:13-3(c)(6); N.M.Dist.Ct.R.Crim.P. 5-501(A)(5); N.C.Gen.Stat. Ann. §15A-904(a)(a2); N.D.R.Crim.P. 16(f)(1)(A); Ohio R.Crim.P. 16(I); Okla.Stat. Ann. tit. 22, §32-2002(A)(1)(a); Or.Rev.Stat. §135.815(1)(a); Pa.R.Crim.P. 573(B)(2)(a)(i); R.I. R.Super.Ct.R.C.R.P. Rule 16(a)(7); Vt.R.Crim.P. 16(a)(2)(E); Wash.Super.Ct.Crim.R. 4.7(a)(1)(i); W.Va.R.Crim.P. 16(a)(1)(F); Wi.Stat. Ann. §971.23(1)(d).

¹⁷ See, e.g., Ga. Super. Ct. R. 30.3 (“the district attorney shall furnish to defense counsel as an officer of the court, in confidence, the addresses and telephone numbers of the state’s witnesses to the extent such are within the knowledge of the district attorney”); Ga. Code Ann. §§17-16-3, 17-16-21 (“list of witnesses” prior to arraignment); Ind. Code Ann. §35-34-1-2(c) (“An indictment or information shall have stated upon it the names of all the material witnesses”); Ia. R. 2.4(6) (indictment includes “notice in writing stating the name and occupation of the witness upon whose testimony the indictment is found, and a full and fair statement of the witness’ testimony. . . . The clerk of the court must, on demand made, furnish the defendant or his or her counsel a copy thereof”); Kan. Stat. Ann. §22-3201(g) (“the prosecuting attorney shall endorse the names of all witnesses known to the prosecuting attorney upon the complaint, information and indictment. . . . [I]n no event shall identification of a witness be delayed beyond arraignment without further order of the court after hearing and an opportunity of the defendant to be heard”); Ky. R. Crim. P. 6.08 (indictment lists “names of all the witnesses who were examined”); S.D. C.L. §23A-5-18 (indictment contains “names of only those witnesses examined before the grand jury”); Tenn. Code Ann. §40-13-107 (indictment lists “names of the witnesses”); Tex. Crim. Pro. Art. 20.20 (indictment lists “names of the witnesses upon whose testimony the [indictment] was found”); Utah R. Crim. P. 4 (j) (indictment or information lists “names of witnesses” on whose evidence it was based and prosecutor shall upon request furnish “names of other witnesses”); Va. Code Ann. §19.2-228 (“name and address of the complaining witness” in misdemeanor cases); see also Ala. Code §§15-11-1, 15-11-6 (right to preliminary hearing at which complainant and witnesses testify in the defendant’s presence); Va. Code Ann. §19.2-183 (similar).

have an equal right, and should have an equal opportunity, to interview willing witnesses and to learn as much about the case as they can while acting in a professional and ethical manner. As the United States Supreme Court has stated, “[t]he traditional counterbalance in the American adversary system” for prosecutors’ pre-trial interviews with and access to witnesses “arises from the equal ability of defense counsel to seek and interview witnesses himself.” New York State court decisions have, likewise, consistently adhered to the seminal rule that witnesses are to be equally shared by the parties.¹⁸

Furthermore, the New York Court of Appeals recently ruled that prosecutors and police have no affirmative duty whatsoever to investigate witnesses or to seek any exculpatory evidence. Those duties fall wholly on the defense lawyer.¹⁹ That the Court has placed this pivotal function squarely and exclusively on defense lawyers further confirms that New York’s criminal discovery statute should now be modified in a way that enables them to fulfill it.

Early disclosure of witnesses’ contact information is often essential for the defense lawyer or investigator who needs to undertake an intelligent investigation of the charges; to evaluate and develop available defenses; and to provide the defendant with informed advice concerning the advisability of pleading guilty. All experienced investigators know that conducting an early investigation – when witnesses are still available, their memories are fresh, and physical evidence has not yet been lost or destroyed – is critically important for finding and preserving any exculpatory evidence and for learning the vital details.

New York has long recognized, for example, that *prosecutors* have a legitimate and crucial need for prompt discovery of adequate information to investigate the defendant’s “alibi defense” witnesses. Defendants are required, therefore, to timely turn over “the names, the residential

¹⁸ *United States v. Ash*, 413 U.S. 300, 318 (1973); accord *United States v. Carrigan*, 804 F.2d 599, 603 (10th Cir.1986); *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985); *United States v. Long*, 449 F.2d 288, 295 (8th Cir. 1971); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); *Schulz v. Marshall*, 528 F. Supp. 2d 77, 98 (E.D.N.Y. 2007), *aff’d*, 345 Fed.Appx. 627 (2d Cir. 2009); *People v. Greene*, 153 A.D.2d 439, 448 (2d Dept. 1990) (“a witness is not the property of either party”) (citation omitted); *People v. Eanes*, 43 A.D.2d 744 (2d Dept. 1973); *People v. DeVecchio*, 17 Misc.3d 1114(A), 2 (Sup. Ct., Kings Co. 2007); *People v. Marino*, 87 Misc.2d 542, 543 (Co. Ct., Monroe Co. 1976); see also *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. Townsley*, 20 N.Y.3d 294, 300 (2012) (“a lawyer’s interviewing a witness in the hope of getting favorable testimony . . . is not in the least improper. It is what good lawyers do”).

¹⁹ See *People v. Hayes*, 17 N.Y.3d 46, 52 (2011) (“[we] decline to impose an affirmative obligation upon the police to obtain exculpatory information for criminal defendants”).

addresses, the places of employment and the addresses thereof of every [] alibi witness.”²⁰ When the defense serves alibi notice, prosecutors quickly dispatch investigators or police to conduct face-to-face interviews with these potential witnesses. It is equally important for both parties to exchange sufficient information to find and investigate *other* types of witnesses as well.

Frequently the defense lawyer has no way to investigate meaningfully without receiving such information from the prosecution. Defense practitioners have found that, in many cases, the defendant is incapable of providing any investigable information or viable leads to locate witnesses.²¹ Further, merely disclosing witnesses’ *names* during discovery is inadequate, because many names are too common to be useful in finding and investigating a person. Instead, an address (not necessarily the home address) is needed. The alibi notice statute recognizes and solves this problem by requiring disclosure of both home addresses and workplace addresses.

Disclosure of witness information also substantially expedites the resolution of many cases in which a defendant is willing to enter a guilty plea, but hesitates to do so because he or she hopes or does not believe that a complainant or other key witness will testify. When these defendants see from the discovery materials that there actually is a specific witness who is going to testify – or hear from the defense lawyer or investigator what the witness has told them, and how the jury will likely react to the person’s demeanor – generally they are far less reluctant to actually enter the guilty plea. Earlier guilty pleas unclog the courts and save taxpayers money.

In contrast, when defense lawyers are deprived of such discovery, they are regularly unable to give meaningful and informed advice concerning plea offers. Without the means to investigate or evaluate the witnesses, their advice is often reduced to a mathematical calculation of risks (“You’re facing 5 years’ prison – I can’t tell you anything more about the evidence. Do you want the plea?”). Trust between court-appointed counsel and defendants is severely eroded, and the court system is beset by recurring delays when defendants request new lawyers.

Another key point is that, regardless of whether the prosecutor reveals witness names, defense lawyers have the ethical and constitutional obligation to *try* to investigate the prosecution’s

²⁰ CPL §250.20(1).

²¹ See Jenny Roberts, “Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases,” 31 Fordham Urb. L. J. 1097, 1102-03 (2004).

witnesses.²² Determined defense lawyers quite often can find a witness. But given the drastically limited resources available to the court-appointed counsel who handle the majority of criminal matters, and the enormous time, expense and “shoe leather” needed to canvass a neighborhood, success in such investigations is possible only in a few cases and often depends on chance factors. The result is a wasteful system in which the same government pays one party in the system to hide information that it possesses, while simultaneously paying the other party to waste its scarce resources trying to uncover the very same facts. Most disturbingly, discovery becomes a matter of luck, not of right – and defense lawyers must use guesswork to try to decide which cases merit the extra effort to find basic information.

Requiring the prosecution to disclose its prospective witnesses – subject to special procedures that allow withholding or restricting of this discovery when appropriate, such as those we recommend below in Section II-A-2 – actually will *improve* witness safety in many cases, by bringing the information into the open and placing strict limitations on disclosure. Opponents of discovery of witnesses ignore that currently defense lawyers have the duty to attempt to identify witnesses and investigate them, and frequently get results – and that usually it is easiest to find witnesses in the most violent and notorious offenses such as homicides and shootings. But because these investigations happen off-the-record, under the current discovery system nothing regulates the exchange of information between the defense lawyer and the defendant. Absent a legal directive, the attorney has no ethical right to withhold information from her clients simply because she has a “bad feeling” about it. Indeed, without disclosure, sometimes the only resources defense counsel has to locate witnesses is the defendant, and the defendant’s friends, and it becomes necessary to disclose whatever information defense counsel has to these individuals in order to attempt to contact witnesses. Thus, one of the great advantages for prosecutors of the proposed discovery rules is that, by obtaining a protective order, the prosecutor can place limits on the defense lawyer’s disclosure of information to the defendant in situations where it is inappropriate. In the absence of this change in

²² See *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits”) (quoting the ABA Standards for Criminal Justice); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *People v. Oliveras*, 21 N.Y.3d 339, 346-48 (2013); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) (“the defendant’s right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial”); *People v. Green*, 37 A.D.3d 615 (2d Dept. 2007); *People v. Fogle*, 307 A.D.2d 299, 301 (2d Dept. 2003).

New York law, such limitations would not be available where defense counsel is obtaining the information independently.

“Appendix A” of this report includes a sampling of ten cases that illustrate ways in which enacting a statutory requirement to disclose witness information is vital to improving the reliability, fairness, and efficiency of New York’s criminal justice system. The troubling question that the examples discussed in this Appendix raise is: *in how many other cases was this kind of crucial information never found?* The record of wrongful convictions in New York State makes this especially distressing.

As long ago as 1991 a detailed report submitted to the New York State Assembly Codes Committee surveyed nationwide discovery practices and determined that, “[o]f the ten largest cities, New York City is the only one located in a state that does not provide for pre-trial disclosure of witness lists.” This report also found that the discovery rules in comparable States did not result in a general problem of witness intimidation, and that not only defense lawyers but also prosecutors strongly approved of the discovery practices and found them to be efficient and fair.²³ The Task Force has discerned no valid basis on which to conclude that the same types of discovery rules for witness information that have worked for decades in comparable States such as California, Florida, Illinois, Massachusetts, Michigan, New Jersey, Ohio and Pennsylvania would not also be practicable in New York – especially if the extra procedures that we recommend as a counterpart to discovery reform are adopted.

Of the more than thirty States with modern discovery rules, only a handful give the prosecution any way to restrict disclosure of witnesses’ addresses (but *not* their names) other than by obtaining a protective order from the court that allows non-disclosure. In California, prosecutors must disclose witnesses’ names, but discovery of addresses and telephone numbers is restricted to only the defense lawyer and defense personnel (and not to the defendant or anyone else) unless the court orders otherwise. In Maryland, prosecutors must disclose witnesses’ names, but in felony cases their addresses and telephone numbers may be withheld until trial upon request unless the

²³ Report to the New York State Assembly Codes Committee, “Criminal Discovery in New York State: Current Practice and Proposals for Change” (1991), p. 15; *accord* Cary Clennon, “Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia,” 38 Cath. U. L. Rev. 641, 662 (1989) (“The most serious objection to disclosure of witness lists is the prospect of widespread witness tampering. . . . Practitioners from jurisdictions with broad discovery, both local and federal, have downplayed its occurrence”).

court orders disclosure. In Michigan, prosecutors must disclose witnesses' names, but their addresses may be withheld when the witness is made available for a pre-trial interview. In Ohio, prosecutors have the option to designate any material as "counsel only," or to certify to the court that material is not being disclosed based upon "reasonable, articulable grounds" to believe disclosure will compromise safety or subject a person to harm, or that interests of justice require non-disclosure, and then, upon motion of the defendant, the court must hold a hearing to review the prosecutor's decisions with participation by defense counsel.²⁴

It is currently standard practice in most parts of New York State – including in four of the five boroughs of New York City – for prosecutors to include the name of the complaining witness in the complaint (except in unusual circumstances), even though the law does not require them to do so. In other New York counties, however, it is the routine practice for the prosecution to withhold even that rudimentary fact until trial, especially in felony cases. The defendant is told in the complaint and the indictment merely that an anonymous "person known to the District Attorney's Office" or "known to the Grand Jury" has accused him of the crimes. Defendants have no way, in practice, to learn the identity of their accusers, let alone to investigate and intelligently assess the case, until trial is underway. Appellate courts have determined that there is ordinarily no right to pre-trial disclosure of the identity of one's accuser.²⁵

When defendants in one county receive the names of their accusers in the complaint – while those in other counties are told only that an anonymous "person known to the District Attorney's Office" has accused them of crimes – it creates a public perception that there is not equal justice in this State, and that the system cannot be trusted. The general practice of most District Attorneys in New York State to disclose complainants' names early in the vast majority of cases also renders suspect the protestations that a discovery obligation that includes witness information would result in widespread new interference with witnesses and dissuade their cooperation.

²⁴ Cal.Pen. Code §1054.2; Md.R. 11-205; Mich.Ct.R. 6.201(A)(1); Ohio R.Crim.P. 16(C),(D),(F). In Ohio, West Virginia and Wisconsin, prosecutors also have the option to memorialize a witness's testimony at a deposition or a hearing, at which the defense may cross-examine the witness, prior to disclosure of his or her name and address, and the record of that testimony is admissible if the witness later becomes unavailable through no fault of the state. Ohio R.Crim.P. 16(G); W.Va.R.Crim.P. 16(a)(1)(F); Wi.Stat.Ann. §971.23(6).

²⁵ *People v. Miller*, 106 A.D.2d 787, 788 (3rd Dept. 1984) ("There is neither a constitutional nor statutory obligation mandating the pretrial disclosure of the identity of a prosecution witness"); *accord People v. Lynch*, 23 N.Y.2d 262, 271-72 (1968); *People v. Emiliano*, 81 A.D.3d 436, 438 (1st Dept. 2011); *People v. Estrada*, 1 A.D.3d 928, 929 (4th Dept. 2003); *People v. Izquierdo*, 292 A.D.2d 247, 248 (1st Dept. 2002); *cf. People v. Andre W.*, 44 N.Y.2d 179, 185-86 (1978).

As for the specific standard that should be employed, the Task Force recommends that the prosecution be required to disclose names and addresses, or adequate alternative contact information (if known), for all persons who the prosecutor knows have evidence or information relevant to any offense charged or to a potential defense – not merely for “intended” witnesses. Only business addresses of police and governmental officials and expert witnesses would be disclosed. Such a formulation of the discovery requirement is recommended by the American Bar Association’s model discovery provisions and is used in States such as New Jersey, Florida and Minnesota.²⁶ It recognizes that prosecutors should not refrain from also disclosing information about known potential *defense* witnesses. It will thus minimize possible “gamesmanship” during the discovery process, and help to avoid constitutional violations since it requires disclosure of potentially exculpatory witnesses. It also avoids the difficulty that prosecutors may have in determining accurately at an early stage in the case which individuals actually will be called to testify at trial (although it does ask that prosecutors endeavor to specify which people they are intending to call at trial, to the extent practicable).²⁷

2. Five Special Procedures for Witness Safety Also Should Be Enacted

While other States rely solely on the court’s issuance of a protective order when the prosecution wishes to withhold a witness’s name or address, the Task Force believes that several additional tools should be available in New York to assist in ensuring safety of witnesses as needed. Five measures designed to help protect witnesses should be enacted.

(i.) *A Broad and Flexible Standard for Protective Orders, and a Procedure for Expedited Review of Rulings on Certain Protective Order Applications:* The statutory definition of good cause for a protective order should be revised to explicitly highlight factors such as dangers arising from gang affiliations. This would make it even more clear that the standard is designed to give judges robust and flexible leeway to issue orders letting the prosecution withhold information, whenever any other factors outweigh its usefulness. The statute should allow any kind of discoverable item or

²⁶ N.J. CT. R. 3:13-3(c)(6); Fla. R. C.P. 3.220(b)(1)(A); Minn. R.Crim.P. 9.01 Subd. 1 (1)(b); Alaska RCP 16 (b)(1)(A)(i); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(ii) (3d ed. 1996); *see also* N.C. Gen. Stat. §15A-903(a)(1)(a); Vt.R.Crim.P. 16(a)(1).

²⁷ Sample statutory language defining the standard for disclosure of civilian witnesses’ names and contact information could be as follows: “The prosecution shall disclose: . . . The names of, and addresses or adequate alternative contact information for, all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to a potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.”

information to be withheld, or permit its disclosure to be delayed, based upon an *ex parte* showing at any point (as under current Criminal Procedure Law §240.50[1]).²⁸

The provision for protective orders should also specify that it is permissible for the court in appropriate cases to restrict disclosure of physical copies of discovery documents to only the lawyer, not to the defendant or others, provided the defendant is given access to inspect (not obtain copies of) redacted versions of such documents. This procedure is used in certain States when a protective order is issued (albeit it is not explicitly described in their discovery statutes). Flagging it in the statute will address prosecutors' oft-stated concerns that occasionally physical copies of discovery materials are improperly posted or circulated by defendants in an effort to intimidate witnesses.²⁹

The Task Force also recommends that an expedited and streamlined review procedure for certain protective order applications be enacted. It should allow either party to present arguments before a single appellate justice, under flexible procedures to be set by the appellate court, in situations where either the lower court denies a protective order and the prosecutor believes that a witness's safety could be jeopardized, or the lower court grants a protective order and the defense believes that the information is critical and there is an inadequate basis for withholding it from defense counsel. This sort of expedited review would be an important "safety valve" in the system to ensure appropriate rulings. Moreover, the provision could be carefully crafted to minimize its

²⁸ Sample statutory language defining "good cause" for issuance of a protective order could be as follows: "Good cause under this section may include constitutional rights or limitations; danger to the integrity of physical evidence; a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person; a substantial risk of an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants; danger to any person stemming from factors such as a defendant's gang affiliation, prior history of interfering with witnesses, or threats or intimidating actions directed at potential witnesses; or other similar factors that also outweigh the usefulness of the discovery."

²⁹ Sample statutory language regarding the availability of a protective order could be as follows: "Upon a showing of good cause by either party, the court may at any time order that discovery or inspection of any kind of material or information under this article be denied, restricted, conditioned or deferred, or make such other order as is appropriate. The court may impose as a condition on discovery to a defendant that the material or information to be discovered be available only to counsel for the defendant; or, alternatively, that counsel for the defendant, and persons employed by the attorney or appointed by the court to assist in the investigation or preparation of a defendant's case, may not disclose physical copies of the discoverable documents to a defendant or to anyone else, provided that the prosecution affords the defendant access to inspect redacted copies of the discoverable documents at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, facility of detention, or court. The court may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record *ex parte* or *in camera*. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. This section does not alter the allocation of the burden of proof with regard to matters at issue, including privilege."

burden on the limited resources of appellate courts, including by requiring the party seeking review to certify that the contested issue is substantial and that diligent efforts at negotiated resolution have failed, and by allowing each appellate court to establish the mode and procedure for its review proceedings (e.g., a court could permit telephone conferences with the appellate justice when appropriate, an informal hearing outside the courtroom, etc.).³⁰

In addition, the protective orders provision should explicitly state that violation of a protective order in the discovery process is a basis for prosecution for criminal contempt in the second degree under Penal Law §215.50. Making clear that criminal prosecution is a consequence for any such violations will deter misconduct, reducing still further the chance that a lawyer or defense personnel would be willing to improperly breach a court order.³¹

(ii.) *Witness Interview As Alternative*: Beyond letting the prosecutor seek a protective order for any item or information at any point, the discovery statute also should give the prosecution an alternative option for withholding a witness's address and contact information even without applying for a protective order. If the prosecutor makes the person available to only counsel for the defendant for a timely interview, disclosure of the person's contact information to the defense should not be required.

³⁰ Sample statutory language for the expedited review procedure could be as follows: “(i) A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to non-disclosure or delayed disclosure of the name of and/or address or contact information for and/or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken. (ii) Such review shall be sought within two business days of the adverse or partially adverse ruling, by order to show cause filed with the intermediate appellate court. The order to show cause shall in addition be timely served on the lower court and on the opposing party, and shall be accompanied by a sworn affirmation stating in good faith (a) that the ruling affects substantial interests, and (b) that diligent efforts to reach an accommodation of the underlying discovery dispute with opposing counsel failed or that no accommodation was feasible; except that service on the opposing party, and a statement regarding efforts to reach an accommodation, are unnecessary where the opposing party was not made aware of the application for a protective order and good cause exists for omitting service of the order to show cause on the opposing party. The lower court's order subject to review shall be stayed until the appellate justice renders decision. (iii) The assignment of the individual appellate justice, and the mode of and procedure for the review, are determined by rules of the individual appellate courts. The appellate justice may consider any relevant and reliable information bearing on the issue, and may dispense with written briefs other than supporting and opposing materials previously submitted to the lower court. The appellate justice may dispense with the issuance of a written opinion in rendering his or her decision, and when practicable shall render decision expeditiously. Such review and decision shall not affect the right of a defendant, in a subsequent appeal from a judgment of conviction, to claim as error the ruling reviewed.”

³¹ Sample statutory language making clear that violation of a protective order in the discovery process is a basis for criminal prosecution could be as follows: “Any protective order issued under this article is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law.”

Notably, the Task Force believes that face-to-face interviews between defense counsel and the witness are preferable to telephone interviews, since phone interviews often are more perfunctory and it is harder for the lawyer to evaluate the witness's demeanor and to have a useful discussion over the phone. Prosecutors and police are not limited to only phone interviews, and the lawyers for both parties ordinarily should have the chance to meet the witnesses given that witnesses "belong" to neither side. But in situations where arranging an in-person interview with defense counsel is not reasonably practicable, or the witness declines to participate in an in-person interview with counsel, a telephone interview should be an acceptable alternative. The statute should direct law enforcement personnel not to encourage a witness, either expressly or implicitly, to decline an in-person interview.³²

(iii.) *Confidential List of Addresses As Alternative*: In cases involving a violent felony charge, the discovery statute should give the prosecution a further alternative option to withhold witnesses' addresses or contact information even without applying for a protective order. The prosecutor should be able to separately disclose a confidential list containing addresses or adequate alternative contact information for the witnesses that would be available only to defense counsel and named defense personnel, who would be prohibited from disclosing it to the defendant or anyone else. In addition, prosecutors should be entitled to make disclosure of this information contingent upon the defendant's personal consent in advance to the use of the attorney-only confidentiality procedure, after on-the-record warnings by the court against the offenses of witness tampering and intimidating a victim or witness. If the defendant opts not to agree to use of this procedure, then no contact information would have to be disclosed to the defense at all.

For the prosecution, the main advantage of this "confidential document" procedure is that the prosecutor would not have to make any particularized showing of good cause in violent felony cases to obtain a protective order that restricts disclosure of addresses. (But, of course, a prosecutor

³² Sample statutory language for the alternative "witness interview" option could be as follows: "Within the prosecutor's discretion, the address, telephone number or similar contact information for any person whose name is disclosed pursuant to this section may be withheld, and redacted from other discovery materials, without need for a motion for a protective order, if the prosecutor makes the person available to counsel for the defendant for an in-person interview within the time period specified for Phase One discovery. In lieu of an in-person interview, a telephone interview may be used where arranging an in-person interview is not reasonably practicable or the person declines to participate in an in-person interview; but law enforcement personnel shall not expressly or implicitly encourage a person to decline to participate in an in-person interview. This subdivision does not create any right for the defendant personally to attend or to participate in such an interview."

always would be free to move for a protective order that authorized even more extensive or complete withholding of names or addresses, or of any other information.)

For the defense, this approach recognizes that the defendant himself – in contrast to the defense lawyer or investigator – does not in general need to learn witnesses’ addresses (unlike their names, which often are essential to comprehending and discussing a case). In contrast, the defense lawyer in many cases is unable to investigate or to develop defenses until he or she is provided with addresses or contact information for finding and/or investigating the witnesses. Having the court elicit the defendant’s own advanced consent on the record also could help to reduce problems for defense lawyers, who may not want to be put in the awkward position of having to withhold information from their own clients. By making the defendant agree to the attorney-only confidentiality procedure beforehand, the defendant would not then misunderstand this restriction as having originated from his or her own lawyer. A lawyer who prefers not to have the responsibility of knowing witness information, and having to keep it confidential, also could waive the right to receive the information.

Finally, the statute should include an affirmative mandate requiring defense lawyers to notify the court or the prosecutor expeditiously if they learn about any intentional or unintentional breach of the confidentiality procedure that is attributable to a lawyer for any defendant, an employee of a defense lawyer, or a court-appointed investigator. This would ensure prompt steps to remedy a known breach and to maintain witness security. And the statute should explicitly state that violation of the confidentiality procedure is a basis for prosecution for criminal contempt in the second degree under Penal Law §215.50.³³

³³ Sample statutory language for the alternative “confidential list” option could be as follows: “(i) Where the defendant is charged with a violent felony offense, within the prosecutor’s discretion the address, telephone number or similar contact information for any person whose name is disclosed pursuant to this section may be withheld, and redacted from other discovery materials, without need for a motion for a protective order; except that a list of the addresses or adequate alternative contact information for persons whose information has been withheld or redacted shall be separately provided to counsel for the defendant in a document clearly marked as confidential, unless a protective order is issued by the court for good cause shown. In addition discovery of this information may be conditioned on the defendant’s personal consent, given in open court in the presence of the court at arraignment or at another time, to the use of the confidentiality procedure set forth in this subdivision. The court shall specifically caution the defendant, in the colloquy about use of this procedure, concerning the offenses of tampering with a witness and intimidating a victim or witness in article 215 of the penal law. Nothing in this subdivision precludes the court from issuing a different protective order for good cause shown.

“(ii) When the confidentiality procedure set forth in this subdivision is used, the following requirements apply:
(a) *Dissemination Prohibited*: Except as provided in the next subsection, counsel for the defendant may not disclose or permit to be disclosed to a defendant or to anyone else the list described in this subdivision or its contents, unless

(iv.) *Exception for Confidential Informants and Undercover Personnel*: The discovery statute should provide that the prosecution may, without having to apply for a protective order, withhold both the names and the contact information of all confidential informants and all undercover law enforcement personnel. But ordinarily the defense should be notified that such information was not disclosed, to avoid potentially misleading the defendant and defense counsel regarding the nature of the case (unless the court rules otherwise for good cause).³⁴

(v.) *Enhanced Penalties for Witness Interference*: If it enacts early and broad discovery rules, the Legislature should also enact additional penalties and/or offenses to deter defendants and others from misusing information provided through the discovery process. The Task Force believes the available penalties for such offenses must be quite significant, so that they actually function as a deterrent against misconduct by defendants who already are charged with serious crimes. Currently the various offenses involving tampering with a witness, and intimidating a victim or witness, are set forth in Penal Law article 215 and range from a Class A misdemeanor to a Class B felony (*i.e.*, for inflicting serious physical injury). The crimes of tampering with a witness in the third degree in Penal Law §215.11 and intimidating a victim or witness in the third degree in Penal Law §215.15

specifically permitted to do so by the court for good cause shown or unless the prosecutor gives written consent. The court may allow a party seeking or opposing such permission, or another affected person, to submit papers or testify on the record *ex parte* or *in camera*. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal. The obligation to maintain confidentiality described in this subdivision is a mandate of the court for purposes of the offense of criminal contempt in subdivision three of section 215.50 of the penal law. (b) *Defense Personnel*: Notwithstanding the previous subsection, counsel for the defendant may disclose or permit to be disclosed the listed contact information for a potential witness to persons employed by the attorney or to persons appointed by the court to assist in the investigation or preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by the attorney shall be informed by the attorney that further dissemination of the information, except as provided by this subdivision, is prohibited. Within the prosecutor's discretion, discovery of the listed contact information may be conditioned on service of a written statement by counsel for the defendant of the names of any employees who may be provided information pursuant to this subsection, and describing any known prior connections between those employees and all defendants in the case. (c) *Pro Se Defendant*: If the defendant is acting as his or her own attorney, in lieu of use of the confidentiality procedure set forth in this subdivision, the court shall consider any arguments of the defendant relating to a need for contact information for a potential witness, and any countervailing arguments of the prosecution or another affected person. Where such arguments are made, the court shall then order as to each such potential witness, as appropriate, that adequate contact information either be provided or be withheld, or provide for contact with the potential witness only through persons appointed by the court to assist in the investigation or preparation of the defendant's case, or impose any other reasonable restrictions on disclosure. (d) *Duty to Report Breach*: If counsel for the defendant learns about any intentional or unintentional breach of the confidentiality procedure set forth in this section that was attributable to conduct of a lawyer for any defendant in the case, or conduct of a person employed by a lawyer in the case or appointed by the court, he or she shall expeditiously notify the court or the prosecutor."

³⁴ Sample statutory language for the "confidential informant/undercover personnel" exception could be as follows: "Information under this section relating to a confidential informant or undercover personnel may be withheld, and redacted from discovery materials, without need for a motion for a protective order; but the defendant shall be notified in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown."

could be elevated from Class E felonies to Class D felonies; and the crimes of tampering with a witness in the second degree in Penal Law §215.12 and intimidating a victim or witness in the second degree in Penal Law §215.16 could be elevated from Class D felonies to Class C felonies. (The much more rare first-degree offenses are already Class B felonies punishable by 25 years' imprisonment.)

B. Discovery From the Prosecution of Additional Types of Information

The Task Force recommends that the rules for discovery from the prosecution should provide for certain additional disclosures. (The recommended time frames for disclosure of each of these specific kinds of items or information should vary, as described below in Section II-D.) These include:

(1.) *Police Reports*: Police reports are a primary source of information for the defendant about a criminal case. They permit the defense lawyer to conduct an intelligent investigation; to plan an appropriate trial strategy; and to confirm the strength of the prosecution's evidence to a defendant considering a guilty plea. Other large States with big cities comparable to New York have required their early disclosure for many years unless the prosecution seeks a protective order. These States include Florida, Massachusetts, Michigan, New Jersey, North Carolina, and Ohio.³⁵

By contrast, many police reports do not have to be disclosed at all under current New York law. Those police reports that are discoverable because they contain written statements by testifying witnesses may be withheld until the trial is underway, which is too late for their use in consideration of plea offers and is normally too late for the defense to investigate information they contain.³⁶ Notably, the Task Force believes that a pragmatic distinction legitimately can be drawn with regard to the time frame for disclosure of these reports, between electronically stored police reports (which are more readily accessible to prosecutors earlier in the case) and other less "formal" police documents such as police memo book notes or vouchers (which are harder to obtain and thus should be discoverable much later). This is described below in Section II-D.

³⁵ Fla. R. C.P. 3.220(b)(1)(B); Mass. R.Crim.P. 14(a)(1)(A)(vii); Mich. CR 6.201(B)(2); N.J. CT. R. 3:13-3(c)(8); N.C. Gen. Stat. §§15A-903(a)(1), (a)(3)(c); Ohio R.Crim.P. 16(B)(6).

³⁶ See CPL §240.45(1)(a).

(2.) *Favorable Evidence and Information:* Timely disclosure by the prosecution of evidence and information that is favorable to the defendant is important. It gives the defense an opportunity to perform intelligent investigations that can develop exculpatory leads and preserve exculpatory evidence, and it enables the defense to incorporate exculpatory evidence into its theory of the case at trial. This reduces the possibility that innocent people will be convicted.

Nevertheless, currently the standards for prosecutors to apply when disclosing favorable evidence and information are wholly unformulated in the discovery statute. It simply directs them to turn over “[a]nything required to be disclosed . . . pursuant to the constitution of this state or of the United States.”³⁷ This lack of specific directives gives litigants and courts no guidance about these critical obligations. The omission has likely contributed to the recurring serious problems of suppression or belated disclosure of exculpatory information by some prosecutors in New York State that have persisted for years, as documented by this Bar Association’s Task Force on Wrongful Convictions.³⁸ The specific disclosure requirements should be plainly set forth in the statute.

The discovery statutes in several other States, for example, require prosecutors to disclose all known exculpatory evidence and information early in the case.³⁹ That standard is designed to make clear that prosecutors making disclosure decisions in the pre-trial context should not apply a so-called “materiality” analysis to restrict discovery of favorable information, but should instead simply turn over all favorable information. The Task Force concurs that the “materiality” limitation that is part of constitutional “*Brady*” law is an appellate standard, which is entirely unsuitable in the pre-trial context.⁴⁰ New York’s discovery statute should explicitly reject any “materiality” limitation on “*Brady*” disclosure.

³⁷ See CPL §240.20(1)(h).

³⁸ New York State Bar Association, “Final Report of the New York State Bar Association’s Task Force on Wrongful Convictions” (2009), pp. 19-44.

³⁹ See, e.g., Ariz. R.Crim.P. 15.1(b)(8); Cal. Penal Code §1054.1(e); Colo. R.Crim.P. 16 Part I (a)(2); Ill. S. Ct. R. 412 (c); Mass. R.Crim.P. 14(a)(1)(A)(iii); Md. R. 4-263(d)(5), (d)(6); Mich. CR 6.201(B)(1); Minn. R.Crim.P. 9.01 Subd. 1 (6); Tex. Crim. Pro. Art. 39.14(h); see also New York State Rules of Professional Conduct, Rule 3.8(b) (“Special Responsibilities of Prosecutors and Other Government Lawyers”); ABA Standards for Criminal Justice: Prosecution Function, Standard 3-3.11(a) (3d ed. 1993); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(viii) (3d ed. 1996).

⁴⁰ Specifically, to obtain a reversal of a conviction on appeal based on a *Brady* violation, the defendant must show that the favorable information withheld by the prosecutor was “material” – meaning it was significant enough to “undermine confidence” in the conviction or create a “reasonable probability” that the result of the proceeding would be

Beyond providing better guidance about the scope of the disclosure obligation and clarifying that a “materiality” threshold does not apply in the pre-trial context, another key benefit of incorporating the duty to disclose favorable evidence into the discovery statute is that it will cause prosecutors to speak with police officers to *learn about* the existence of favorable information – which often is not written down in police reports or otherwise memorialized, and thus can be hard for prosecutors to uncover – considerably earlier in the case. This will result in more prompt disclosures of *Brady* material to the defense, and give the defense a better opportunity to investigate and use that favorable information.

Many prosecutors wait to contact all of the government agents who acted in the investigation to ascertain whether they know of any favorable evidence (whether or not it was written down) until close to the time of a trial or even during the trial. Often this results in untimely disclosure of *Brady* information, or even the failure to disclose *Brady* information when a case is resolved without a trial. By incorporating into the discovery statute an obligation to turn over, by a specified date, any favorable information known to all of the police officers who acted the case – and requiring the prosecutor to certify in writing by that date that reasonable efforts were made to comply with this obligation (as described below in Section II-F-2) – recurring problems of untimely disclosure and non-disclosure of *Brady* materials can be greatly reduced.

There should be no concern that linking disclosure of favorable evidence and information to a statutory time frame may result in *delaying* disclosure of *Brady* material in some situations, because the statute would specify that if a prosecutor learns about any favorable information prior to the statutory disclosure date he or she must turn it over promptly rather than waiting until the end of the statutory period. In addition, this discovery obligation (like all others) would be subject to a

different had it been turned over. *See People v. Fuentes*, 12 N.Y.3d 259, 260 (2009); *accord Strickler v. Greene*, 527 U.S. 263, 296 (1999). That analysis is appropriate in the appellate context, since the key question on appeal is whether the defendant’s conviction must be reversed because the failure to disclose the favorable evidence prejudiced the outcome. By contrast, the key question in the pre-trial period should not be whether the defendant would be able to demonstrate prejudice in the event of a conviction. It should simply be whether the information is favorable, and, thus, the process would be more fair and reliable if there is disclosure. “Materiality” analysis also is unsuitable in the pre-trial context because the prosecutor frequently does not know the nature or full contents of the defense theory of the case at that stage. Hence, he or she may be unable to make accurate judgments about the “materiality” of various kinds of information. For these and other reasons, screening for “materiality” is unjustified before trial. *See generally United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013); *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-40 (D.Nev. 2005); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D.Cal. 1999); *see also People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

continuing duty to disclose any additional information learned later in the case. And the mandate would be achievable in practice by prosecutors, especially since nothing in it would prevent a prosecutor from delegating the task of making affirmative inquiries of all police officers who acted in the case – which is constitutionally required, in any event⁴¹ – to a lead case agent or in another reasonable way.

As for the specific standard that should be enacted, the Task Force recommends that the discovery statute require the prosecution to disclose all known evidence and information that tends to exculpate the defendant, to mitigate the level of the defendant’s culpability, to support a potential defense, or to mitigate punishment.

Disclosure of information that tends to impeach a prosecution witness’s credibility also should be required.⁴² But if the Task Force’s recommendation about a two-stage time frame for the prosecution’s discovery is adopted (as discussed below in Section II-D), it would be appropriate for the statute to differentiate between the obligations to disclose impeachment information at the two phases of discovery. At the earlier stage, it should require more limited disclosure of impeachment facts known to the prosecutor at that time that would “significantly” impugn the credibility of an “important” prosecution witness, informant or evidence; whereas at the later stage, it should require disclosure of *all* impeachment facts known to prosecutors and police acting in the case that tend to impugn the credibility of any prosecution witness, informant or evidence.

Employing two separate time frames for disclosure is needed to take into account the constitutional rule that the prosecution must turn over not only favorable information personally known to the prosecutor, but also favorable information known to police officers and other members of the law enforcement team acting in the case.⁴³ Given this broad disclosure duty, it would be impracticable to expect prosecutors with heavy case loads to contact all of the police officers – and to identify all of the plethora of possible impeachment information that could exist in a given case – within days of arraignment. Prosecutors should, instead, have a broader time frame to

⁴¹ See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

⁴² See *People v. Steadman*, 82 N.Y.2d 1, 7 (1993) (“The prosecutor’s duty is not lessened because *Brady* material may affect only the credibility of a government witness”); accord *Smith v. Cain*, 132 S.Ct. 627, 630 (2012); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *People v. Bond*, 95 N.Y.2d 840, 842-43 (2000); *People v. Waters*, 35 Misc.3d 855, 858-61 (Sup. Ct., Bronx Co. 2012).

⁴³ See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

make their affirmative so-called “*Kyles* inquiries” of police officers and to identify and disclose less significant types of impeachment facts.⁴⁴

There are several critical advantages for the criminal justice system if an obligation is placed on prosecutors to speak with police about favorable information and review the evidence for impeachment facts at an earlier stage of the case than is required under current law. The defense should receive a timely opportunity to investigate, develop, and make use of any favorable information in preparing its theory of the case for trial. Equally important, more prompt review by the prosecutor of the evidence – and, thus, of the relative strengths and weaknesses of the case – often will result in more appropriate and better informed guilty plea offers, and, when criminal prosecution is found unmerited (or the initially designated highest charges are deemed unfounded), it will cause a more expeditious dismissal or reduction of charges.⁴⁵ Justice will be better served.

While prosecutors should be given a reasonable time to speak with police witnesses and to identify all of the possible impeachment information in the case, the Task Force’s understanding of the constitutional *Brady* obligation is that prosecutors must turn over known exculpatory evidence *promptly upon its receipt* by the prosecutor.⁴⁶ The discovery statute must harmonize this constitutional requirement of prompt disclosure of exculpatory evidence with the two-stage framework for disclosures that we believe should be used. To this end, the statutory provision should include a specific directive that, where a prosecutor learns about exculpatory evidence after the initial stage of discovery but prior to the second stage of discovery, she should disclose it to the defense expeditiously and should not wait to do so until the later statutory discovery deadline. Put

⁴⁴ Notably, the Task Force believes that affording prosecutors a few months to provide discovery of these particular categories of favorable information will, nevertheless, typically result in *earlier* disclosures than presently occur for this information in most parts of New York. That is so for two main reasons: first, many prosecutors currently wait to speak to all of the officers regarding their knowledge of any favorable information until closer to the date of a trial; and, second, federal constitutional decisions have not required prosecutors to turn over ordinary impeachment information to the defense at the time of a guilty plea or well in advance of trial. See *United States v. Ruiz*, 536 U.S. 622, 629-31 (2002); *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001); see also *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); cf. *Leka v. Portuondo*, 257 F.3d 89, 99-103 (2d Cir. 2001).

⁴⁵ See Mary Prosser, “Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities,” 2006 Wis. L. Rev. 541, 550-53 (2006).

⁴⁶ See, e.g., *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000) (noting a requirement to “promptly disclose any such material evidence to the defendant”); *People v. Jackson*, 168 Misc.2d 182, 185-86 (Sup. Ct., Bronx Co. 1995) (“the prosecutor should disclose [*Brady* material] at the earliest possible moment”); see generally *Leka v. Portuondo*, 257 F.3d 89, 99-103 (2d Cir. 2001).

differently, prosecutors should have adequate time in which to ask police about favorable information – but upon learning it, they should provide it promptly to the defense.

Further, the statutory provision for disclosure of favorable information should specifically require the prosecution to disclose facts that provide a basis for a motion to suppress evidence on constitutional grounds.⁴⁷ And it should specify that all of these obligations apply whether or not the evidence or information would be “admissible” at trial or is recorded in tangible form.⁴⁸ These provisions not only would give courts and litigants better guidance regarding the disclosure obligations in this vital area, but they would also help to achieve *Brady*’s underlying goals by making the adversarial system more fair and reliable.⁴⁹ That said, it is important to note that such statutory rules would not, of course, supersede any of *Brady*’s constitutional requirements (which are discussed below in Section III). All constitutional disclosure obligations would have to be complied with – and be separately reviewed – whether or not the statutory framework is satisfied.

(3.) *Intended Exhibits*: There is currently no obligation under article 240 for either party to provide discovery before trial of all the exhibits it plans to introduce. The Task Force believes that both parties should make available to the other side items of tangible property that they “intend to introduce” on their cases in chief. Such a discovery rule exists under the criminal discovery rules in federal cases.⁵⁰ The prosecution, however, should have the option to condition discovery of its exhibits on a timely demand to produce them made by the defense. Confirming in advance that the

⁴⁷ See *People v. Williams*, 7 N.Y.3d 15, 19 (2006); *People v. Geaslen*, 54 N.Y.2d 510, 515-16 (1981); *People v. McCutcheon*, 96 A.D.3d 580 (1st Dept. 2012); *People v. White*, 200 A.D.2d 351, 352-53 (1st Dept. 1994).

⁴⁸ See *United States v. Rodriguez*, 496 F.3d 221, 226 & n.4 (2d Cir. 2007); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); see, e.g., *People v. Bond*, 95 N.Y.2d 840, 842 (2000); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994); *People v. Steadman*, 82 N.Y.2d 1, 7-8 (1993).

⁴⁹ Sample statutory language for the “favorable evidence and information” provision (*i.e.*, as it would apply in “Phase One” of the prosecution’s discovery) could be as follows: “The prosecution shall disclose: . . . When it is known to the prosecution (not solely known to police or another law enforcement agency), all evidence and information, whether or not admissible or recorded in tangible form, that tends to (i) exculpate the defendant; (ii) mitigate the defendant’s culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) provide a basis for a motion to suppress evidence on constitutional grounds; (v) significantly impugn the credibility of an important prosecution witness, informant or evidence; or (vi) mitigate punishment.” As described in the text, in “Phase Two” of the prosecution’s discovery, a more broad standard for disclosure of impeachment facts should apply; and the obligation also would cover such evidence and information that was solely known to police at the time of “Phase One” discovery. Moreover, to comport with constitutional requirements regarding timing of disclosures, and to ensure fairness to the defendant, the provision should also include a directive that: “The prosecution shall disclose evidence or information under this subsection expeditiously upon its receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.”

⁵⁰ Fed. R.Crim.P 16 (a)(1)(E)(ii).

defense has a genuine interest in access to all of the exhibits is appropriate, before a prosecutor should have to expend sometimes substantial efforts to identify and assemble them. Because it may not be practicable for the parties to identify all of their exhibits until close to the time of trial, however, the Task Force believes that this discovery provision should explicitly make the time frame for disclosure more flexible without need for the parties to routinely seek court orders.⁵¹

(4.) *Expert Opinion Evidence*: The Task Force believes that both parties' disclosure obligations regarding expert opinion evidence should be much broader than under current New York law.⁵² Both parties should be required to disclose: (1.) the name, business address, current curriculum vitae, and a list of publications of each intended expert witness; (2.) all written reports by the expert that pertain to the case; and (3.) if no report is prepared, a written summary of the subject matter of the intended testimony, the expert's opinions and conclusions, and the basis for such opinions and conclusions. Such a rule would be similar to that in effect in civil cases in New York.⁵³

Because consulting an expert and obtaining a report or written summary of prospective testimony normally takes considerable time, the Task Force believes that this discovery provision should make the time frames for these disclosures more flexible, without need for the parties to seek court orders. Automatic leeway in the timing for expert disclosures should, however, extend only to sixty days before a scheduled trial date (for the prosecution's intended experts) or thirty days before a scheduled trial date (for the defendant's intended experts) – with the caveat that, where the prosecution first decides to call an expert after receiving the defense's discovery, the court must adjust a scheduled trial date (if necessary) to ensure the prosecution has sufficient time to disclose

⁵¹ Sample statutory language for the "intended exhibits" provision could be as follows: "The prosecution shall disclose: . . . All tangible property that the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. Discovery of items under this subsection may be conditioned on service of a demand to produce made by the defendant, if in its initial discovery package the prosecution timely served notice on the defendant that a demand to produce items under this subsection would have to be served on the prosecution within thirty days of that notice. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in this section that an item under this subsection will be introduced at trial or a pre-trial hearing, that period shall be stayed without need for a motion for a court order; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose."

⁵² See CPL §§240.20(1)(c), 240.30(1)(a).

⁵³ CPLR §3101(d); see also Fed. R.Crim.P 16 (a)(1)(G), (b)(1)(C).

its “responsive” expert materials and the defense has sufficient time to prepare and respond to those materials.⁵⁴

(5.) *Witnesses’ Criminal History Information*: Prosecutors have an obligation to disclose information regarding their witnesses’ criminal histories under article 240, but that obligation applies only if a witness’s criminal record actually is known by the prosecutor to exist. The prosecutor has no obligation affirmatively to run criminal record searches.⁵⁵ Further, there is no statutory obligation to provide criminal history information for co-defendants. A recurring problem for many defense lawyers is that they lack access to a database for obtaining this critical information. Yet presenting facts about a witness’s prior criminal record to the jury is essential to the truth-finding function of trials. Knowing the full criminal history of the defendant and all co-defendants is also essential to proper representation, but sometimes this information is not timely provided to the defense in some parts of the State.⁵⁶

The Task Force believes that the defense should be provided with complete criminal history information for the prosecution’s intended civilian witnesses, and for defendants and co-defendants. (Providing such information is unnecessary for expert witnesses and law enforcement personnel.) Moreover, it is important that this information be disclosed in a timely manner before trial, so that

⁵⁴ Sample statutory language for the “expert opinion evidence” provision could be as follows: “The prosecution shall disclose: . . . Expert opinion evidence, including the name, business address, current curriculum vitae, and a list of publications of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This subsection does not alter or in any way affect the procedures, obligations or rights set forth in [Criminal Procedure Law] section 250.10. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in this section, that period shall be stayed without need for a motion for a court order; except that the disclosure shall be made as soon as practicable and not later than sixty calendar days before a scheduled trial date, unless a different court order is obtained. Where the prosecution’s expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty days to make the disclosure and the defense thirty days to prepare and respond to the new materials.” (A similar discovery provision for expert opinion evidence should apply to the defense, but since the defense’s discovery should follow that provided by the prosecution, its expert witness disclosures would need to occur no later than thirty days before a scheduled trial date rather than sixty days before that date.)

⁵⁵ CPL §§240.44(2), 240.45(1)(b).

⁵⁶ *Cf.* CPL §§160.40(2), 530.20(2)(b)(ii).

the lawyer has a reasonable opportunity to gather related documents and information from underlying public court files, and to investigate the witnesses and prepare.⁵⁷

(6.) *List of Potentially Suppressible Property*: The discovery statute should provide enough information for the defense lawyer to file informed and timely suppression motions. While under current law the prosecution must give notice within fifteen days of arraignment of any statements made by the defendant to a public servant and of any identification procedures involving the defendant, there is no equivalent requirement that the prosecutor provide prompt notice of potentially suppressible tangible property.⁵⁸ Consequently, defense lawyers often do not have the necessary information to seek all of the suppression hearings to which a defendant may be entitled. For instance, the defendant may not have seen the police recover certain property, especially if it was not taken from his or her person and the prosecution will be relying on a theory of “constructive” possession.

The Task Force believes that the prosecution should, therefore, be required to specify early in the case all of the potentially suppressible physical evidence that it contends the defendant physically or constructively possessed, or that it contends the defendant possessed but “abandoned” prior to the arrest (*i.e.*, since decisional law has established that whether there was an intentional and voluntary “abandonment” may need to be resolved at a hearing).⁵⁹ This information will facilitate efficient motion practice.⁶⁰ Relatedly, the Legislature should also amend Criminal Procedure Law §255.20(1) – which sets a limitation for the defense to file motions within 45 days of arraignment – to provide an alternative, in situations where the list of suppressible property

⁵⁷ Sample statutory language for the “criminal history information” provision could be as follows: “The prosecution shall disclose: . . . The results of complete criminal history record checks for all defendants and all persons designated as potential prosecution witnesses, other than those witnesses who are experts or law enforcement officers.”

⁵⁸ CPL §710.30.

⁵⁹ See, e.g., *People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 108-10 (1996); *People v. Howard*, 50 N.Y.2d 583, 593 (1980); *People v. Crawford*, 89 A.D.3d 422, 424 (1st Dept. 2011); *People v. Smalls*, 83 A.D.3d 1103, 1104 (2d Dept. 2011); see generally CPL §710.60.

⁶⁰ Sample statutory language for the “list of suppressible property” provision could be as follows: “The prosecution shall disclose: . . . A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant’s possession of any tangible objects by means of a statutory presumption of possession, it shall designate that intention as to each such object. If reasonably practicable, it shall also designate the location from which each tangible object was recovered.”

(and/or search warrants) is not timely provided. In that circumstance, the defense should be entitled to file its motions within 45 days, *or within 30 days of the date that the prosecution provided these discovery materials*.

(7.) *Search Warrants*: No provision in article 240 explicitly requires the prosecution to disclose search warrants. This omission impedes orderly litigation of defense motions to controvert a search warrant and to suppress evidence. It needlessly burdens courts with repeated applications for disclosure, which have resulted in a patchwork of rulings that generally have ordered disclosure of the warrant documents.⁶¹ The defendant may not be aware that a search warrant was executed at all or that evidence was obtained in a search. The defense lawyer cannot assess the possible grounds to litigate whether the warrant requirements set forth in Criminal Procedure Law article 690 were properly obeyed, and whether the search was constitutional, without inspecting the warrant and warrant application. In short, as with eavesdropping warrants, the defense should have timely access to search warrants and related documents (subject, like any other discoverable item, to a protective order where appropriate).⁶² The discoverable items should include the warrant, warrant application, supporting affidavits, and the police inventory of all property seized under the warrant.⁶³ This will ensure efficient and informed pre-trial litigation.⁶⁴

C. Expanded Reciprocal Discovery From the Defense

As in other States that have modernized their criminal discovery rules, defendants in New York State should provide the prosecution with considerably greater and earlier discovery than under current New York law. Like the current reciprocal discovery rule in Criminal Procedure Law §240.30, however, expanded discovery from the defense should be limited to witnesses and items

⁶¹ See, e.g., *People v. Chahine*, 150 Misc.2d 242, 243 (Crim. Ct., N.Y. Co. 1991); *People v. Velez*, 147 Misc.2d 865, 866 (Sup. Ct., N.Y. Co. 1990); *People v. Seychel*, 136 Misc.2d 310, 313-14 (Sup. Ct., N.Y. Co. 1987); *People v. Brown*, 104 Misc.2d 157, 163 (Crim. Ct., Queens Co. 1980); see also *People v. Beniquez*, 215 A.D.2d 678, 678 (2d Dept. 1995); *People v. Pimental*, 182 A.D.2d 80, 84 (2d Dept. 1992); cf. *People v. Castillo*, 80 N.Y.2d 578, 586-87 (1992); *People v. Peterson*, 266 A.D.2d 480 (2d Dept. 1999).

⁶² Compare CPL §700.70 (requiring timely notice and disclosure of copies of an eavesdropping warrant and accompanying application documents).

⁶³ See CPL §690.50(4).

⁶⁴ Sample statutory language for the “search warrants” provision could be as follows: “The prosecution shall disclose: . . . Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.”

that the defense “intends to introduce” at trial. If the defense lawyer learns of *incriminating* witnesses or evidence, it would raise serious constitutional problems for the discovery statute to mandate disclosure of such information. It is also appropriate to require the prosecution to complete its initial discovery before the defense must produce its reciprocal discovery. The defense needs time to review and synthesize the discovery materials, and to undertake investigations to ascertain which evidence and witnesses it intends to introduce at trial, before providing its own discovery. The prosecution will have already had the time it needed to build a case against the defendant, before bringing the criminal charges.

The Task Force recommends that the following materials and information should be discoverable from the defense: (1.) names, known aliases, addresses, and dates of birth of intended defense witnesses other than the defendant; (2.) written and recorded statements of intended defense witnesses other than the defendant; (3.) intended exhibits; (4.) tapes and electronic recordings intended to be introduced; (5.) reports and documents concerning physical or mental examinations, or scientific tests or experiments, intended to be introduced or that were made by an intended defense witness other than the defendant; (6.) intended expert opinion evidence; and (7.) a summary of any rewards, promises, and inducements made to intended defense witnesses.

D. Discovery From the Prosecution Should Occur in Two Stages

There is a broad consensus nationwide that the principal benefits of criminal discovery reform hinge on requiring disclosures early in the case. But meaningful discovery reform also requires that the obligations actually be achievable by prosecutors and police. To ensure that the expanded discovery obligations are feasible, the Task Force recommends that the prosecution’s discovery be provided in two stages, and then the defense should provide its reciprocal discovery.

Specifically, in “Phase One” of the prosecution’s discovery, key items that are actually possessed by or readily accessible to prosecutors (such as electronically stored police reports) should be discoverable within a short period after the defendant’s arraignment on the indictment or misdemeanor information. In “Phase Two” of the prosecution’s discovery, other items – like transcripts of Grand Jury witnesses’ testimony, exhibits, and less “formal” police reports such as police memo book notes or vouchers, which may be harder for a prosecutor to obtain and may not be in electronic form – should be discoverable a few months after the defendant’s arraignment.

Upon completing discovery, the prosecutor should then file a “certificate of compliance” that indicates that, after exercising reasonable diligence, all known discoverable items have been disclosed. This document will trigger a thirty day period for the defendant to provide reciprocal discovery. (As described below in Section II-F-2, a certificate of compliance filed in good faith should not in itself constitute any ground for litigation or for “penalizing” a prosecutor in any way, and the statute should make that clear.)⁶⁵

The Task Force makes the following more specific suggestions regarding *when* discovery could occur from each party, and *what items* could be disclosed at each stage. These recommendations are intended to be illustrative and are not “set in stone.” Other specific periods, or contents for discovery at each stage, could be deemed more appropriate. Moreover, two points should be reiterated: (i.) either party should be entitled to move at any time for an order that alters the time frame or contents of discovery for good cause; and (ii.) untimely disclosure of an item by either party, despite reasonable good faith efforts to comply with discovery, should result in a “remedy” at trial only if the party entitled to disclosure shows that it suffered “significant prejudice.”

As an appropriate time frame for discovery, the Task Force suggests that: (1.) the prosecution would provide its “Phase One” discovery packet *15 days after arraignment*; (2.) the prosecution would provide its “Phase Two” discovery packet *90 days after arraignment* – and then the prosecutor would file and serve a “certificate of compliance”; (3.) the defense would provide its reciprocal discovery packet *30 days after the prosecution’s “certificate of compliance”* – and then the defense lawyer would file and serve a “certificate of compliance.” If the prosecutor was engaged in an ongoing trial or did not report to work due to a vacation or similar reason during one or more days of the “Phase One” discovery period, he or she would also automatically receive *an additional*

⁶⁵ Sample statutory language to illustrate the two separate discovery phases – here, with respect to disclosure of witnesses’ written and recorded statements – could be as follows. *Phase One*: “The prosecution shall disclose: . . . When they are in the possession of the prosecution (not solely in the possession of police or another law enforcement agency), all statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto. Statements solely in the possession of police or another law enforcement agency at the time of Phase One discovery are discoverable under a corresponding subsection in Phase Two discovery.” *Phase Two*: “The prosecution shall disclose: . . . All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to a potential defense thereto, including those that were solely in the possession of police or another law enforcement agency at the time of Phase One discovery. Statements previously disclosed in Phase One discovery need not be disclosed again.”

7 days to complete “Phase One” discovery. A one-week extension of the period for “Phase One” discovery is appropriate in such situations because prosecutors may need to catch up on discovery obligations for multiple cases after a trial or an absence from the office, and they should be given adequate time to do so without having to make rote applications for extensions.

Our reasons for recommending a relatively short time period such as fifteen days after arraignment for “Phase One” discovery are that receiving basic discovery early in the case is extremely important for viable investigations by the defense, for giving informed advice about plea offers, and for orderly submission of motions to suppress evidence. Here, a period of fifteen days would be achievable in practice because (as discussed further below) this obligation would include only items and information that the prosecutor actually has in his or her possession at that point in the case (not things solely possessed by police) and electronically accessible police reports (but not other police documents). It would also include a list of the potentially suppressible tangible property, and of the defendants’ statements made to law enforcement (most of which are already routinely “noticed” to the defense within fifteen days under Criminal Procedure Law §710.30).

Other States currently employ a ten or fifteen day period for more extensive discovery from the prosecution than this.⁶⁶ Moreover, the fifteen-day period would start from the date of the defendant’s arraignment on an indictment or a “converted” misdemeanor information – not from the initial court appearance after the arrest. In many or most cases, that means it would not begin until several days, and typically several weeks or several months, after the arrest.⁶⁷ Further, as noted, prosecutors who are on trial or absent from the office during one or more days of the fifteen-day

⁶⁶ See, e.g., Fla. R. C.P. 3.220(b)(1) (within 15 days of demand); Hawaii R. Penal P. 16(e)(1) (within 10 days of arraignment); Mo.R.Crim.P. 25.02 (within 10 days of demand); N.J. CT. R. 3:13-3(b)(1) (within 7 days of unsealing of indictment); N.M.Dist.Ct.R.Crim.P. 5-501(A) (within 10 days of arraignment); see also Ariz. R.Crim.P. 15.1(c) (30 days after arraignment); Colo. R.Crim.P. 16 Part I (b)(1) (21 days after first appearance); Md. R. 4-263(h) (within 30 days after first appearance); Mich. CR 6.201(F) (within 21 days of demand); N.H. R. C.P. 12(b)(1)(B)(i) (within 30 days of not guilty plea); R.I. R.Super.Ct. R.C.R.P. Rule 16(f) (within 30 days of arraignment); Tex. Crim. Pro. Art. 39.14(a) (as soon as practicable after receiving a timely request).

⁶⁷ There are frequently two separate “arraignments” in a criminal case in New York State, and discovery is provided after the later of them. The first arraignment is the defendant’s initial appearance in local criminal court, when he or she often is charged only in a complaint. The second arraignment occurs at a subsequent court appearance, after the prosecution has filed an indictment or, in misdemeanor cases, a legally sufficient accusatory instrument (such as an information). Thus, there would be no across-the-board mandate that prosecutors must provide discovery within “fifteen days” of the inception of the case. In many or most cases (and nearly always when there are considerable discovery materials), the “arraignment” that triggers the fifteen-day period for initial discovery would not occur until several days or even months after the arrest. An often-substantial period between the arrest and the arraignment may, therefore, in effect be added to the fifteen days.

period would automatically get a one-week extension; the court would have authority to further alter the time periods for discovery as needed; and a remedy at trial for any untimely disclosure would be available only for a showing of “significant prejudice.”

Our recommendation that “Phase Two” discovery occur within ninety days after arraignment is intended, first, to give the prosecution reasonable time to communicate with police and obtain the discoverable materials; and, second, to give considerable time to negotiate with the defense regarding the possibility of a guilty plea that would spare having to assemble and provide the full discovery.

In addition, the discovery statute should include three other specialized provisions that would give prosecutors further leeway automatically to delay discovery, without having to seek permission from the court. *First*, where the prosecution’s discoverable materials are exceptionally voluminous, the statute should provide that its time periods for discovery may be automatically deferred by up to an additional forty-five days without need for making a motion. *Second*, when limited availability of transcription resources makes transcripts of Grand Jury witnesses’ testimony unavailable for disclosure within the specified time period, the statute should allow the time period for discovery of those transcripts to be automatically deferred by up to an additional forty-five days without need for making a motion. But because prompt review of Grand Jury minutes by the court is desirable, the statute should direct the prosecution to disclose such minutes expeditiously upon their receipt rather than waiting to do so until the statutory discovery deadline. *Third*, as described above in Section II-B-4, the time periods for disclosure of both parties’ expert opinion evidence should be flexible without need for making motions, because frequently it is impossible to consult with experts and to obtain reports within ninety days of the arraignment.

As an appropriate list of materials and information that could be discoverable at each of the three stages, the Task Force makes the following proposal (but, again, this is simply an illustrative list):

(1.) *Prosecution’s “Phase One” Discovery:*

- (a.) Electronically stored police reports (*i.e.*, this provision does *not* include less formal police documents that are not available electronically – they would not be discoverable until “Phase Two” discovery).

- (b.) Other written or recorded witness statements, if they are actually possessed by the prosecution fifteen days after arraignment (*i.e.*, this provision does *not* include written or recorded statements that are possessed solely by police or another law enforcement agency at the time of “Phase One” discovery – they would not be discoverable until “Phase Two” discovery).
- (c.) Names and addresses or adequate contact information for all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense, with a designation if feasible as to which of them may be called as witnesses. Only business addresses should be disclosed for police or other officials and experts. (As described above in Section II-A-2, addresses and contact information may be withheld and redacted from discovery materials without need for making a motion, if either [i.] the prosecutor arranges a timely interview between the witness and the defense lawyer; [ii.] the prosecutor uses the attorney-only confidentiality procedure in a violent felony case; or [iii.] the person is a confidential informant or undercover law enforcement personnel).
- (d.) Statements made by the defendant or a co-defendant to a public servant engaged in law enforcement activity other than during the offense.
- (e.) A list of tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant (as described above in Section II-B-6).
- (f.) Information about search warrants (as described above in Section II-B-7).
- (g.) Favorable evidence and information, if it is actually known to the prosecution fifteen days after arraignment (*i.e.*, this provision does *not* include favorable evidence or information that is known solely to police or another law enforcement agency at the time of “Phase One” discovery – such information would not have to be obtained by the prosecution until “Phase Two” discovery, albeit it should be subject to a duty to promptly disclose it upon receipt by the prosecutor, as described above in Section II-B-2).
- (h.) The approximate date, time and place of the offenses charged and of the defendant’s arrest.

(2.) *Prosecution’s “Phase Two” Discovery:*

- (a.) Transcripts of Grand Jury witnesses’ testimony (subject to an automatic time-frame adjustment if there are limited transcription resources, but also to a duty to promptly submit the minutes to the court for review upon receipt by the prosecutor, as described above).
- (b.) Additional police reports, including those not electronically stored.
- (c.) Additional written or recorded witness statements, including those that were possessed solely by police or another law enforcement agency at the time of “Phase One” discovery.
- (d.) Intended exhibits (subject to the prosecution’s option to require a “demand” for them, and to an automatic time-frame adjustment where the prosecutor has not formed an

intent to introduce specific items at the time of “Phase Two” discovery, as described above in Section II-B-3).

- (e.) Tapes and electronic recordings intended to be introduced.
- (f.) Photographs and drawings.
- (g.) Reports and documents concerning physical or mental examinations, or scientific tests or experiments.
- (h.) Additional favorable evidence and information, including that known solely to police or another law enforcement agency at the time of “Phase One” discovery.
- (i.) A summary of any rewards, promises, and inducements made to witnesses.
- (j.) The results of complete criminal history record checks for intended witnesses (and for defendants and co-defendants, if not provided previously).
- (k.) Known pending criminal charges against intended witnesses.
- (l.) Expert witness evidence (as described above in Section II-B-4).

The Task Force’s suggestions of an appropriate list of materials and information that could be discoverable from the defendant as reciprocal discovery are described above in Section II-C.

E. Statutory Provision for “Remedies” (Not “Sanctions”) for Non-Compliance

Technical violations of discovery obligations are inevitable in any court system. In large part, this is because prosecutors and police work for separate agencies and have manifold responsibilities that do not always permit them to efficiently communicate and cooperate for purposes of providing discovery materials.

The Task Force recommends that, with respect to the potential *consequences* of violations during the discovery process, the statute employ the term “remedy” – not “sanction.” This terminology properly recognizes that the purpose of these rules is simply to try to ensure that the parties receive as much discovery as is feasible, as early as possible (consistent with witness safety). It is not to “penalize” prosecutors or police for inevitable lapses during the process, despite their reasonably diligent efforts to comply in good faith. (Of course, by advising that the term “remedy” be used in the discovery statute, we do not suggest that courts or professional disciplinary bodies should not, when appropriate, impose “sanctions” directly against prosecutors or other lawyers who are found to have acted unethically – such as by intentionally violating the *Brady* obligation or a court’s discovery orders – as discussed below in Section III.)

Specifically, when discoverable material is lost or destroyed, the statute should instruct courts to provide a “remedy” at trial that is proportionate to how the missing item reasonably might have been helpful. When discoverable material is disclosed belatedly, the statute should instruct courts to provide a “remedy” at trial if the party entitled to disclosure is able to show that it was “significantly prejudiced.” (To provide a disincentive against a rare unscrupulous litigant who might attempt to delay providing discovery well beyond the statutory time frames on the rationale that the opposing party could not likely show “significant prejudice,” the statute should also contain another limited option. In that unusual situation, the court should have discretion to impose an appropriate remedy if the untimely disclosure resulted from a lack of reasonably diligent efforts to comply with discovery and the party entitled to disclosure showed “some prejudice.”) Settled case law holding that “preclusion” of evidence and “dismissal” of charges are sanctions that a court may not employ unless the prejudice cannot be rectified by any lesser remedy would, of course, still apply.⁶⁸

Currently Criminal Procedure Law §240.70(1) gives judges broad leeway to provide a sanction/remedy, but it provides little insight about the applicable analysis for gauging *when* a remedy is appropriate and *what* the remedy should be. The proposed rules for granting a remedy described here simply reflect the analysis set forth in current case law.⁶⁹ But specifying them in the discovery statute would provide clearer guidance for litigants and courts than does article 240. These are forgiving standards (especially in the context of untimely disclosures), which are designed to rectify harm and not to create a windfall for mere mishaps. They should allay any concerns about the potential impact of the Task Force’s proposals.⁷⁰

⁶⁸ See, e.g., *People v. Jenkins*, 98 N.Y.2d 280, 284 (2002) (“Preclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction”); *People v. Kelly*, 62 N.Y.2d 516, 521 (1984) (“as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence”).

⁶⁹ See, e.g., *People v. Joseph*, 86 N.Y.2d 565, 570-72 (1995); *People v. Banch*, 80 N.Y.2d 610, 616 (1992); *People v. Goins*, 73 N.Y.2d 989, 991 (1989); *People v. Perez*, 65 N.Y.2d 154, 159 (1985).

⁷⁰ Sample statutory language for the “remedy for discovery violations” provision could be as follows: “(i) When material or information is discoverable under this article but is disclosed belatedly, the court shall impose an appropriate remedy if the party entitled to disclosure shows that it was significantly prejudiced. If the untimely disclosure occurred because the party responsible failed to make reasonably diligent efforts to comply with this article, the court has discretion to impose an appropriate remedy if the party entitled to disclosure shows some prejudice. In either situation the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material. (ii) When material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue. The appropriate remedy is that which is proportionate to the potential ways in which the lost or destroyed material reasonably could have been helpful to the party entitled to disclosure.”

F. Additional Measures to Help Facilitate the Goals of Discovery

The Task Force recommends that certain other measures should also be enacted to further the underlying goals of criminal discovery reform and help facilitate compliance with the discovery rules. These include:

(1.) *Discovery By Court Order*: There should be a “catch-all”-type provision that would permit the court, within its discretion and based upon an appropriate showing of need, to grant discovery of important evidence that is not otherwise discoverable. The availability of such discretionary discovery orders should be limited to situations where the defendant not only establishes that he or she cannot (without undue hardship) obtain substantially equivalent evidence by other means, but also that the evidence sought is reasonably likely to be material. Such procedures are used in States such as Arizona, Colorado, Florida, Massachusetts, and others.⁷¹ By contrast, discovery in New York currently is strictly limited to items listed in the statute and to constitutionally required disclosures.⁷² Situations where resort to this provision would be needed presumably would be rare. But judges should have the authority and flexibility to permit discovery of items needed for a complete investigation or a fair trial.⁷³ There should also be a provision authorizing an expedited order that requires preservation and non-spoliation of evidence.⁷⁴

⁷¹ See, e.g., Ariz. R.Crim.P. 15.1(g); Colo. R.Crim.P. 16 Part I (d)(1); Fla. R. C.P. 3.220(f); Ill. S. Ct. R. 412(h); Mass. R.Crim.P. 14(a)(2); Minn.R.Crim.P. 9.01 Subd. 2; Mo. Sup. Ct. R. 25.04(A); Pa. R.Crim.P. 573 (B)(2)(a)(iv); Wash. C.R.R. 4.7(e)(1).

⁷² See, e.g., *People v. Colavito*, 87 N.Y.2d 423, 427 (1996); *Matter of Pittari v. Pirro*, 258 A.D.2d 202, 207 (2d Dept. 1999).

⁷³ Sample statutory language for the “discovery by order of the court” provision could be as follows: “The court in its discretion may, upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, order the prosecution, or any individual, agency or other entity subject to the jurisdiction of the court, to make available for disclosure to the defendant any material or information which potentially relates to the subject matter of the case and is reasonably likely to be material. A motion under this subdivision must be on notice to any person or entity affected by the order. The court may, upon request of any person or entity affected by the order, vacate or modify the order if compliance would be unreasonable or will create significant hardship. The court may permit a party seeking or opposing a discretionary order of discovery under this subdivision, or another affected person or entity, to submit papers or testify on the record ex parte or in camera. Any such papers and a transcript of such testimony may be sealed and shall constitute a part of the record on appeal.”

⁷⁴ Sample statutory language for the “order to preserve evidence” provision could be as follows: “At any time, a party may move for a court order to any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of that evidence is preserved by a specified alternative means.”

Furthermore, currently the New York discovery statute does not include any mechanism for a defense lawyer to obtain prompt access to inspect, photograph, measure, or diagram a private or otherwise restricted crime scene connected to the case. Yet it is basic to constitutionally effective representation that the defense lawyer have visited the crime scene, so as to properly cross-examine and to ensure that the jury will adequately assess any limitations in the witnesses' contentions.⁷⁵ A reasonable investigation sometimes may require seeing a private location before it is cleaned, and before possibly probative features bearing on the circumstances of the crime or the defense are altered and lost. In such situations, the defense should not be limited solely to the photographs taken by the police, especially because there may be aspects of the offense or the location that are known only to the defendant and were not photographed. Normally police investigators would have already completed their evidence collection at the scene before the defendant is charged.

Nevertheless, due to the lack of explicit authority in the discovery statute for granting such access, appellate courts have ruled that trial judges lack the authority to issue orders that permit it.⁷⁶ The Task Force believes that a defense lawyer should be able to move for an expedited order directing an individual or entity in possession of a crime scene or other location that relates to the subject matter of the case or is otherwise relevant to allow counsel prompt and reasonable access to inspect, photograph, or measure the location (supervised by law enforcement, as the court requires), at a time when its condition remains unchanged. A similar option is available in civil cases.⁷⁷ But

⁷⁵ See, e.g., *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995); *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 101 (E.D.N.Y. 2003); *People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept. 1992); *People v. Armstrong*, NYLJ 11/16/95, p. 30, col. 5 (Sup. Ct., Queens Co. 1995), *aff'd*, 249 A.D.2d 317 (2d Dept. 1998); see generally *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. Oliveras*, 21 N.Y.3d 339, 346-48 (2013); *People v. Droz*, 39 N.Y.2d 457, 462 (1976).

⁷⁶ See, e.g., *Matter of Brown v. Appelman*, 241 A.D.2d 279, 281-84 (2d Dept. 1998); *Matter of Pirro v. LaCava*, 230 A.D.2d 909, 910 (2d Dept. 1996); *Matter of Kaplan v. Tomei*, 224 A.D.2d 530 (2d Dept. 1996); *People v. Kyriazas*, 2002 WL 31972172, *1 (Sup. Ct., Westchester Co. 2002) ("This Court, quite frankly, is at a loss to find a logical reason why defendant . . . should be denied the limited relief requested. . . ."); cf. *People v. Davis*, 169 Misc.2d 977, 979-82 (Co. Ct., West. Co. 1996); *People v. Legrande*, 182 Misc.2d 375, 377-78 (Co. Ct., Sullivan Co. 1999); *People v. Nicholas*, 157 Misc.2d 947, 948 (Sup. Ct., Bronx Co. 1993); *State in Interest of A.B.*, 99 A.3d 782 (NJ 2014) (access to inspect victim's home); *Henshaw v. Commonwealth*, 451 S.E.2d 415, 419 (Va. App. 1994) (access to inspect the crime scene implicates fundamental fairness); *State v. Lee*, 461 N.W.2d 245, 246-47 (Minn. App. 1990).

⁷⁷ CPLR §3120(1)(ii) ("After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena . . . to permit entry upon designated land or other property . . . for the purpose of inspecting, measuring . . . [or] photographing . . . the property").

any affected party should be entitled to apply to the court for modification or vacatur of such orders, as needed.⁷⁸

(2.) *Certificates of Compliance*: The Task Force recommends that both the prosecutor and the defense lawyer be required to file a “certificate of compliance” upon completion of their discovery obligations. This certificate would simply state that, after exercising due diligence and making reasonable inquiries, the lawyer has disclosed all “known” materials that are subject to discovery, and list the items provided. When additional items are found and turned over later in the case, the lawyer would then file a supplemental certificate of compliance. The prosecutor’s certificate will also serve as the triggering date for the defense’s thirty day period to provide its reciprocal discovery, as described above in Section II-D.

This procedure has been used in Massachusetts.⁷⁹ It is simply designed to help foster compliance and personal responsibility by lawyers in the discovery process, and to create a reviewable record of disclosures and thereby reduce discovery litigation. The statute should explicitly direct, therefore, that no adverse consequence to the prosecution or the prosecutor, or to the defendant or the defense lawyer, may result from the filing of a certificate in good faith. The purpose of these certificates is to formalize responsibilities, avert disputes, and document stages in the case – it is emphatically not to spawn litigation, or to threaten penalties against or demean any lawyers acting in good faith – and the statute should make that clear.⁸⁰

⁷⁸ Sample statutory language for the “court ordered access to premises” provision could be as follows: “At any time, the defendant may move for a court order to any individual, agency or other entity in possession, custody or control of a crime scene or other premises that relates to the subject matter of the case or is otherwise relevant, requiring that counsel for the defendant be granted prompt and reasonable access to inspect, photograph or measure that crime scene or those premises, and that the condition of the crime scene or premises remain unchanged in the interim. The court shall hear and rule upon such motions expeditiously. The court may modify or vacate such an order upon a showing that granting access to a particular crime scene or premises will create significant hardship, on condition that the probative value of that location is preserved by a specified alternative means.”

⁷⁹ Mass. R.Crim.P. 14(a)(3).

⁸⁰ Sample statutory language for the “certificate of compliance” provision could be as follows: “When the prosecution has provided the discovery required in ‘Phase One’ and ‘Phase Two’ of discovery, except for any items or information that are the subject of a protective order, it shall serve upon the defendant and file with the court a certificate of compliance. The certificate shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided. If additional discovery is subsequently provided prior to trial, a supplemental certificate shall be served upon the defendant and filed with the court identifying the additional material and information provided. No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith; but the court may grant a remedy for a discovery violation as provided in this article.” (A corresponding provision would describe defense counsel’s certificate of compliance.)

(3.) *Discretionary Court Procedures to Facilitate Compliance*: The Task Force does *not* recommend that pre-trial “discovery conferences” be mandatory in New York State, as such a requirement in every case would unnecessarily strain resources. Nevertheless, it would be beneficial for the discovery statute to highlight that judges have the option within their discretion to require such conferences – or to require that the attorneys for all parties must confer to attempt to resolve any discovery dispute before seeking a ruling from the court – or to establish other reasonable procedures to facilitate compliance with the rules.⁸¹

(4.) *Disclosure of Defendant’s Uncharged Misconduct*: The Task Force recommends that the prosecution be required to disclose all specific instances of the defendant’s prior uncharged misconduct or criminal acts that the prosecutor intends to introduce at trial as substantive evidence (so-called “*Molineux*” material) or for impeachment if the defendant elects to testify (so-called “*Sandoval*” material).⁸² This disclosure should occur on a different timetable than the other kinds of discovery, such as fifteen days before a scheduled trial date, because often a prosecutor will not know until he or she has begun to prepare for trial which specific bad acts of the defendant will be offered as substantive or impeachment evidence.

Under current New York law, there is no statutory requirement to disclose misconduct and prior criminal acts that will be offered on the prosecution’s case-in-chief; and such information that will be offered as impeachment evidence need be disclosed only at the time of the trial.⁸³ Providing several days of advance notice to the defense would eliminate unfair surprise and afford defense counsel adequate time to investigate, research, and prepare.⁸⁴

⁸¹ Sample statutory language for the “court ordered procedures to facilitate compliance” provision could be as follows: “To facilitate compliance with this article, and to reduce or streamline litigation of any disputes about discovery, the court in its discretion may issue an order (i) requiring that the prosecutor and counsel for the defendant diligently confer to attempt to reach an accommodation as to any dispute concerning discovery prior to seeking a ruling from the court; (ii) requiring a discovery compliance conference at a specified time prior to trial between the prosecutor, counsel for all defendants, and the court or its staff; (iii) requiring the prosecution to file an additional certificate of compliance that states that the prosecutor and/or an appropriate named agent has made reasonable inquiries of all police officers and other persons who have participated in investigating or evaluating the case about the existence of any favorable evidence or information, including such evidence or information that was not reduced to writing or otherwise memorialized or preserved as evidence, and has disclosed any such information to the defendant; and/or (iv) requiring other measures or proceedings designed to carry into effect the goals of this article.”

⁸² See *People v. Sandoval*, 34 N.Y.2d 371 (1974); *People v. Molineux*, 168 N.Y. 264 (1901).

⁸³ See CPL §240.43; *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); compare Ariz. R.Crim.P. 15.1(b)(7); ABA Standards for Criminal Justice: Discovery, Standard 11-2.1(a)(vi) (3d ed. 1996).

⁸⁴ Sample statutory language for this “disclosure of prior misconduct or criminal acts” provision could be as follows: “Not later than fifteen calendar days before a scheduled trial date, the prosecution shall disclose to the

(5.) *Two Changes to Subpoena Law*: Because they also relate to the defense’s ability to obtain pre-trial access to information relevant to investigating and evaluating cases, the Task Force recommends that two particular statutory changes should be made to notable aspects of current subpoena law.

(i.) Appellate courts have in recent years strictly limited the defense’s use of subpoenas that may be served on third parties under Criminal Procedure Law §610.20(3), by requiring the defense lawyer to make a showing – when a subpoena is challenged – that the subpoenaed items are reasonably likely to be “relevant and *exculpatory*,” not merely that they are reasonably likely to be “relevant and *material*.”⁸⁵ In practice, it is often impossible for the defense to make such a showing, even where the items are plainly important for evaluating the strength of the case or for assessing the viability of a potential defense. For example, the defense should be allowed to subpoena and review surveillance footage from a third party business, even if that footage is reasonably likely to be incriminating and counsel is unable to demonstrate in advance a likelihood that it would be “exculpatory.”

Just as prosecutors regularly use Grand Jury subpoenas to investigate potentially “material” evidence without knowing in advance whether it will be inculpatory or exculpatory, the defense should be entitled to use subpoenas to investigate potentially “material” evidence without having to show in advance that the item is likely to be exculpatory. But to be clear, the Task Force is not suggesting the alteration of *other* related aspects of current subpoena law. For instance, a defense subpoena would still have to be a demand for production of specific items, not merely an effort to

defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor’s information, information, or simplified information, which the prosecution intends to use at trial for purposes of (i) impeaching the credibility of the defendant, or (ii) as substantive proof of any material issue in the case. In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.”

⁸⁵ See, e.g., *People v. Ricketts*, 38 A.D.3d 291, 292 (1st Dept. 2007) (“Defendant did not establish a ‘factual predicate which would make it reasonably likely that documentary information will bear relevant and exculpatory evidence’”); accord *People v. Kozlowski*, 11 N.Y.3d 223, 241-43 (2008); *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Bagley*, 279 A.D.2d 426, 427 (1st Dept. 2001); compare *Hynes v. Moskowitz*, 44 N.Y.2d 383, 393 (1978) (“the issuer must show that the items sought to be subpoenaed have some relevancy and *materiality*”) (emphasis added).

ascertain the existence of evidence; and courts would still retain the authority to quash an improperly overbroad or unreasonably burdensome subpoena.⁸⁶

(ii.) The second particular change to subpoena law that the Task Force recommends is streamlining the inefficient and burdensome requirements of Criminal Procedure Law §610.20(3), which incorporates Civil Practice Law and Rules §2307 for defense subpoenas served on governmental agencies. These provisions currently require the defense attorney to give both the governmental agency and the prosecution “at least one day’s notice” that the defense intends to issue such a subpoena. If the court agrees to indorse the subpoena, the defense attorney must then re-serve the subpoena on both the governmental agency and the prosecution, “at least twenty-four hours before the time fixed for the production of such records.”⁸⁷

This multi-step service process is unnecessarily burdensome: there is no reason the defense attorney should have to serve the same subpoena on the same two agencies on consecutive days. Not only does that involve unnecessary legwork and paperwork, but it also fails to provide the subpoenaed agency with adequate time in which to consider and prepare any response, and/or to provide the subpoenaed materials. Another recurring problem is that the footage from government-operated surveillance cameras, which may be key evidence in a criminal case, is frequently automatically deleted within short periods (such as seven days). If the multi-step process required by the statute – of serving notice, litigating for issuance of the subpoena if it is contested, and re-

⁸⁶ See, e.g., *Matter of Terry D.*, 81 N.Y.2d 1042, 1044 (1993); *Matter of Constantine v. Leto*, 77 N.Y.2d 975, 976 (1991), *aff’d*, 157 A.D.2d 376, 378 (3rd Dept. 1990); *People v. Ricketts*, 38 A.D.3d 291, 292 (1st Dept. 2007).

⁸⁷ Criminal Procedure Law §610.20(3) provides: “An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules.”

In turn, Civil Practice Law and Rules §2307 provides (in relevant part): “A subpoena duces tecum to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required is triable. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day’s notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party. Such subpoena must be served upon such library, or such department or bureau of such municipal corporation or of the state or an officer having custody of the book, document or other thing and the adverse party at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required. . . .”

serving the subpoena – is not initiated right away and promptly concluded, such evidence may be permanently lost.

A better approach would be to dispense with the requirement of providing one day's advanced notice, but to extend the period for the agency's compliance with a court-indorsed subpoena to three days. That would provide the agency with more reasonable time to consider the subpoena, and to move to quash if appropriate or to provide the materials. And it would eliminate the inefficient and costly run-around of serving the same document on multiple parties on consecutive days. This change could be achieved by eliminating the third sentence of §610.20(3) (which currently states: "Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in [CPLR §2307]"), and modifying and supplementing the second sentence of the same subsection to state: "An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof, *unless the subpoena is indorsed by the court and provides at least three days for the production of the requested materials. In the case of an emergency, the court may by order dispense with the three-day production period.*"

Notably, this modification also would dispense with the requirement that the defense must notify the "adverse party" (the prosecution) in advance about its intended subpoenas. This is appropriate for two main reasons. First, the original purpose of CPLR §2307 and its predecessor provisions in the Civil Practice Act and the Code of Civil Procedure was simply to prevent governmental agencies from having to produce original documents "when a copy thereof will answer the requirement of the litigants." The idea was that the notice period would give the parties the opportunity to agree to stipulate to the use of copies, rather than originals. Where one party refused to stipulate, the judge would issue a subpoena for the production of the originals, but could impose costs on the refusing party.⁸⁸ Those concerns are essentially moot now in the era of photocopies and electronically stored information.

Second, requiring the defense to give the prosecution advanced notice of its subpoenas – without any comparable requirement on the part of the prosecutor – is unbalanced and gives

⁸⁸ *Friedeberg v. Haffen*, 162 A.D. 79, 80 (1st Dept. 1914); *see also* Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR §2307:2.

prosecutors the unfair advantage of being able to monitor the defense's investigations, which inhibits full defense investigations in practice. It also arguably runs afoul of the constitutional due process requirement of reciprocity in notice rules.⁸⁹ Of course, if materials the defense obtains by subpoena come within the discovery law, they will be disclosed to the prosecution by that means prior to trial.

The Legislature previously recognized these concerns when it passed a bill in 1995 that would have amended §2307 to eliminate the requirement in both civil and criminal cases of a motion and court order for a subpoena duces tecum to a government agency. But then-Governor Pataki vetoed that bill on the grounds that it would result in a significant increase in the number of improper subpoenas served and unreasonable burdens on State agencies.⁹⁰ Those concerns would not be presented by the statutory change we suggest here, since the subpoenaed agency would receive a full three-day period in which to move to contest any improper or unreasonably burdensome subpoena prior to complying with it, and the court also would have the initial opportunity to decline to approve any subpoena it deemed inappropriate.

In sum, this change to subpoena law would further the underlying goals of discovery reform. It would enable more efficient and complete investigations by the defense, without waste of scarce investigatory resources. It would help to ensure that perishable surveillance footage from government-operated cameras is not inadvertently erased. And, if discovery provisions like those this Task Force recommends are enacted, the prosecution would still timely be provided with the materials subpoenaed by the defense that it intends to introduce at trial.

(6.) *Four Changes to Pre-Trial Notice Statute (CPL §710.30)*: Important discovery provisions in Criminal Procedure Law section 710.30 supplement those of article 240. Section 710.30 obliges the prosecution to give notice of certain types of evidence that, in particular cases, may have been obtained by the authorities. This Task Force believes that amendments to section 710.30 would, if enacted as a whole, further the interest of justice, even if not all of the other changes suggested in this report should be adopted.

⁸⁹ See generally *Wardius v. Oregon*, 412 U.S. 470, 475 (1973) (“It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State”).

⁹⁰ See S.3804/Volker; 1995 Executive Veto Message for S.3804/Volker.

(i.) *Remedy for a Violation of the 15-Day Notice Rule*: Section 710.30 governs what notice the prosecution must give of its intent to introduce (a) evidence of statements made by the defendant, and (b) identification evidence by a witness who has made a prior identification of the defendant. The notice facilitates the prompt filing of motions to suppress evidence. Failure to provide timely notice requires preclusion of the relevant evidence.

As originally drafted, section 710.30(2) simply required that the prosecution give statement and identification notice before trial. Even after trial began, the court could accept late notice, and admit the statement or identification evidence, for “good cause shown.” Given how late in the day such notice would be, the Court of Appeals understandably interpreted the “good cause” language very strictly, such that for practical purposes virtually no cause would be “good” enough to justify mid-trial notice. In particular, it was no excuse for mid-trial notice that the police did not tell the prosecutor about the evidence until after trial began.⁹¹

In 1976 the Legislature amended section 710.30 to require provision of statement and identification notice in felony cases within 15 days after the Supreme Court arraignment on the indictment.⁹² The “good cause” language remained unchanged, so the prosecution still could hope to use the evidence if notice was late for good cause. The Court of Appeals was asked to relax its strict interpretation of the “good cause” rule in post-amendment cases in light of the fact that notice served a short time after the 15-day deadline would not cause prejudice in the way that mid-trial notice did in prior cases. But the Court decided that, as the “good cause” language remained the same, the same type of near-impossible showing would still have to be made before late notice could be excused.⁹³ Thus it is the law that notice coming after the 15th day requires preclusion of statement and identification evidence, even if the prosecutor did not learn of the evidence in that period and even if the defense has not been harmed in the slightest by the delay.

We propose that the “good cause” language be amended to avoid draconian sanctions for technical errors of no significance. In other areas, this Task Force endorses the view that sanctions

⁹¹ See *People v. Spruill*, 47 N.Y.2d 869, 870-71 (1979).

⁹² In misdemeanor cases, the courts generally consider that the 15-day period runs from the arraignment on the information. See, e.g., *People v. Alcindor*, 157 Misc.2d 725 (Crim. Ct., Kings Co. 1993); *People v. Haines*, 139 Misc.2d 762 (Crim. Ct., Queens Co. 1988); see also *People v. Littlejohn*, 184 A.D.2d 790 (2d Dept. 1992); *People v. Penasso*, 142 A.D.2d 691, 693 (2d Dept. 1988).

⁹³ See *People v. O’Doherty*, 70 N.Y.2d 479 (1987); *People v. McMullin*, 70 N.Y.2d 855 (1987).

for prosecution discovery violations should be tailored solely to cure any prejudice suffered by the defense. Here, however, there remains a special need for notice well before trial – without it, the defense cannot intelligently and efficiently make its pretrial suppression motions. Additional benefits of maintaining the requirement to provide notice early in the case are that it greatly assists defendants in intelligently evaluating guilty plea offers, and serves as an effective check against an unscrupulous witness who might otherwise “remember” or “tailor” new statements as a case develops in the pre-trial period or even during trial.

The Task Force therefore proposes that evidence should be precluded for failure to give notice as required by section 710.30 if, and only if, the prosecutor failed to act with due diligence. We believe that the burden of showing that preclusion is unwarranted for late notice based on reasonable diligence should be placed on the prosecution to ensure that a meaningful incentive exists for routinely providing early notice and thus for avoiding gamesmanship and delay.

(ii.) *The Defendant’s Need to Choose Between Preclusion and Suppression Claims*: Section 710.30 requires that evidence be precluded on account of deficient notice unless, despite the deficiency, the defendant moved to suppress and that motion was denied on the merits. The provision makes sense when the defense knows about the evidence, does not see fit to take issue with an inconsequential delay in or specificity in notice, and chooses instead to press the merits of the suppression claim.

But the Court of Appeals complicated matters for defense attorneys. When a defense application for preclusion is made, the trial court may of course deny the application on a finding that notice was not late or otherwise deficient. That happened in a case of a defendant named Kirkland, and the defendant then moved to suppress the evidence on the merits. After a full hearing, the motion was denied. On appeal the defendant argued that the initial preclusion ruling was incorrect. The Appellate Division agreed, and reversed. The Court of Appeals reinstated the conviction. It found that the defendant had waived his preclusion claim because, despite arguably receiving inadequate notice, he nonetheless moved to suppress the evidence and that motion was denied.⁹⁴

⁹⁴ See *People v. Kirkland*, 89 N.Y.2d 903, 904-05 (1996).

This *Kirkland* rule forces a defense attorney with an arguably sound preclusion argument and an arguably sound suppression argument to choose between them, and we find this arbitrary. In most circumstances a defendant who fails to obtain relief on one ground can make an argument in the alternative without forfeiting appellate review of his initial claim. The *Kirkland* rule compels an unjustified “Sophie’s choice.”

We propose that Section 710.30 be amended to reflect that a defendant may litigate the merits of a suppression claim without thereby waiving a notice preclusion claim that has been denied.

(iii.) *Specification of Prior Identification Procedures*: Section 710.30(1)(b) provides that when identification testimony will be heard at trial from a witness who has previously identified the defendant, the People must provide notice specifying the evidence intended to be “offered” at trial. It sometimes happens that identification procedures occur which will not be discussed at trial. For example, under current law, where a witness picks the defendant out of a photo array and then a lineup, the jury will learn only about the lineup – and if an in-court identification is made, about that identification as well. Under the language of the statute, the People need not give the defendant notice before trial about the photo array, evidence of which cannot be “offered” at trial.⁹⁵

Information about identification procedures may be quite relevant to the defense strategy at the suppression stage, as well as at trial, even if the prosecution cannot place the results of those proceedings before the jury. Indeed, unfairness in an identification proceeding that will not be addressed on the prosecution’s direct case at trial could be the very basis for a motion to suppress the identification evidence that the prosecution does intend to present, since obviously an improperly suggestive photo identification – like other improper identifications procedures – can “taint” any later identification.⁹⁶ The only good reason not to require that the prosecution provide information about all identification procedures is that adding any burdens to the prosecutor’s notice obligations, while we remain in the world of extremely inflexible remedies for notice error, risks compounding unfairness to the prosecution.

⁹⁵ See *People v. Grajales*, 8 N.Y.3d 361 (2007).

⁹⁶ See, e.g., *People v. Delamota*, 18 N.Y.3d 107, 119 (2011); *People v. Gee*, 99 N.Y.2d 158, 163 (2002).

We propose that, when the prosecution intends to introduce identification testimony at trial, the prosecutor be obliged to give notice of all identification proceedings in which the witness participated, including photographic identifications.

(iv.) *Appeals from Preclusion Orders*: Interlocutory appeals are rare in New York criminal cases. But an appeal by the prosecution is permitted when a trial court suppresses evidence pursuant to Criminal Procedure Law article 710. To restrict the numbers of appeals, the law obliges the People to stipulate that if their appeal is unsuccessful, the case will be dismissed.⁹⁷

Preclusion orders have the same effect as suppression orders, as to the same evidence. Logic would dictate that they be appealable in the same way that suppression orders are appealable. But the Court of Appeals has decided that the current Criminal Procedure Law provisions authorizing People's appeals apply only to merits suppression orders, and do not apply when evidence is precluded for untimely or inadequate notice.⁹⁸

We recommend that Criminal Procedure Law section 450.20 be amended to permit appeals from preclusion orders. The new provision should, like section 450.20(8), require a statement by the prosecution that the case will not go forward if the appeal is unsuccessful.

(v.) *Notice About Physical Evidence*: Criminal Procedure Law section 710.30 requires notice only as to statements and identification testimony. Physical property seized by the police is not subject to this notice rule, perhaps on the theory that the defendant will know what physical property was taken from him. But a defendant (and his attorney) often will not know what was recovered in a search conducted pursuant to a warrant, possibly while the defendant was absent. Nor will the defendant necessarily be aware of what was recovered in a search of his car, which might be conducted long after the defendant was removed from that car, or in the search of a companion or of premises remote from the time or place of the arrest but allegedly within the defendant's "dominion and control." Nor will the defendant necessarily be aware of evidence recovered as the "fruits" of searches of which he has knowledge. Likewise, the defendant often does not know that common items taken from him by the police, such as money or phones taken after arrest for safekeeping, will be used by the prosecution at trial. Provisions in article 240 address the discovery of physical evidence, but if the 15 day notice rule is eased, there is no reason not to include in

⁹⁷ See CPL §450.50.

⁹⁸ See *People v. Laing*, 79 N.Y.2d 166 (1992).

section 710.30 notice of physical evidence recovered from the defendant, or from a place as to which he arguably has standing.

G. Discovery Should Be Automatic (But “Demands” Also Could Be Retained)

Currently the discovery statute requires both parties to serve written “demands” to initiate the discovery process.⁹⁹ The Task Force recommends that both parties’ discovery obligations instead be automatic. Eliminating the “demand” rule would spare defense lawyers, prosecutors, and the court system needless burdens of formulaic paperwork. Notably, District Attorneys in New York State who voluntarily offer the defense forms of “open file” discovery also have abandoned article 240’s “demand” system for routine discovery, recognizing that most litigants in a case that has not been resolved by that stage of the proceedings will want to obtain discovery.¹⁰⁰

H. The Task Force Does Not Recommend Pre-Guilty Plea Discovery Rules

The Task Force does not at the present time recommend that a statutory obligation to turn over discovery to defendants prior to pleas of guilty be adopted in New York State. Such a provision would present concerns for the efficient administration of criminal justice, and could deprive the plea bargaining process of one of its principal advantages – saving resources. Prosecutors should be encouraged, however, to voluntarily provide such discovery where the law does not otherwise require it to be turned over. In addition, the Task Force strongly recommends that new measures be adopted to ensure that *Brady* information is disclosed earlier in the process than currently occurs in most parts of the State (and before formal discovery deadlines, if need be), so that both parties can evaluate it when making critically important decisions about guilty pleas.¹⁰¹

⁹⁹ See CPL §§240.10(1), 240.20, 240.30, 240.80.

¹⁰⁰ Were it deemed worthwhile as a means to spare prosecutors having to copy materials for some defendants who do not actually want discovery, the Task Force also believes that it would be an acceptable alternative approach for the discovery statute to require each party to serve a *simple and concise* written demand on the opposing party to trigger discovery obligations.

¹⁰¹ See *United States v. Copp*, 267 F.3d 132, 135 (2d Cir. 2001) (“*Brady* material must be disclosed in time for its effective use at trial . . . or at a plea proceeding”); *People v. Delarosa*, 48 A.D.3d 1098, 1099 (4th Dept. 2008); *People v. Carter*, 258 A.D.2d 409, 411-12 (1st Dept. 1999); cf. *United States v. Ruiz*, 536 U.S. 622, 629-31 (2002); see generally *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

III. Additional Recommendations for Rectifying Problems With Inadequate Disclosure of Favorable Evidence and Information

Beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), the decisions of the Supreme Court of the United States require that law enforcement officers and prosecutors deliver to the defense information and evidence that tends to be favorable to the accused or impeaches a prosecution witness. Delivery should be made to the defense as soon as practicable after the prosecutor learns of the information. The constitutional requirement that the turnovers take place at the earliest time and continue throughout the proceeding has often been violated. Steps to reduce such violations deserve urgent attention and are the subject of this section of our report.

A. Constitutional Underpinnings of *Brady v. Maryland*

Brady v. Maryland, 373 U.S. 83 (1963), establishes the federal constitutional obligation of prosecutors to disclose information that tends to be favorable to the accused. That includes exculpatory information, information that might reduce the defendant's punishment after conviction, and information that impeaches prosecution witnesses.¹⁰² Now simply called "*Brady*," the rule's purpose is to protect the due process right to a fair trial and to prevent wrongful convictions and inappropriate sentences.

Criminal defense attorneys, prosecutors, and judges appreciate that *Brady* protection is essential to achieving justice in criminal cases. Nonetheless, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."¹⁰³

¹⁰² *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994).

¹⁰³ *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, CJ., dissenting) (citing *Smith v. Cain*, 132 S. Ct. 627 (2012); *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir. 2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *Simmons v. Beard*, 590 F.3d 223 (3rd Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009); *United States v. Zomber*, 299 F. Appx. 130 (3rd Cir. 2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *United States v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); *People v. Uribe*, 76 Cal. Rptr. 3d 829 (Cal. Ct. App. 2008); *Miller v. United States*, 14 A.3d 1094 (D.C. 2011); *Deren v. State*, 15 So.3d 723 (Fla. Dist. Ct. App. 2009); *Walker v. Johnson*, 646 S.E.2d 44 (Ga. 2007); *Aguilera v. State*, 807 N.W.2d 249 (Iowa 2011); *DeSimone v. State*, 803 N.W.2d 97 (Iowa 2011); *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010); *Duley v. State*, 304 S.W.3d 158 (Mo. Ct. App. 2009); *People v. Garrett*, 106 A.D.3d 929 (2d Dept. 2013); *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011); *In re Stenson*, 276 P.3d 286 (Wash. 2012); *State v. Youngblood*, 650 S.E.2d

New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction. Unfortunately, this is not just a New York problem; it is a national problem, as noted in the dissent in *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting).

The recurrence of *Brady* violations is a compelling reason for this Task Force to advocate for reform of the New York State discovery statutes. If all discovery materials and information, favorable and non-favorable to the defense, are turned over to the defense at the early stages of a case, most *Brady* materials would automatically be disclosed. Of course, a state statutory discovery procedure does not supersede the constitutional rules for *Brady* turnover, but liberalized discovery would help to greatly reduce *Brady* errors. Broad, expedient statutory discovery will prevent or reduce *Brady* violations by removing difficult decision-making for law enforcement and prosecutors who have the sole responsibility of providing *Brady* material to the defense.

New York state law is as significant as federal law in articulating the protections guaranteed by *Brady*. The decisions of both court systems agree that *Brady* places on the prosecutor a one-sided obligation to turn over information that is favorable to the accused. This unilateral obligation applies to information in the prosecutor's possession, and the prosecution is also charged with having knowledge of information if it is in the possession, constructive or actual, of a law enforcement agent working on the case. Further, *Brady* and its progeny have determined that the prosecutor is required affirmatively to learn about the existence of any favorable information known to any law enforcement agency or personnel in the case.¹⁰⁴ This is a heavy obligation when we think of the scope of the information law enforcement agents and prosecutors may possess in a given case (*i.e.*, police reports, medical reports, psychological records, forensic reports, biological evidence, ballistic evidence, firearms, knives, clothing, letters, financial records, identification evidence, witness statements, defendant and co-defendant statements, etc.).

Brady information is considered so essential to achieving justice that case law makes it unnecessary for the defense to request it. Rather, the defense is entitled to such information without

119 (W.Va. 2007)); *see also* Editorial, "Rampant Prosecutorial Misconduct," *NEW YORK TIMES* (Jan. 4, 2014); Editorial, "Justice and Open Files," *NEW YORK TIMES* (Feb. 26, 2012).

¹⁰⁴ *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Wright*, 86 N.Y.2d 591, 598 (1995).

motions or demands.¹⁰⁵ In New York, when the defense does actually request a type of *Brady* material, but the information is not forthcoming, the standard for showing prejudice is reduced.¹⁰⁶

B. Examples of *Brady* Material

Some of the kinds of information that may constitute *Brady* material in particular situations are listed below. The list is by no means complete, but it lends support to the proposition that identifying *Brady* material requires careful evaluation in each criminal case of the information in the possession of law enforcement and that enacting broad and early discovery would reduce *Brady* violations.

(1.) *Exculpatory Evidence*: Exculpatory evidence includes not only information directly rebutting the prosecution's affirmative case, but also other information in the possession of law enforcement which may tend to exculpate the defendant. In this paragraph, however, we use the term to refer to evidence displaying or suggesting a weakness in the prosecution case. Such evidence may be verbal, written or recorded, or demonstrative and may include, but is not limited to: photographs (including photographs of the crime scene, the victim/witness/defendant); forensic evidence (including fingernail clippings, hair samples, blood samples, and DNA samples, with test results, positive or negative); scientific, medical and psychiatric reports (including conclusions and laboratory notes); ballistics evidence; evidence of intoxication of the victim/witness/defendant; videotapes or surveillance footage; emails; text messages; voice recordings or exemplars; financial reports; clothing and personal belongings of the witness, victim or defendant worn at the time of the crime or some other relevant time; identification evidence (photo arrays, show-ups and line-ups including positive identifications of other suspects, non-identifications and misidentifications); etc.¹⁰⁷

¹⁰⁵ *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1972); *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

¹⁰⁶ *People v. Vilardi*, 76 N.Y.2d 67 (1990).

¹⁰⁷ See, e.g., *United States v. Rodriguez*, 496 F.3d 221, 222-26 (2nd Cir. 2007) (non-memorialized oral statements were discoverable under *Brady*); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011), *aff'd*, 19 N.Y.3d 932 (2012) (e-mail); *People v. Bozella*, 25 Misc.3d 1215 (Sup. Ct., Dutchess Co. 2009) (oral statement to police); *People v. Maldonado*, 36 Misc.3d 1224(A) (Co. Ct., Sullivan Co. 2012) (mistrial granted after court learned that several items not turned over); see also *People v. Bryce*, 88 N.Y.2d 124, 128 (1996) (deceased's skull was potentially *Brady* material).

(2.) *Information Supporting a Legal Defense*: Information supporting a legal defense also presents itself in many forms. In any form, it should be turned over to the defendant.¹⁰⁸ Legal defenses include, but are not limited to, the following: self-defense, agency, alibi, entrapment, misidentification, and insanity. Such information, in whatever form, is considered exculpatory and favorable to the defense.

(3.) *Benefits and Promises to the Victim or Witness in Exchange for Testimony or Cooperation*: Prosecutors and law enforcement officers must inform the defense of “benefits” and “promises” provided to or made to the witness or his associates, family, or others with significance to him by the prosecution, police or other individuals with a vested interest in the outcome of the case. Benefits and promises may include, but are not limited to: gifts, payments, vacations, jobs, any item of monetary value, a promise not to harm the witness or relatives of the witness, bribes, relocation expenses, immunity from prosecution and “deals” in other criminal cases, etc. With such information, the defense attorney may seek to impeach the victim or witness by showing bias towards the prosecution, and a willingness to be less than truthful due to the influence of the benefit or promise.¹⁰⁹

¹⁰⁸ See, e.g., *Cone v. Bell*, 556 U.S. 449, 470 n.16 (2009) (“evidence consistent with” the defendant’s assertion that he was suffering from chronic amphetamine psychosis during the crime); *Youngblood v. West Virginia*, 547 U.S. 867, 868-70 (2006) (“graphically explicit note that both squarely contradicted the state’s account of the incidents and directly supported [the] consensual-sex defense”); *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (“the evidence supported a potential defense theory that, whatever DiSimone’s involvement in the fight, he was not the cause of Balancio’s death”); *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (non-testifying eyewitness described events that that conflicted with version of eyewitnesses); *People v. Rivera*, 138 A.D.2d 169, 175 (1st Dept.1988) (“the denial of the psychiatric records to the defendant constituted the withholding of *Brady* material. Those records were crucial as to who was the ‘initial aggressor’ and as to whether defendant could retreat ‘with complete safety as to himself and others’ in relation to the defense of justification”) ; *People v. Barreras*, 92 A.D.2d 871 (2d Dept. 1983) (witness would have contradicted testimony that property was obtained from defendant); *People v. Hairston*, 30 Misc.3d 1206 (Westchester Co. Ct. 2011) (evidence of justification suppressed, CPL §440.10 motion granted); *People v. Gilman*, 28 Misc.3d 1217 (Sup. Ct., N.Y. Co. 2009) (some counts to be retried because of *Brady* violation); *People v. Davis*, 27 Misc.3d 1226 (Sup. Ct., Bronx Co. 2010) (claimed loss of evidence supporting a defense; hearing granted); see also *People v. Geaslen*, 54 N.Y.2d 510, 516 (1981) (evidence that “could affect” a suppression ruling); *People v. McCutcheon*, 96 A.D.3d 580 (1st Dept. 2012) (same).

¹⁰⁹ See, e.g., *People v. Colon*, 13 N.Y.3d 343 (2009) (promise to witness not revealed); *People v. Steadman*, 82 N.Y.2d 1, 6-8 (1993) (promise made to witness’s attorney by another prosecutor); *People v. Novoa*, 70 N.Y.2d 490, 496-97 (1987) (“contingent and insignificant” statement that, were prosecutor asked, she would say witness cooperated); *People v. Cwikla*, 46 N.Y.2d 434, 438-42 (1979) (correspondence with Parole Board); *People v. Carusso*, 94 A.D.3d 529 (1st Dept. 2012) (*Brady* violation, but cured); *People v. Jackson*, 29 A.D.3d 328 (1st Dept. 2006) (impeachment material treated as newly discovered evidence rather than *Brady* material); *People v. Mickel*, 274 A.D.2d 325, 325-26 (1st Dept. 2000) (“Once any understanding has been reached between the prosecutor and a witness, it is for the jury to determine how much value to assign it”) ; *Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013) (confused information about promise to a witness results in vacatur of conviction); see also *People v. Bermudez*, 25 Misc.3d 1226 (Sup. Ct., N.Y. Co. 2008).

(4.) *Evidence Suggesting Bias, Interest, Hostility, and Motive to Lie or Fabricate*: The defense should be provided with information that may tend to show an unrelated bias or hostility toward the defendant, or interest of the witness, as these emotions may cause the witness to lie about the evidence or to fabricate or exaggerate unfavorable evidence against the defendant.¹¹⁰

(5.) *Criminal Record and Prior Bad Acts of the Victim and/or Witness*: The criminal record and prior bad acts of the victim and other prosecution witnesses must be turned over to the defense. With such information, the defense may attempt to show a lack of moral integrity and thus, a lack of credibility on the part of the victim/witness.¹¹¹

(6.) *Recantations and Inconsistent Prior Statements of a Victim/Witness, Which May be Verbal, Written or Recorded*: With this information, the defense may attempt to show that the victim/witness is uncertain, inaccurate, not worthy of belief or lying.¹¹²

¹¹⁰ See, e.g., *Banks v. Dretke*, 540 U.S. 668, 691, 701 (2004) (paid informant status); *United States v. Bagley*, 473 U.S. 667, 683 (1985) (contingent possibility of a reward); *People v. Baxley*, 84 N.Y.2d 208, 213 (1994) (claim that witness “had been induced to falsely accuse defendant” by another person); *People v. Wright*, 86 N.Y.2d 591, 596-97 (1995) (“status as a police informant”); *People v. Sinha*, 84 A.D.3d 35, 40-41 (1st Dept. 2011) (witness’s belief that defendant had caused him to be charged with violating probation), *aff’d*, 19 N.Y.3d 932 (2012); *People v. Wallert*, 98 A.D.2d 47, 49-50 (1st Dept. 1983) (civil suit for damages); *People v. Velez*, 118 A.D.2d 116, 118-20 (1st Dept. 1986) (statement of belief that defendant previously robbed witness’s wife).

¹¹¹ See, e.g., *People v. Williams*, 7 N.Y.3d 15, 19 (2006) (perjury investigation of police witness); *People v. Sinha*, 84 A.D.3d 35, 40-41 (1st Dept. 2011) (prior uncharged misconduct), *aff’d*, 19 N.Y.3d 932 (2012); *People v. Monroe*, 17 A.D.3d 863, 864 (3d Dept. 2005) (complainant’s prior arguments with attendant at another gas station); *People v. Pressley*, 234 A.D.2d 954, 955 (4th Dept. 1996), *aff’d*, 91 N.Y.2d 825, 827 (1997); *People v. Suh*, 27 Misc.3d 143(A) (App. Term, 9th & 10th Jud. Dists. 2010).

¹¹² See, e.g., *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) (detective’s notes of witness interview); *Strickler v. Greene*, 527 U.S. 419 (1999) (detective’s summary and notes of witness interviews); *Kyles v. Whitley*, 514 U.S. 419 (1995) (inconsistent statements by eyewitnesses and by police informant); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162-63 (2d Cir. 2008) (agent’s notes of proffer meeting with witness’s attorney); *United States v. Rodriguez*, 496 F.3d 221, 228 (2d Cir. 2007) (oral statements during proffer interview); *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001) (statements suggesting complainant was less certain shortly after incident); *People v. Bond*, 95 N.Y.2d 840, 842-43 (2000) (initial oral statement to police that witness did not see anything); *People v. Leibovits*, 94 A.D.3d 1146 (2d Dept. 2012) (delayed disclosure of statement); *People v. Frantz*, 57 A.D.3d 692, 693 (2d Dept. 2008) (statements that witness did not see defendant with weapon and that it was dark); *People v. Williams*, 50 A.D.3d 1177, 1180 (3rd Dept. 2008) (officer’s notes that witness had previously reported seeing another object); *People v. Gantt*, 13 A.D.3d 204, 205 (1st Dept. 2004) (prior testimony implying witness may not have been at scene); *People v. Waters*, 35 Misc. 3d 855 (Sup. Ct., Bronx Co. 2012) (failure to disclose that witness changed his testimony); see also *NEW YORK TIMES* (May 25, 2012 at A25 col.1); *NEW YORK TIMES* (October 10, 2012 at 20, col.1).

C. Application of the *Brady* Obligation

The prosecutor must exercise due diligence to learn of exculpatory or impeaching information held by or known to those law enforcement officials or agencies working on the case. However, *Brady* does not generally require the prosecutor to conduct searches for information not in the possession of the law enforcement officials or other agencies investigating the case.¹¹³

The *Brady* obligation requires the prosecutor to preserve favorable or impeaching information in his or her possession and to provide the defense with access to the information.¹¹⁴ The obligation is continuing and prompt. Further, the prosecutor must turn over the information that is favorable to the defendant even if the prosecutor believes it to be unreliable or false.¹¹⁵ Importantly, a prosecutor's failure to deliver *Brady* information need not be intentional or involve bad faith. Any failure to deliver favorable or impeaching information is a violation, although perhaps not requiring a remedy at trial or on appeal for some independent reason.¹¹⁶

¹¹³ *Kyles v. Whitley*, 514 U.S. 419 (1995); *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000); cf. *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998) (“government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure”); *People v. DaGata*, 86 N.Y.2d 40, 44-45 (1995); *People v. Novoa*, 70 N.Y.2d 490, 498 (1987); *People v. Rutter*, 202 A.D.2d 123, 131 (1st Dept. 1994).

¹¹⁴ *People v. Hayes*, 17 N.Y.3d 46 (2011); *People v. Cortijo*, 70 N.Y.2d 868, 870 (1987); *People v. Waters*, 35 Misc.3d 855, 862 (Sup. Ct., Bronx Co. 2012); *People v. Davis*, 27 Misc. 3d 1226 (Sup. Ct., Bronx. Co. 2010) (claimed loss of evidence supporting a defense; hearing granted).

¹¹⁵ See, e.g., *People v. Baxley*, 84 N.Y.2d 208, 213-14 (1994) (“nondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved [the *Brady* information]”); *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (“if there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it To allow otherwise would be to appoint the fox as henhouse guard”); *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010) (“It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder”); *People v. Lantigua*, 228 A.D.2d 213, 220 (1st Dept. 1996); *People v. Robinson*, 133 A.D.2d 859, 860 (2d Dept. 1987); see also *People v. Behling*, 26 N.Y.2d 651, 652 (1978) (“Nor is the impropriety made the less because the prosecutor may have believed the [witness’s] recantation to be false and a maneuver either to avoid giving testimony or to avoid being thought disloyal to the defendant”); see generally *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (resolving doubtful questions in favor of disclosure “will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations”); *Brady v. Maryland*, 313 U.S. 83, 88 (1963) (observing that a prosecutor who withholds evidence that tends to exculpate the defendant casts himself “in the role of an architect of a proceeding that does not comport with standards of justice”).

¹¹⁶ See, e.g., *United States v. Copp*, 267 F.3d 132, 135-50 (2d Cir. 2001) (it is not “error” for a prosecutor to fail to disclose non-material but favorable information before trial, which suggests to prosecutors that they should disclose favorable but non-material information even if doing so is not constitutionally required); *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233-40 (D. Nev. 2005) *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); see generally *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

D. Consequences of *Brady* Violations

Notwithstanding the due process-based obligation imposed by *Brady*, there regularly appear in New York instances of *Brady* violations. Such violations include the failure to turn over exculpatory or impeaching information, late delivery of *Brady* information, and the loss of *Brady* material. These violations have serious consequences for defendants who may be wrongfully convicted, and for victims whose cases may be dismissed or retried. Despite these serious consequences on both sides of the criminal justice system, the prosecutor who mistakenly, negligently, or intentionally violates *Brady* does not generally face significant personal consequences.

The occurrence of *Brady* violations in New York, especially those involving the prosecutor's failure to disclose impeachment material, presents the fundamental question of what can be done to enhance adherence to *Brady* so that errors are avoided, and trials are conducted with all of the defendants' due process rights intact. This question requires a serious evaluation of our criminal justice procedures as they relate to the prosecutors' duty to provide the defense with *Brady* material. When the prosecutor turns over *Brady* material just prior to trial and after pretrial hearings have been completed, the defense might request additional pretrial hearings, or additional time to investigate the information. The trial judge may grant such requests, which can prevent harm to the accused and provide for a fair trial.¹¹⁷ If the trial has begun when the *Brady* material is delivered or if the information is lost or destroyed, the court should take steps to prevent harm to the defense. The defense may seek a trial remedy including a mistrial; an adjournment for investigation, research, or the assistance of an expert; an appropriate curative instruction; a limit on or preclusion of evidence; and an opportunity to call additional witnesses to testify and to recall witnesses for further testimony.

There are several procedures for preventing *Brady* violations and responding to those committed. But emphasis must be placed on an early and complete turnover of *Brady* material so that the accused can be afforded a fair trial.

¹¹⁷ See, e.g., *People v. Whitehead*, 84 A.D.3d 1128 (2d Dept. 2011) (*Brady* violation minimized by further cross examination); *People v. Sinha*, 84 A.D.3d 35 (1st Dept. 2011) *aff'd*, 19 N.Y.3d 932 (2012); *People v. Williams*, 50 A.D.3d 1177 (3d Dept. 2008); *People v. Jackson*, 264 A.D.3d 683, 684 (1st Dept. 1999).

E. Causes of and Remedies for *Brady* Violations

As discussed above, *Brady* violations include the failure to turn over exculpatory or impeaching information, late delivery of *Brady* information, or the loss or contamination of *Brady* material. The relevant case law, as well as information gathered by the Task Force from prosecutors, defense counsel and judges, suggest that *Brady* violations can be placed in three categories with identifiable causes: (1.) unintentional violations caused by poor understanding of what constitutes *Brady* material; (2.) negligent violations when the prosecutor understands what constitutes *Brady* material, but through oversight or carelessness neglects to turn it over; and (3.) intentional violations caused by inappropriately competitive prosecutors or other law enforcement officers who believe that a conviction in a criminal case justifies a refusal to turn over *Brady* material. The Task Force will address these causes of *Brady* violations and recommend ways to remedy these violations.

(1.) *The “Materiality” Language in Brady Decisions Causes Confusion:* “*Brady* material” is defined by the courts in various ways. While the courts offer up the definitions to help us understand the scope of *Brady*, the variety of definitions can confuse rather than clarify the meaning of “*Brady* material.” This confusion seems to be one of the reasons why well-intentioned law enforcement officers and prosecutors fail to turn over *Brady* materials.

While the Court’s decision in *Brady* describes the information within the rule as that which is “favorable to the accused” or “would tend to exculpate” the accused (*see also Giglio v. United States*, 405 U.S. 150 (1972)), *Brady* decisions have also included the term “material evidence.” The term “material” comes into play when courts have ruled that exculpatory information must be “material to either guilt or punishment” for a defendant to receive post-trial relief from a *Brady* violation. The Task Force believes that, notwithstanding the need for a standard of “materiality” for post-trial review in *Brady* violation cases, “materiality” under *Brady* is a standard applicable only after conviction and should not be applied before.¹¹⁸

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court said that evidence is “material” if there is a “reasonable probability” that had the information been disclosed to the defense “the result

¹¹⁸ Compare *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001) with *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233-40 (D. Nev. 2005) *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); *see also People v. Vilardi*, 76 N.Y.2d 67, 77-78 (1990).

of the proceeding would have been different.” *See also Vilardi*, 76 N.Y.2d 67 (1990) (“reasonable possibility the result would have been different”). Later in *Kyles*, 514 U.S. 419 (1995), the Court determined that the failure to disclose need not have prevented an acquittal, if it led to a verdict that is not “worthy of confidence.”

Forecasting before trial the possibility that the disclosure of information might not change the verdict is difficult for any criminal justice practitioner. Such analysis is better left to the appellate court that benefits from a retrospective view of the evidence, and has no place in a pretrial decision whether to disclose evidence favorable to the defense. The prosecutor does not have the perspective of the defense attorney. Without an understanding of the defense perspective, prosecutors may not be able to recognize the full significance of “favorable” or “exculpatory” information. Defenses like agency, self defense, entrapment, and lack of specific intent rest on information that, standing on its own, can either support the prosecutor’s position or a defense raised by the accused. Indeed, even trial judges will require defense attorneys to explain their defense strategies when deciding to allow lines of questioning to continue, or to permit the introduction of defense evidence when its relevance or exculpatory value is not obvious.

(2.) *Proposed Remedies for Unintentional Brady Violations* □ *Training and Use of a Discovery/Brady Checklist*. (i.) *Training*: The Task Force suggests that a well-developed *Brady* training program can greatly reduce unintentional *Brady* violations. *Brady* training should be given not just to prosecutors, but also to other law enforcement officials and to forensic laboratory officials, who are required to advise prosecutors when there is evidence known to them that is favorable to the defense. *Brady* training should also be given to defense counsel and judges (*see* NY Rules of Professional Conduct, Rule 5.1 (b)(1), (c)). Such training should include regular, in-depth study of case law describing *Brady* principles and their application to numerous case scenarios. This training should include an explanation of *Brady* material from the defense perspective.

The Task Force recommends that *Brady* training include in its curriculum the following topics, among others: (1.) standards for disclosure of impeachment and exculpatory information; (2.) scenarios illustrating when a lack of incriminating results from scientific testing or identification procedures is evidence favorable to the defendant; (3.) scenarios illustrating when inadmissible information is discoverable; (4.) standards governing when names and contact information for witnesses is discoverable; (5.) scenarios illustrating that oral and non-memorialized

favorable information is discoverable; (6.) timing of disclosures; (7.) delegation of *Kyles* inquiries by the ADA to an agent/police officer; (8.) scenarios illustrating the types of information the prosecutor believes is false or unreliable, but is still favorable to the defendant; (9.) scenarios illustrating situations when the ADA thinks there is an explanation for the information that “reconciles” the information to the prosecution’s theory, but the information is nonetheless discoverable; (10.) scenarios illustrating when information that could affect a suppression ruling is discoverable; and (11.) the standards for *in camera* review of possible *Brady* information.

This Task Force has attempted to determine whether *Brady* training in New York State is effective or sufficient. The Task Force could not obtain enough information to make such a determination. However, one District Attorney’s Office referred to the use of a twenty page handbook by the District Attorneys Association of the State of New York entitled “The Right Thing: Ethical Guidelines for Prosecutors” (the “handbook”).

The section of the handbook that is dedicated to the *Brady* obligation (pages 14-15) is far too abbreviated and inadequate by itself. For example, the handbook limits *Brady* material to “information directly related to the crime,” and it does not discuss circumstances unrelated to the crime that would negatively affect the credibility of a prosecution witness. The handbook states that *Brady* is satisfied when the defense has been given a meaningful opportunity to use allegedly exculpatory information to cross examine the People’s witnesses or as evidence during his case. The handbook would be more instructive if it detailed how the defense actually uses *Brady* material. For example, prosecutors should be informed that before the defense decides to use the information for cross examination, the defense may need to investigate, research, engage an expert witness, issue subpoenas, or take other steps fully to utilize *Brady* material. Prosecutors should be instructed that the defense must have the opportunity to integrate the *Brady* information with the defense strategy. With such instructions, and instructions on the other matters discussed above, prosecutors and law enforcement officers might identify *Brady* information more quickly and turn it over at an earlier stage of the case. Lastly, there is no mention in the handbook of law enforcement’s obligation to safeguard *Brady* material by preventing its loss, destruction, or contamination, which is so important at the earliest stages of a case.

The introduction to the handbook states that the information in it is to be added to or supplemented by other teachings and principles. The Task Force agrees with this caveat, as the

handbook does not provide sufficient analysis or an adequate description of *Brady* material for the reader to determine what constitutes *Brady* material and how to comply with the *Brady* obligation. Additionally, the District Attorneys Association of the State of New York recommends that a joint effort be undertaken by the defense and the prosecution to prepare a teaching document to be used by all participants in the criminal justice system. The Task Force agrees with this suggestion, which underscores the proposition that prosecutors should learn how to analyze evidence from the perspective of a defense attorney.

(ii.) *Sample Discovery/Brady Checklist*: In an effort to provide a training and practice tool for prosecutors, the Task Force has prepared a sample checklist of discovery and *Brady* information. It is a comprehensive list of various documents, evidence forms, reports and other information which, in the context of a specific case, may constitute discovery and *Brady* material. This checklist is attached as “Appendix B” of this Report.¹¹⁹ It is intended to provide a guide for prosecutors, law enforcement officers, defense attorneys and judges as to what information may constitute discovery and *Brady* material. The checklist may not identify every item that constitutes discovery or *Brady* material, but the Task Force believes that the checklist, or one like it, would help prosecutors and other members of the criminal justice system to identify *Brady* material and disclose it.

(3.) *Proposed Remedies for Negligent Brady Violations – Judicial Intervention and Procedural Enhancements*: “Negligent” *Brady* violations usually occur when the prosecutor, recognizing that he or she has *Brady* material in his or her possession or that it is in the possession of law enforcement, negligently fails to turn it over, at least in timely fashion. Perhaps the prosecutor meant to, but forgot. This may occur when prosecutors have heavy caseloads or insufficient support staff to assist in the preparation of case files.

The unintentionally delayed turnover of *Brady* material to the defense can result in inadequate disclosure, and thus a *Brady* violation. *Brady* information should be turned over to the defense when the prosecution learns of the existence of such information. At the least, the defense must receive the information in sufficient time to investigate, prepare, and integrate the information

¹¹⁹ The checklist includes types of documents used in various prosecution offices and law enforcement jurisdictions of this State. It could be modified to include those documents used within each particular jurisdiction or locality. It would be preferable for the State to adopt uniform criminal justice documents, as previously recommended by this Task Force.

into the defense case. The negligently late turnover of *Brady* material can occur when prosecutors delay the review of law enforcement files until shortly before the time of trial. A prosecutor can incorrectly estimate the amount of time needed by the defense to prepare and make use of the information revealed by the *Brady* turnover. The defense may need scientists, doctors, or computer experts, among others, to identify and develop the usefulness of the information. This is especially true for biological testing and computer examinations, which can take weeks or months to complete. When delayed turnover of *Brady* material occurs, the defense may have to request an adjournment of a trial in order to review the *Brady* material fully. Yet, despite the need for additional preparation time, judges are often reluctant to delay a trial, especially if a jury is involved.

In light of the various ways *Brady* violations affect the proper disposition of cases, the Task Force has evaluated the possibility of requiring judicial involvement in pretrial discovery procedures related to *Brady* turnover. Interest has developed in stricter application of Section 200.12 of the New York Uniform Rules for Courts Exercising Criminal Jurisdiction. Rule 200.12 directs that:

As soon as practicable after the assignment of an action to an individual assignment judge, the assigned judge shall conduct a preliminary conference. The matters to be considered at such conference shall include establishment of a timetable for completion of discovery. . . . At the conclusion of the conference the directions by the court to the parties. . . shall be placed on the record or incorporated in a written court order. In the discretion of the court, failure of a party to comply with these directions shall result in the imposition of such sanctions as are authorized by law. The court may direct the holding of additional preliminary conferences as may be needed.

The Task Force recommends that this rule be used to construct and enhance *Brady* turnover procedures. The Task Force suggests that the date for the first conference be after, but very close to, the first court appearance on the felony indictment or misdemeanor information so that the turnover date is independent of the hearing and trial date and the defense, as well as the prosecutor, can begin preparation either for trial or plea negotiation. At the conference, the prosecution would inform the defense and the court as to the status of discovery matters; what, if any, *Brady* material has been turned over; *Brady* material that the prosecution intends to turn over and what inquiries about possible *Brady* information the prosecutor has made of others acting in the case; and what non-law

enforcement government agency records (social welfare agencies, child welfare agencies) are in the possession of law enforcement agents.¹²⁰

The Task Force recommends that the sample Discovery/*Brady* Checklist, or one like it, be integrated into court procedures to help identify discovery and *Brady* information, and that it be used to create a record of what information has been turned over to the defense. A certificate should be created showing the information that has been turned over, and that certificate should be made part of the record. During the conference, judges should inquire whether the prosecutor has acted with due diligence to find *Brady* material in the possession of other agencies or individuals who have acted in the case.

(4.) *Proposed Remedies for Intentional Brady Violations – Enforcing the Rules of Professional Responsibility*: Criminal justice studies have demonstrated that some prosecutors knowingly fail to hand over *Brady* material. These studies attribute the intentional disregard of *Brady* to office culture and a failure by prosecution supervisors to create an attitude of respect for the rule.¹²¹ In such prosecutors’ offices, obtaining a conviction becomes a paramount goal with the result that *Brady* may be disregarded if the information threatens the success of the prosecution.¹²²

It is here that the difference between a “remedy” and a “sanction” is significant. Earlier portions of this report speak of the importance of correcting the adverse consequences of a failure timely to deliver discovery by providing a remedy. The remedy is directed at avoiding prejudice from an error, not at punishment of a particular person. A sanction is, however, intended to punish

¹²⁰ The Task Force recognizes that criminal cases are processed differently in different counties, within different courts in the same county, and even within different court parts in the same court. In many courts the “individual assignment system” is not used, and very large numbers of cases are calendared in “up front” or “calendar” parts until they are ready to be sent to another court part for hearings or trial. In such “up front” parts, the caseload may not permit the court to hold discovery conferences close to the first appearance on the accusatory instrument underlying trial jurisdiction. The Task Force nonetheless believes that, even in such court parts, it is critical for the discovery conference to be held *well before* the expected date of hearings and trial.

¹²¹ See, e.g., Yaroshevsky & Green, “Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure,” in *Lawyers in Practice: Ethical Decision Making in Context* 269 (Levin & Mather, ed., 2012).

¹²² As Chief Judge Kozinski observed in his dissent in *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013): “A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence.”

an individual for improper conduct that is a knowing and intentional violation of the right to a fair trial. Sanctions, like remedies, have a place in the legal system, depending on the circumstances.¹²³

The New York State Rules of Professional Conduct contain one relevant provision that applies specifically to prosecutors, and others that apply to all attorneys, including prosecutors. Rule 3.8, entitled Special Responsibilities of Prosecutors and Other Government Lawyers, provides:

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

This provision expands the predecessor ethical requirement by including not just evidence, but information.¹²⁴ An intentional *Brady* violation is likely to fall within Rule 3.8 as well as other rules governing attorney conduct. Alleged violations of these rules are evaluated and determined by the attorney grievance committees of the Appellate Divisions. But the disciplinary rules and procedures have rarely been used to address *Brady* violations.

Other rules define the conduct expected of a lawyer. A lawyer cannot knowingly make a false statement (Rule 3.3), and cannot suppress evidence that he/she has an obligation to reveal (Rule 3.4).

The Task Force surveyed Department Disciplinary Committees in all Departments and Judicial Districts, seeking any information they could provide concerning disciplinary actions or complaints based on *Brady* violations. All of the responding Committee Counsel indicated that, due to confidentiality restrictions, their answers were limited to unspecific and generic information, without statistics. The Task Force learned that complaints based upon *Brady* violations are unusual.

¹²³ See *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (“Professional discipline is rare, and violations seldom give rise to liability for money damages. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1366 [2011]. Criminal liability for causing an innocent man to lose decades of his life behind bars is practically unheard of. See, e.g., Nathan Koppel, ‘Texas Ex-Prosecutor Gets Brief Jail Time for Misconduct,’ *Wall St. J.*, Nov. 9–10, 2013, at A5 [reporting that Texas settled civil and criminal misconduct charges against former prosecutor Ken Anderson, whose suppression of evidence in a murder trial resulted in the defendant spending 25 years in prison, in exchange for Anderson ‘forfeit[ing] his law license, [] serv[ing] up to 10 days in jail, pay[ing] a \$500 fine and perform[ing] 500 hours of community service’]”).

¹²⁴ Notably, the Rule does not exactly mirror the *Brady* requirements because the prosecutor is subject to sanction only if the conduct failing to disclose the information is “knowing.” The Task Force believes that under certain circumstances negligent *Brady* violations should be sanctioned under the Rules of Professional Conduct.

For the most part they have been made by defendants after convictions, and when the complaints were investigated they were determined to be unfounded. *Brady* complaints by attorneys and judges are rare. No public action taken by a Grievance Committee after a *Brady* violation was reported. One caution citation from about 15 years ago was remembered.

Each Appellate Division has a procedure for examining alleged violations of the Rules, and subsequent judicial procedures for monitoring alleged misconduct by members of the bar. The Task Force recommends that lawyers and judges apply the rules of professional responsibility described above when there is a factual basis for reporting or finding a *Brady* violation. The historical absence of proceedings that begin in Grievance Committees is without explanation and is puzzling. The recurrence of *Brady* issues, with no apparent attention by the public and the judiciary, needs to be changed so that *Brady* violations will be reduced.

That there appear to be no records or reports of proceedings resulting from *Brady* violations is startling. The absence of such records leads to the conclusion that there have been no proceedings, or at most a few, to determine if prosecutorial misconduct of this nature actually occurred. Better record keeping of the occurrence of possible *Brady* violations, and of the consequence of any resulting proceedings, is essential to discourage continuing violations. The information should, in fact, be available from already existing reporting requirements, transcripts of court proceedings, and the personal knowledge of the participants to the events of the underlying criminal actions. The Task Force recommends that the New York State Bar Association undertake a project to track instances of asserted or apparent *Brady* violations and record the results of the examinations of the incidents.

F. *Brady* and Guilty Pleas

Brady material can have a critical impact on the decision to plead guilty. Locating and gathering *Brady* information very early in cases where pleas are discussed must be examined. Considering that the overwhelming majority of cases are resolved by plea, the Task Force has considered the *Brady* obligation in the context of the right to counsel and the plea process.

In *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998), the Court wrote of *Brady* turnover in the plea context:

The government's obligation to make such [*Brady*] disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty. The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. *See, e.g., Tate v. Wood*, 963 F.2d 20, 24-25 (2d Cir. 1992). Although a guilty plea is generally considered valid so long as the plea was intelligent and voluntary, *see, e.g., Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969), the validity of the plea must be reassessed if it resulted from “impermissible conduct by state agents,” *Brady v. United States*, 397 U.S. at 757. Impermissible conduct includes *Brady* violations. *See, e.g., Miller v. Angliker*, 848 F.2d 1312, 1320-23 (2d Cir.), *cert. denied*, 488 U.S. 890, 109 S. Ct. 224, 102 L.Ed.2d 214 (1988). Thus, we have noted that where prosecutors have withheld favorable material evidence “even a guilty plea that was ‘knowing’ and ‘intelligent’ may be vulnerable to challenge.” *Id.* at 1320 (holding that *Brady* violation invalidated agreement to plead not guilty by reason of insanity); *see Tate v. Wood*, 963 F.2d at 24-25 (remanding for evidentiary hearing with respect to effect of nondisclosure on agreement to plead guilty).

Decisions such as this suggest that changes are needed in the manner in which plea negotiations are currently conducted.¹²⁵ Notably, New York cases are divided on the application of *Brady* to plea cases. *Brady* rights are not waived and turnover is required for plea discussions in the Third Department and the Fourth Department.¹²⁶ But apparently *Brady* turnover is waived by a plea in the Second Department.¹²⁷

The Task Force has considered that defense counsel often advise clients to enter guilty pleas before discovery and *Brady* materials are turned over, and additionally that prosecutors sometimes place a condition on the plea offer indicating that it must be accepted within a certain time period before discovery and *Brady* are turned over. After further study on this issue, it may eventually be determined that engaging in pleas discussions, especially final negotiations, before the defense has discovery and *Brady* material is not appropriate. At this time, the Task Force recommends that prosecutors’ offices not place a time limit on plea offers unless the prosecutor has already proved discovery to the defense and made *Brady* disclosures.

The Task Force acknowledges the importance of plea negotiations for defendants, prosecutors, and the criminal justice system generally. One more reason that we advocate for

¹²⁵ *See also Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

¹²⁶ *People v. DeLaRosa*, 48 A.D.3d 1098 (4th Dept. 2008); *People v. Ortiz*, 127 A.D.2d 305 (3d Dept. 1987).

¹²⁷ *People v. Day*, 150 A.D.2d 595 (2d Dept. 1989); *People v. Philips*, 30 A.D.2d 621 (2d Dept. 2006); *see generally People v. Bernard*, 163 Misc.2d 176 (Sup. Ct., N.Y. Co. 1994).

significant reform of the New York discovery statutes is that a broad, expedient discovery statute would inevitably reduce *Brady* violations and lead to more informed and appropriate guilty pleas.

G. Summary of *Brady* Recommendations by the Task Force

(1.) *Training*: The Task Force recommends enhanced training of prosecutors, law enforcement agents, defense counsel, and judges as to what constitutes *Brady* material, and as to available remedies and sanctions for violations of *Brady*. Such training should include lectures and case scenario discussions illustrating how to review evidence from the defense perspective, in order to assist the parties in better understanding what might constitute *Brady* material. The Task Force recommends using the Discovery/*Brady* checklist to train practitioners as to what might be *Brady* material (*i.e.*, what documents might exist and what information might be favorable to the defense for impeachment and exculpation). The checklist may be used to keep a record of what documents have been given to the defense. A copy of the checklist should be in each prosecution case file. The checklist should also be used by trial judges conducting pre-trial discovery/*Brady* conferences. The multi-functional use of the checklist will assist in reducing *Brady* violations.

(2.) *Early Judicial Involvement*: The Task Force recommends early judicial involvement in the turnover process for discovery and *Brady* materials. Our recommendation includes an early court conference with the parties under Rule 200.12 to determine what needs to be turned over, a turnover schedule, and the creation of status reports stating what information has been turned over to the defense. Compliance with discovery rules and *Brady* should be memorialized by a signed certification.

(3.) *Turnover Prior to Guilty Pleas*: The Task Force understands that requiring the turnover of discovery and *Brady* material before a plea offer is communicated and resolved is the ideal practice for protecting defendants' rights. However, this requirement is currently impractical. Nevertheless, the Task Force recommends that the New York discovery statute be revised to allow for broad and expedient turnover of discovery and *Brady* materials. In particular, the Task Force suggests that turnover of *Brady* material should occur before a plea offer is withdrawn.

(4.) *Tracking Brady Violations*: The Task Force recommends that the New York State Bar Association track cases involving allegations of *Brady* violations and the resolution of such cases.

Developing a database for this information will help members of the bar identify further steps that need to be taken to eradicate these problems.

(5.) *State-wide Procedures*: The Task Force recommends the establishment of state-wide procedures for monitoring the enforcement of the Rules of Professional Responsibility where *Brady* violations are alleged.

(6.) *Disciplinary Procedures for Intentional Brady Violations*: The Task Force recommends establishing and implementing internal and external disciplinary procedures for prosecutors and law enforcement officers who intentionally fail to turn over *Brady* material.

IV. Recommendations Regarding the Flow of Information Between Police and Prosecutors

In preparing this report, the subcommittee members met with law enforcement personnel and district attorneys to review the current state of information transfer between law enforcement agencies and prosecutors' offices, and to identify existing (and future) impediments to the flow of information between them.

An analysis of this subject must begin with the understanding that there are hundreds of federal, state, and local law enforcement agencies in New York, each with its own forms and procedures for recording and preserving relevant information about an investigation. New York police agencies range from those that employ thousands of officers and support staff, to smaller offices that employ part-time police officers and no support staff. Although there was consensus among subcommittee members that the current procedures governing the transfer of information between police agencies and prosecutors are acceptable, there was an acknowledgement that the relationship between police agencies and prosecutors' offices could be improved by addressing existing inefficiencies in the flow of information. Should New York State modify its laws to expand the scope of information provided during discovery, and require that this information be provided earlier in the process, it is likely that a number of police agencies will struggle to comply with the new obligations.

The issues surrounding current impediments to the flow of information between police agencies and prosecutors (as well as possible future impediments should the discovery statutes be modified) are related to the lack of police department training, an absence of standard operating procedures or general orders for the sharing of information, insufficient staffing and resources

within agencies, limited technology possessed by agencies, and the proliferation of electronic devices that generate possible discovery (*e.g.*, cellular telephones, mobile data terminals).

A. Current Information Transfer Between “Upstate” Police Agencies and Prosecutor Offices

In discussions with “upstate” prosecutors, it became clear that the common practice of district attorneys and their assistants is to work with the “lead investigator” (or officer) assigned to the case when seeking relevant case information. Normally, in a case involving a single police agency, the lead investigator (since he is an employee of the police agency) is able to determine what documents have been generated and provide them to the prosecutor assigned to the case. The practice of the assigned prosecutor obtaining relevant case information from the lead investigator works in the majority of cases because a significant number of prosecutions in New York involve only a single police agency.

This procedure becomes problematic, however, where there are multiple agencies involved in an investigation. In these cases the lead investigator is not always familiar with the documents generated by the other agencies, and must rely upon those agencies to provide promptly all documents requested by the prosecutor. Furthermore, as there is no system in place to track information that is generated by each police agency involved in a particular case, the prosecutor must rely upon the lead investigator to obtain all documentation relevant to the case.

Due to the nature of police work, documentation provided by the lead investigator to the prosecutor is often provided “piecemeal” – as a report or other document is provided to the investigator, it is then provided to the prosecutor. Additionally, police agencies normally have a senior officer review reports prior to filing. For larger police agencies, this may take several days. For smaller police agencies, the review by a senior officer and the completion of the “final” report may take weeks. This results in incomplete reports being provided to the prosecutor (and sometimes the defense). Under the current discovery scheme, this is sometimes problematic. Should a new discovery statute require quicker disclosure, it is likely that smaller police agencies will have difficulty complying.

Additionally, few police agencies itemize or log the documents that are generated and/or provided to the prosecutor. Very few police agencies have the technological resources to be

“paperless”: to prepare all documents using a computer, and transfer them to the prosecutor by electronic means. Most upstate police agencies still generate a number of documents by hand, and transfer those documents to the prosecutor either by mail, or by scanning the documents and emailing them to the prosecutor.

As a result, in “upstate” practice, the prosecutor requests, often immediately before trial, that the lead investigator provide his file to the prosecutor so that the prosecutor may personally review the file to determine whether all documents have been provided. This is obviously inefficient, as it requires the prosecutor to manually compare the documents received by the prosecutor with those contained in the file. Furthermore, in cases where multiple police agencies are involved, the prosecutor cannot determine with certainty that he has received all relevant information from each police agency.

B. Current Information Transfer Between NYPD and NYC Prosecutor Offices

In discussions with New York City prosecutors and police officers as well the Commissioner and Deputy Commissioner for Information Technology at the New York City Police Department (NYPD), it became clear that, despite significant efforts and progress made in the flow of information, the NYPD and NYC prosecutors face challenges similar to those found in smaller “upstate” police agencies. Due to the size of the NYPD and its numerous internal divisions, prosecutors will often find themselves working with multiple units within the NYPD. For example, during the course of a long term investigation it would not be uncommon for a prosecutor to work with the Patrol Borough, the Narcotics Division, the Detective Bureau and other units within the NYPD. This poses a challenge for the lead investigator and the prosecutor in their efforts to gather all the documentation relevant to a case.

The NYPD has developed an automated case management system for many of the reports produced by units or bureaus in the department. As this system is improved upon, the flow of information between police and prosecutors will be expedited. At this time, however, the automated case information system does not extend to the entire department, only certain divisions. In addition, there are discoverable documents that are not being scanned into the system (*e.g.*, patrol officer memo books). As a result, like their colleagues working with smaller police agencies, prosecutors in NYC request the complete case file from the lead investigator, but will still often

receive documents piecemeal and have to expend time and resources to ensure that all the relevant paperwork is located in advance of trial.

Members of the Information Technology Division of the NYPD (“IT”) also raised an issue that may be specific to the NYPD. They noted that NYPD officers are asked to provide information to the individual District Attorneys’ Offices in formats that are particularized to the specific office. For example, when preparing the complaint and writing up a new case, an individual District Attorney’s office may require the NYPD to provide information for a specific form that is different from the form used by another NYC prosecutor’s office in a case involving identical charges. The NYPD IT supervisors felt that were the NYC prosecutors’ offices to coordinate and develop a common set of required forms, NYPD personnel could save time and effort.

C. Lack of Police Agency Training or Standard Operating Procedures

Another concern raised by the prosecutors was a perception that not all police agencies have adequate training and general orders on what documents and written materials must be disclosed to the prosecution. Furthermore, prosecutors may not be aware of all the documents generated by police agencies that may be relevant to the case and potentially “discoverable.” For example, a police agency may prepare a “use of force” report for internal purposes that may contain a narrative of the events that lead to criminal charges. This report may not be provided to the prosecutor by the police agency and it may not be specifically requested by the prosecutor who might not be aware of its existence. Most prosecutors deal with a number of police agencies, each with their own internal forms and procedures, and it is difficult for prosecutors to know what should be produced in each criminal case.

One way to address the challenge that prosecutors face, when seeking to identify and collect the wide variety of police reports and forms used by different law enforcement agencies, would be to develop a common set of electronic police forms that could be used by agencies statewide. The New York State Division of Criminal Justice Services (DCJS) would be in the best position to explore the feasibility of creating such a common set of police forms.

The proliferation of electronic devices used by law enforcement personnel is also adding a new challenge to prompt disclosure of discovery by police agencies. Text messages or photographs on cellphones or electronic communication from mobile data or terminals may not be consistently

preserved or disclosed to prosecutors' offices. This is likely due to a lack of training on what is "discoverable" under New York law, and an absence of established protocols within police agencies for the preservation of electronic communications and media.

To address these issues prosecutors take a "give me everything you have" position in requesting information from police agencies. However, prosecutors at times may find (sometimes during a trial) that not all "discoverable" information has been provided by the police agency. Rarely is this due to a refusal by a police agency to provide requested information. Instead, it is more likely due to an individual police officer's misunderstanding about what documents need to be produced in a given case. For example, all police officers are not necessarily attuned to the fact that scratch notes written on the back of a form or on whatever paper is handy during a street encounter may contain important *Rosario* material. Indeed, a refrain sometimes heard by prosecutors who inquire of police officers why notes or a report was not produced is, "I didn't know you wanted that."

D. Lack of Sufficient Support Staff

Police agencies often lack the support staff necessary to provide discoverable documents quickly to prosecutors' offices. For instance, there are small, part-time police agencies in upstate counties that have very limited staffing, and are not staffed 24 hours per day, seven days per week. Lack of staffing is also an issue with some district attorney offices. Smaller offices normally employ part-time assistant district attorneys who do not have the time to obtain and disclose discoverable documents. As an example, in Wayne County prosecutors are unable to obtain discovery (with some exceptions) from smaller police agencies in misdemeanor/violation cases and instead rely upon whatever documents are contained in the court file (which may be only the charging document).

Limited staffing, however, is not only an issue with smaller police agencies. Larger agencies also suffer from a lack of support staff, which often requires that police officers (instead of support staff) waste valuable time copying documents so that they may be provided to prosecutors in a timely manner. Also, prosecutor offices often do not have the staffing to make copies of discoverable documents for the defense. As a result, assistant district attorneys are often required to make any copies that must be provided to the defense.

E. Recommendations

If the discovery statutes are changed to require increased and expedited discovery, police agencies and prosecutor offices will need to: (1.) enhance training of police officers and improve procedures to ensure that all information generated by a police agency is preserved and provided to prosecutors promptly when requested; (2.) increase support staffing to allow prompt disclosure of discoverable documents; (3.) develop and implement greater technological tools to enhance the flow of information between police agencies and prosecutors; (4.) encourage DCJS to explore developing a common set of electronic police forms that could be used by law enforcement agencies statewide; and (5.) ensure that as new technology is adopted by police agencies, efforts are made to determine what information kept or generated by the new technology is “discoverable” and that procedures are put in place to preserve and promptly disclose same to the prosecutor.

As discussed earlier, typically the primary cause of a police agency’s failure to provide necessary documents to a prosecutor is the lack of appropriate training, and insufficient operating procedures, designed to ensure that police agencies comply with prosecutors’ requests for information. Each police agency must have internal procedures in place to ensure that officers are appropriately trained on how to memorialize and preserve relevant information, and procedures that ensure that this information is promptly provided to the prosecution.

Prosecutors must also be proactive in determining what forms are commonly used by each police agency in their jurisdiction so that they may determine independently which documents need to be produced in a given case. Furthermore, prosecutors must work with police agencies to develop police operating procedures to ensure that relevant information is preserved and provided to prosecutors upon demand.

Although some states impose a statutory obligation on police agencies to provide a “complete file” to the prosecutor upon request, a similar requirement in New York would not resolve the above issues. As noted, the failure of an individual officer or police agency to provide requested information is rarely due to recalcitrance. Instead such failures are overwhelmingly due to a lack of understanding of what information needs to be provided to the prosecutor. The phrase “complete file” is ambiguous, and ignores the fact that relevant information about a particular criminal case may be contained in any number of physical or electronic locations. There is rarely a

single “case file” where all information generated by police agencies (or law enforcement laboratories) is stored.

Additionally, the lack of staffing and/or resources of smaller police agencies must be acknowledged when discussing possible revisions to the discovery statutes. A significant number of police departments in New York do not have the technology necessary to efficiently memorialize information obtained in the course of an investigation and transfer that information to a prosecutor upon demand. A number of these departments still rely upon handwritten documents which are photocopied and delivered to the court and prosecuting agency.

Smaller police departments rarely have support staff able to quickly obtain and deliver documents requested by a prosecutor. Even larger departments often struggle to comply quickly with prosecutors’ demands for relevant case information due to a lack of support staff, funding or limited technology.

As local police departments are primarily funded by localities with limited budgets, it is recommended that any legislation revising the discovery statutes also implement a grant program that would provide needed resources for police departments to improve technology designed to comply with discovery obligations. Similar to the justice court assistance grants that were made available to local justice courts, these grants would be used by local police agencies to implement technology designed to efficiently memorialize relevant case information and provide same to local prosecutor offices.

CONCLUSION

In the 35 years since Criminal Procedure Law article 240 was last significantly revised, New York has fallen from its frequent status as a trendsetter to being among the five or ten States with the most restrictive criminal discovery rules.

The main consequences of the current system of unduly narrow and belated discovery are: (1.) guilty pleas are needlessly delayed for months in many cases; (2.) guilty pleas often are otherwise entered based on mere guesswork, rather than informed decision-making; (3.) adversarial testing is crippled by the defense’s inability to investigate, to find and develop possibly exculpatory evidence, and to carefully prepare the defense theory and incorporate belatedly disclosed materials into the case; and (4.) the court system is burdened by delays and sloppy litigation practices mainly

attributable to both parties being forced to operate “in the dark” until hearings and trials are actually underway.

Each of these chronic problems can be largely rectified by open and early discovery. This Task Force hopes that the balanced and workable framework for discovery practice that we have envisioned in this report will be an important step in the process of bringing that about, and returning New York’s criminal justice system to the mainstream nationally on this critical issue.

RESPONSE TO MAJORITY’S REPORT

Submitted by Steven M. Goldstein, Kristy L. Sprague, and Itamar J. Yeger

I. Introduction

We write, respectfully, to express our disagreement with the most significant of the recommendations under consideration by this Task Force, and our dismay at the inadequacy of the process employed in reaching them.

To be clear: every member of this Task Force recognizes the importance of discovery in criminal cases, and the need to examine and recommend changes to the law where appropriate. We are united in a desire to ensure fair trials and just outcomes, and cognizant of the importance of our discovery statutes in that regard. We are confident that there are areas in which those statutes could be amended to provide more and earlier information to the defense without compromising other compelling interests. But the need to provide information to the defense must always be balanced against the need to protect civilian witnesses from harm, to encourage them to step forward with truthful testimony, and to safeguard the integrity of judicial proceedings. And reform proposals must be weighed against their practical impact on a system with scarce resources. In our view, this Task Force has not struck the appropriate balance in either respect.

The changes embodied in the Task Force report would represent a radical restructuring of New York’s discovery statute. At their core is a provision compelling prosecutors to reveal the identities of civilian witnesses and anyone else known to have “relevant” information, as well as where and how to find them, at the earliest stage of a criminal case. The proposed restructuring would have enormous consequences for the criminal justice system, with a potentially devastating impact on our ability to secure the cooperation of civilian witnesses and ensure their safety, and significant costs in time and resources. It is a proposal that should not be endorsed by this Task Force without a thorough, probing, and unbiased evaluation of both those potential costs and its putative benefits. We regret to say that such an evaluation has not taken place. It is our judgment that many of the recommended changes should therefore be rejected.

We emphasize at the outset that we support a number of Task Force recommendations. We believe, for example, that there are persuasive reasons to support some of the proposals for providing additional discovery under Criminal Procedure Law (CPL) §240.20, as we will delineate

later in this report. Likewise, we concur in many of the suggested amendments to CPL §710.30. We also agree with all of the proposals intended to enhance the flow of information between prosecutors and other law enforcement agencies, and some of the proposals regarding *Brady* material.

We understand, too, that there are reasons to re-evaluate those provisions of our current laws under which witness statements need not be provided to the defense until a hearing or trial has commenced. We believe it may be possible to provide for somewhat earlier disclosure of these statements without compromising other compelling interests. The Task Force recommendations are extreme, however, both with respect to the timing of disclosure and the nature and scope of the information that would be revealed. And the arguments advanced to support those recommendations fail to distinguish between the need to safeguard a defendant's trial confrontation rights and other considerations that do not touch on constitutionally protected interests.

New York's current laws provide for discovery to take place in phases. At an early stage of the criminal proceedings, prosecutors are required to provide the defendant with a Bill of Particulars that essentially outlines the who, what, when, where, and how of his alleged criminal conduct.¹²⁸ In addition, the prosecution is required to disclose and make available for inspection, photographing, copying, or testing, the evidence, property and information outlined in CPL §240.20.¹²⁹ Absent earlier, voluntary disclosure of this material, which occurs regularly, these disclosures are generally made within 15 days of a defense request or demand, which can be served on the prosecutor as early as the arraignment on the relevant accusatory instrument. These rules provide the defense with the information necessary to make pre-trial motions, a significant amount of information about the charged offenses and the evidence that may be introduced to prove them, and any evidence required to be disclosed under the Constitution.

Our existing laws do not, however, compel disclosure of witnesses' statements (commonly referred to as "*Rosario* material") or of information that may reveal their identities until the

¹²⁸ CPL §200.95(1)(a).

¹²⁹ In addition to these discovery provisions, CPL §710.30 requires the People to provide, within 15 days of arraignment, notice of their intention to introduce evidence of statements made by the defendant to a public servant, as well as identification evidence to be made by a witness who previously identified the defendant, and to specify the evidence to be offered.

commencement of a hearing or trial in which those witnesses will testify.¹³⁰ It is that information which has historically raised the greatest concerns about ensuring witness cooperation and safety, and the integrity of criminal proceedings. Notably, the information disclosed about witnesses, even during their own testimony, does not now include addresses or contact information of any kind. Yet it is this very sort of personal information the Task Force proposes to disclose 15 days after arraignment. Indeed, the Task Force goes much further, to require the disclosure of such information not only about witnesses who will offer testimony, but about “all persons” whom the prosecutor knows to have “relevant” evidence or information.

Whatever ultimate conclusion one reaches about the need for changes to New York’s current discovery laws, it is only fair to assume that in drafting these laws our legislators attempted to strike an appropriate balance. They sought to protect the rights of those accused of crimes, while being mindful of the need to protect witnesses’ safety and privacy, to discourage tampering, and to encourage cooperation. These concerns are reflected in other sections of the Criminal Procedure Law as well. For example, New York State laws related to the grand jury require secrecy, and criminalize the unlawful disclosure of grand jury proceedings or materials. The New York Court of Appeals has specifically observed that the policy reasons for grand jury secrecy include the need to “assure prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely,” as well as the need to prevent “subornation of perjury and tampering with witnesses at the trial to be held as a result of any indictment the grand jury returns.”¹³¹

The Task Force correctly notes that New York’s discovery rules have not been significantly amended since 1979, and that “reform” has been considered and rejected on a number of occasions in the past. The argument is made that these facts demonstrate that “reform” is overdue and militate in favor of “modernization.” But a dispassionate observer confronted with the same facts could well draw the opposite conclusion – that the endurance of New York’s statutory scheme is evidence both that it has served its purposes well, and that changes involve a host of difficult issues. In fact, those

¹³⁰ CPL §§240.44 and 240.45 require the prosecution to give to the defense any prior written or recorded statements of a witness who testifies for the prosecution at a hearing or a trial, as well as the witness’s record of conviction and any pending criminal actions against him. At trial, the statutory obligation to turn over witness statements and criminal history information arises before opening statements. At pretrial hearings, the obligation arises after the witness has completed direct testimony.

¹³¹ *People v. Di Napoli*, 27 N.Y.2d 229, 235 (1970).

issues are difficult enough that the many intelligent and experienced people who have examined them previously have never yet agreed on solutions.

It is worth noting that this failure to agree on appropriate amendments does not bespeak a legislature that is insensitive to the rights of criminal defendants, or a state that has, as the Task Force asserts, institutionalized “trial by ambush.”¹³² On the contrary, when it comes to the protections its laws afford to defendants, New York is among the most progressive jurisdictions in the country. That holds true at all stages of a criminal proceeding, from the investigative and charging phase through and including post-conviction proceedings. And it is true of all kinds of protections – procedural, constitutional, and substantive.¹³³

It seems clear that, in the context of this history and the state’s other laws, the fact that our legislature has not seen fit to amend our discovery statutes is not due to an obdurate reluctance to “modernize,” as the Task Force suggests. Rather, it reflects a legislative recognition that a misguided reform scheme can strike at the heart of the criminal justice system, by compromising not only people’s safety, but their willingness to help prevent and solve crimes, and to tell the truth in court.

All of these facts highlight the need to approach this area with the utmost caution. That is particularly so since the risks inherent in broader discovery – the potential threats to witness safety and willingness to cooperate – have become ever more difficult to manage in the digital age and the world of social media. It has become possible to identify and locate people based on the most minimal information, to publicize their involvement in a case to the entire world, to disseminate

¹³² Report NYSBA Task Force on Criminal Discovery (“NYSBA Report”), p. 5.

¹³³ One would never imagine this to be the case judging from the tone and tenor of the Task Force report. In contrast to New York, 43 states and the federal system allow longer than 144 hours for probable cause determinations regarding felony defendants in custody; 32 states and the federal system allow hearsay or partial hearsay at probable cause hearings or grand jury proceedings; 49 states and the federal system do not provide automatic transactional immunity to witnesses in the grand jury; in 42 states and the federal system the right to counsel attaches only at arraignment, co-extensive with the Sixth Amendment; 33 states and the federal system do not allow challenges to the evidentiary sufficiency of an indictment; 31 states and the federal system require the prosecution’s consent for a non-jury trial; 37 states and the federal system have time limits for post-conviction relief motions; 27 states allow for a state prosecution following a federal prosecution where jeopardy attaches, as does the federal system following a state prosecution; 46 states and the federal system adhere to the *Strickland* rule for ineffective assistance of counsel; 43 states and the federal system adhere to the *Bagley* materiality standard in deciding *Brady* cases; 32 states and the federal system have no accomplice corroboration requirement; and New York is the only jurisdiction in the country, state or federal, that does not permit evidence of photographic identifications at trial, in effect requiring that convictions be supported by corporeal identifications.

their photographs, addresses, personal information, cooperation agreements, police statements, and grand jury testimony, and to pressure and harass them, all by tapping on a keyboard.

Against this historical and technological backdrop, recommendations for reform that would expose witness information earlier or in more detail should be evaluated with more care than ever. Yet it is in this very area that the Task Force proposes the most sweeping of changes.

II. Summary of the Proposals Calling for Expanded and Early Discovery

At the heart of the Task Force report are proposals that would jettison the existing discovery framework. They would provide both for a significant expansion of the information to be disclosed, and for much earlier disclosure of information that is personal and sensitive. They would reveal the identities of witnesses and others with “relevant information” – a term of undefined breadth – as well as their address or contact information. And they would do so long before any court proceeding at which testimony is to be offered.

Specifically, the proposal calls for “Phase One” discovery to take place 15 days after arraignment on an indictment or a converted misdemeanor information, and “Phase Two” discovery to take place within 90 days of arraignment.¹³⁴ At the 15-day mark, “Phase One” discovery would include, among other things, electronically stored police reports,¹³⁵ written or recorded witness statements possessed by the prosecution, names and addresses or adequate contact information for all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense, and both search warrants and the affidavits supporting their issuance. Name and address information would be accompanied by a designation as to which of those named “may” be called as witnesses. At the 90-day mark, “Phase Two” discovery would

¹³⁴ The Task Force report recommends a different timetable for materials relating to expert witnesses, which will not be dealt with here.

¹³⁵ The distinction made between police reports that are “electronically stored” and other reports rests on the erroneous assumption that such reports are more readily accessible. Unless a police department has an automated case management system, where electronic case reports are stored under a common case number, the fact that reports are electronically stored does not make them easier to collect. Very few police departments in the state have such a system.

include grand jury transcripts, all additional police reports, all additional written or recorded witness statements, and a variety of other items.¹³⁶

III. The Proposed Mechanisms to Protect Witnesses Are Inadequate

The Task Force recognizes that its proposed disclosures of witness information create serious concerns and significant risks.¹³⁷ We are, after all, contemplating the wholesale disclosure of information about a significantly expanded pool of people at very early stages of the prosecution. The Task Force seeks to assuage those concerns and ameliorate those risks through various procedural mechanisms – protective orders, “lawyer only” disclosures, the substitution of a “voluntary” interview by the defense for the disclosure of contact information, special provisions for informants and undercovers, and enhanced penalties for witness interference.¹³⁸ But the Task Force misapprehends the nature, seriousness, and impact of the problems its proposals would create. And at the end of the day, its procedural mechanisms are wholly inadequate to address them.

(a.) *Protective Orders*: The notion that protective orders can adequately safeguard witnesses rests on the assumption that prosecutors and judges can accurately predict which defendants are likely to intimidate, threaten, harm, or kill the witnesses against them. It is no exaggeration to say that under the Task Force proposal, people’s lives would depend on the accuracy of those forecasts.

Common sense and history teach us that we have no such predictive power. The type of defendant who might threaten or harm a witness, and the type of charge that might inspire such behavior, cannot be readily predicted or categorized. In addition, under this Task Force proposal, disclosure of witness information would take place in the earliest stages of the case. That is when the prosecution is least likely to have developed information about a defendant’s background and

¹³⁶ These items include a summary of any rewards, promises, or inducements made to witnesses, the criminal histories of witnesses (or enough information for the defense to obtain their criminal histories), and known pending charges against witnesses. Some of these items – criminal histories, for example – would reveal not only the identities of witnesses, but a significant amount of information about where and how to find both them, and, in all likelihood, their family members.

¹³⁷ For the sake of economy, we use the term “witness” to encompass the expanded category of “persons” with “evidence or information relevant to an offense charged or to a potential defense,” as described in the Task Force proposal.

¹³⁸ More specifically, the Task Force would allow for protective orders based on a “broad and flexible” standard (though requiring a showing of “substantial risk” with respect to various possible harms); permit “lawyer only” disclosures of address or contact information in Violent Felony cases under specified circumstances; allow location and contact information to be withheld provided a witness agrees to be interviewed by a defense attorney; permit the prosecution to withhold the identities of informants and undercovers, while generally requiring that their involvement in a case be disclosed; and create enhanced penalties for witness interference.

associations that would enable even a preliminary assessment of risk. In fact, that kind of information is often not developed at all.

The pitfalls of the proposed approach are illustrated in cases involving defendants with gang affiliations, a category correctly singled out by the Task Force as being particularly likely to pose a threat to witnesses. Witness intimidation is endemic in gang prosecutions, both in New York and the rest of the country.¹³⁹ This should not be surprising. By definition, gang prosecutions involve defendants who have a mutual sense of loyalty or a common financial interest with other lawbreakers, and a communal self-interest in deterring and punishing cooperation with law enforcement. Even if a particular defendant is incarcerated, his involvement in a gang means that he has associates on the outside who can help ensure that no one will testify against him. Indeed, in recognition of this reality, the Task Force proposes that the standards for protective orders highlight gang affiliations as a factor supporting their issuance.

But the existence of a mechanism for securing protective orders provides only the illusion of adequate protection even in this narrow category of case, in which orders are likely to be most easily secured. The reason is simple. Extra vigilance in gang cases requires in the first instance that the prosecution know about a particular defendant's gang membership, to say nothing of requiring persuasive supporting evidence. Such knowledge may exist when an individual is charged in a conspiracy, or is arrested wearing gang insignia, or has known criminal associations. There are, however, many kinds of gangs, from the organized narcotics crew to the loose association of high school hooligans, and gang members commit many kinds of crimes that do not of themselves signify gang membership. They are as likely as not to be arrested alone, since their crimes need not

¹³⁹ "Witness intimidation has become so pervasive that it is ruining the public's faith in the criminal justice system to protect them," according to Judge John Glynn of Baltimore City Circuit Court, as reported in a N.Y. Times article. That article also reported that a witness to a gang shooting in Boston found copies of his grand jury testimony taped to all the doors in the housing project where he lived. Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES (Jan. 16, 2005). In New Jersey, dozens of "murder cases have been undone over the past five years after witnesses were killed, disappeared before trial or changed their stories." David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES (March 1, 2007). Senator Charles Schumer recently pointed to the gang culture of intimidating witnesses in the capital region and other urban areas across New York State, making it tougher to ensure witness safety and resulting in credible witnesses remaining quiet. Colleen Siuzdak, *Schumer Pushes for Harsher Witness Intimidation Penalty*, LEGISLATIVE GAZETTE (Oct. 1, 2012). According to Kamala Harris, California Attorney General, the data suggests a troubling increase in witness intimidation compared to a decade ago, and prosecutors across the country believe that witness intimidation is the single biggest hurdle facing any successful gang prosecution. *Testimony before the Committee on the Judiciary United States House of Representatives* (April 2007) (at the time of her testimony, Kamala Harris was serving as District Attorney in San Francisco).

involve accomplices. There is simply no assurance that even a hard-core gang member will be identified as such at any point during a prosecution. And that identification is least likely to have occurred during the early stages of a case, when this Task Force would insist that the identities of witnesses be revealed.

More broadly, it is important to realize that in the average criminal case the prosecutor's focus is not on learning all there is to know about the defendant; it is, at least until the sentencing phase, on learning all there is to know about his involvement in the particular crime of which he stands accused. The notion that protective orders can ever be a reliable bulwark against witness intimidation rests on a faulty premise about the scope of the prosecution's knowledge. It is unrealistic to assume that a prosecutor will necessarily learn about factors which might support the issuance of a protective order, whatever the reality of a defendant's life and associations might be.

Aside from that, the notion that witness intimidation – even murder – is exclusively or even principally the province of gang members is simply false. By definition, gang members have criminal associates who may be willing to help them intimidate a witness. But defendants who are not gang members may also have associates – friends, family members, acquaintances, fellow inmates, or simply people they can pay – willing to threaten, cajole, bribe, or do bodily harm to a witness to help make a charge go away. And no one can distinguish those defendants who have such associates from those who do not.

It would, moreover, be a mistake to think that such behavior is confined to individuals charged with violent crimes, or who have a violent history. All kinds of criminals, facing all kinds of charges, have plotted to intimidate or kill witnesses against them, and even to kill judges.

Indeed, perhaps the most notorious witness murder in the history of New York City was ordered by a white collar defendant incarcerated on federal fraud charges in the Metropolitan Correctional Center. Fearful that his female bookkeeper would provide evidence against him, 47 year-old businessman Irwin Margolies hired a hitman to kill her. On April 12, 1982, the hitman carried out the contract, murdering not only the bookkeeper, but three CBS employees who intervened in her abduction in a futile effort to help her.¹⁴⁰ Similarly, it was not a gang member but

¹⁴⁰ This crime, which became known as the “CBS murders,” resulted in the convictions of both Irwin Margolies and Donald Nash, the contract killer whom he hired. *People v. Irwin Margolies*, Ind. No. 4442/1983 (Sup. Ct. N.Y. Co. 1983); *People v. Donald Nash*, Ind. No. 7474/82 (Sup. Ct. N.Y. Co. 1982).

a stockbroker, Stuart Winkler, who, in December 2000, was convicted of conspiring to kill the Manhattan Supreme Court justice presiding over his case.¹⁴¹ More recently, in January of 2012, another Manhattan defendant, age 40, pled guilty in a plot to kill a witness who had testified against him in his 2010 trial. The charges on which he had been tried and convicted involved mortgage fraud.¹⁴²

These examples are undoubtedly just the tip of the iceberg. Were this Task Force to speak with prosecutors in this state and elsewhere, there is little doubt it would find many more examples of “improbable defendants” who tampered with witnesses in one way or another. Even those examples would reflect only the limited instances in which such tampering had come to light.

(b.) *Enhanced Penalties for Witness Interference*: The Task Force proposal to increase penalties for various forms of witness interference, while welcome, is not going to solve the problems inevitably created by the early and expanded disclosure of witness information. Successful prosecutions for witness intimidation are rare precisely because of the difficulties in proof that they involve.¹⁴³ By definition, if a defendant succeeds in intimidating or bribing a witness, the prosecution is unlikely to be told about it. The witness may recant, or he may claim mistake or a failure of memory. He may simply disappear, or become “unavailable,” failing to appear on critical court dates or taking a long “vacation” in an unknown location. All prosecutors have dealt with such situations, and all prosecutors know that the last thing the fearful witness will do is point the finger at the very defendant who has succeeded in inducing him not to point the finger in the first place. As a practical matter, almost always, the ability to prosecute a defendant under a tampering statute ceases to exist whenever the defendant achieves his goal.

Undoubtedly the hope embodied in the Task Force proposal is that an enhanced penalty structure will deter defendants from undertaking efforts at intimidation, or worse. We share that hope, but it is a thin reed to lean on. Particularly in more serious cases, defendants simply have too much incentive to try to make the charges against them disappear, and too little reason to believe

¹⁴¹ *People v. Stuart Winkler*, Ind. No. 4914/2000 (Sup. Ct. N.Y. Co. 2000).

¹⁴² *People v. Aaron Hand*, Ind. No. 4807/2011 (Sup. Ct. N.Y. Co. 2011).

¹⁴³ While there are seven separate New York Penal Law criminal offenses that can be charged relating to witness intimidation (Tampering with a Witness in the First, Second, Third, and Fourth Degree and Intimidating a Victim or Witness in the First, Second, and Third Degree), in 2012 the cumulative number of top count charges brought for those offenses was 53. *New York State Processing Report*, Division of Criminal Justice Services (May 2013).

they will be caught if they do so. Moreover, if a defendant already faces a substantial sentence, the slim possibility that he will be charged and face additional time is unlikely to have much effect. This means that in the very cases in which defendants have the most obvious reasons to tamper with witnesses, enhanced penalties are least likely to provide effective deterrence.

(c.) *Confidential Lists as an Alternative*: The “confidential list” protective mechanism proposed by the Task Force is equally problematic. The Task Force would allow for disclosures of witness address and contact information on a “lawyer only” basis, but it would do so only in that narrow class of crimes the Penal Law designates as Violent Felonies. The option would be unavailable in other felony cases, even where the charged crime in fact entailed violence,¹⁴⁴ and even where the defendant has a violent history. That limitation aside, the superficial logic behind singling these crimes out suffers from the same problems of prediction outlined above. In addition, the provision would create difficult issues for the lawyer/client relationship, and thorny problems of compliance and enforcement.¹⁴⁵

More fundamentally, even the limited protection afforded by this option would extend only to address and contact information, and not to the identities or statements of witnesses; that information would still be disclosed, even to Violent Felons, at the earliest stage of a case. The witnesses who are most at risk are undoubtedly those whom the defendant knows – particularly those from his own area – and he does not need a roadmap to find them. It is folly to presume that strangers cannot be located as well, especially given the abundance of information available online, and the many leads often provided by witness statements. To claim that a witness’s address is “protected” simply because it is not spelled out is to rely on a fiction.

(d.) *Witness Interview as an Alternative*: The “witness interview alternative” proposed by the Task Force is frankly bizarre. The Task Force report suggests that an exception may be made to the requirement that address or contact information be provided when a witness, at the prosecution’s request, consents to be interviewed by the defense attorney. Should the witness decline an interview, the prosecution would be compelled to hand his information over.

¹⁴⁴ Crimes of violence that are not designated as such under the Penal Law include Robbery in the Third Degree and Assault in the Third Degree. Narcotics trafficking felonies are also an example of offenses that are not listed as Violent Felonies, but frequently are associated with violence, or threats of violence, as well as witness intimidation.

¹⁴⁵ Philadelphia’s experience in this regard is instructive. According to Ronald Eisenberg, Deputy District Attorney in the Philadelphia District Attorney’s Office, prosecutors there have begun to watermark papers handed over on a “lawyer only” basis in order to hold lawyers accountable when the papers end up in the hands of the defendant.

The problems inherent in this proposal are obvious: the provision would in effect coerce “consent”; it would destroy trust between the prosecutor and the witness; and it would have the perverse effect of revealing the contact information of precisely those witnesses who have expressed the greatest reluctance to deal with the defense. In addition, like the “confidential list” proposal, this alternative would require the disclosure of a witness’s identity and statements to the defendant himself, even if the witness submitted to an interview. It would therefore provide no meaningful protection.

The details of this particular recommendation highlight a critical and pervasive flaw in the approach the Task Force has taken when examining discovery issues. While its analysis places heavy emphasis on the rights and protections to be accorded the accused, the rights of victims and witnesses are treated as inconsequential. The Task Force does not appear troubled by the notion that a citizen who becomes a crime victim or witness should thereby forfeit his right to control his personal information, and should be forced to undergo unwanted and potentially dangerous intrusions. Yet the unfairness of this idea seems obvious, particularly since the roles of victim and witness are thrust upon people who would assuredly not seek them out. It is not too much to say that under the Task Force proposals victims will be “re-victimized,” and witnesses penalized, for becoming part of events they wish had never happened in the first place.

IV. The Task Force Has Given No Consideration to the Effect Its Proposals Will Have on Witness Cooperation or to the Impact the Internet and Social Media Have Had on Witness Safety and Privacy

Apart from the limitations of these protective mechanisms, they are all irrelevant to another aspect of the problem of witness intimidation – which is, that it is not only defendants who pressure and intimidate witnesses. Pressure and intimidation can come in many forms, and from many sources; indeed, some forms of pressure may not be attributable to the defendant himself. They result from the mere fact that a person has been identified as a witness, and the reaction of his peers, family members, neighborhood, or larger community to the knowledge that he is helping law enforcement. Today’s “snitches get stitches” culture is powerful, widespread, and growing. It has evolved from an underground street code to a social norm, creating communities and subcultures in which cooperation has consequences for a witness which range from ostracism to far worse. Quite

naturally, the fears this culture engenders strongly discourage potential witnesses from stepping forward.¹⁴⁶

The Task Force gives no consideration at all to this concern, which could well be the most significant problem its proposal will create. The issue is not just the certainty that some, or even many, witnesses who come forward may be intimidated or imperiled; it is that many witnesses will not come forward at all under a system in which their identities and contact information will be disclosed long before any courtroom testimony is to be given. If that proves to be the case, as it likely will, it is not only ongoing prosecutions that will be affected; it is society's ability to solve crimes in the first place.

The most powerful tool a prosecutor has is not the subpoena or the material witness order. It is the ability to explain to a witness that grand jury proceedings are secret, and that no one will know of his cooperation unless and until there is a trial. Indeed in all kinds of cases, witnesses are reassured by the prospect that disclosure will at least be delayed, and by the hope that their cooperation may never come to light. Often it is only that prospect that elicits the truth. This does not reflect anything underhanded or nefarious; it reflects human nature and the pressures and risks that exist in the real world.

Even under current law, which permits such assurances, it would be hard to overstate the difficulty of securing witness cooperation, particularly in those neighborhoods hardest hit by violent crime, and especially in homicide and shooting cases. This may seem paradoxical, but of course it is not: despite their desperate desire for safer neighborhoods, the residents of such communities know first-hand what intimidation and violence look like, and they fear for themselves and their families.

¹⁴⁶ According to the National Center for Victim of Crimes 2007 study, *Snitches Get Stitches* (a study aimed at gathering data about factors that influence youths' decisions to cooperate in the criminal justice process and the extent and nature of intimidation in their communities), fears of being labeled a snitch "whether or not they are related to an actual threat of harm, are real and prevent a good deal of potential reporting to and cooperation with police at the investigation stage of criminal cases." Julie Whitman and Robert Davis, *Snitches Get Stitches: Youth, Gangs, and Witness Intimidation in Massachusetts*, National Center for Crime Victims (Washington D.C., 2007). In New Jersey, law enforcement has struggled to successfully prosecute homicide cases "as the state's murder rate has climbed and the problem of witness intimidation has spread." David Kocieniewski, *In Prosecution of Gang, A Chilling Adversary: The Code of the Streets*, N.Y. TIMES (Sept. 9, 2007). As far back as 1990, a Bronx study by the Victim Service Agency, based on complaint room interviews with 226 victims of a broad range of crimes, found that between 36% and 41% had been threatened and that those victims were three times more likely to decide to drop charges. Robert Davis, Barbara Smith and Madeline Henley, *Victim Witness Intimidation in Bronx Courts*, Victims Service Agency (New York, June 1990).

Such concerns, real or perceived, are not limited to those living in high crime neighborhoods, or testifying in cases that involve violent crimes or defendants with violent histories. Prospective civilian witnesses are hardly reassured by a prosecutor's statement that the non-violent nature of a crime or the absence of violence in a defendant's background suggest that their safety is unlikely to be jeopardized. They are rarely comforted by the "low odds" that harm will come to them. And they are not likely to find solace in the sort of "special procedures" the Task Force suggests. Rightly or wrongly, truthful witnesses believe they are providing information about a criminal, and are often of the understandable and well-founded belief that it is impossible to predict what a criminal or his friends or family members may do.

Under the Task Force's scheme, it is hard to imagine that anyone from any neighborhood, testifying in any case, would feel secure in stepping forward as a witness. It is fair to predict that the average person would be deeply uncomfortable with the notion that a defendant, or even the defendant's attorney, will know who he is early in the criminal proceedings, or where he, and perhaps his loved ones, live. It is not a stretch to think that many individuals will simply opt for silence.

The impact of this reality will be multiplied many times over by the proposal that disclosure be required, not only of information about civilians who will actually testify, but about a broad and ill-defined category of "persons" with evidence or information "relevant" to an offense charged or to a defense that may be asserted. Many law enforcement operations are initiated based upon civilian complaints about criminal activity. The complaints come from all sorts of people, from grandmothers who sit at the window watching their courtyards to store owners who tell the police what they see on the corner. It is likely that in some areas, this sort of cooperation with the police will simply shut down. Concerned citizens will quickly realize that if they report drug dealing in front of the local school, they will ultimately be identified, regardless of the specifics of their observations or their knowledge of a particular defendant.

The panoply of issues relating to witnesses has been rendered infinitely more complex by the ubiquity of the Internet. Astoundingly, the Task Force report contains not a single reference to the Internet or its potential impact on discovery issues, although the complications posed by the digital age are readily apparent. For example, it is obviously far easier to find people today than it has ever been, and it is possible to do so based on very little information. Just a name can be enough

to lead to a home address, along with other personal and professional information. This makes witnesses more vulnerable during the pendency of a case, and also makes it much more difficult to relocate them successfully should that be necessary.

Witnesses are also vulnerable to harassment and intimidation of a whole new type – through Facebook¹⁴⁷ and Instagram¹⁴⁸ postings, Twitter, and e-mail.¹⁴⁹ And of course, the fact that a witness is cooperating can now be posted on the web, along with photographs, personal information, and documentary proof such as police reports and grand jury minutes.¹⁵⁰ These developments make it impossible for some witnesses ever to feel – or for that matter ever to be – completely secure.

In fact, the Internet has spawned a virtual cottage industry devoted to deterring cooperation with law enforcement and punishing those who transgress. The Exhibit attached to this response contains a sampling of webpages that illustrate the role the Internet is playing in creating a pervasive “code of silence” in many communities throughout the country. Notably, as the Exhibit reveals, intimidation-by-computer makes liberal use of precisely the sorts of discovery materials this Task Force would require the prosecution to turn over in the early stages of a case.

In sum, the Task Force’s notion that witnesses can be adequately protected under the measures it proposes does not withstand scrutiny. We cannot reliably predict which defendants pose a threat. An enhanced penalty structure will not adequately deter those who do. And the confidential list and witness interview procedures advanced as solutions are unworkable and provide no real protection. More than that, we must recognize that once a witness’s identity has been revealed, there is a significant possibility that he will experience pressure and intimidation from sources other than

¹⁴⁷ On February 3, 2013, Philadelphia District Attorney Seth Williams, asked Facebook CEO Mark Zuckerberg to remove potentially life threatening posts intimidating witnesses. The posts included the actual statement of a witness who had testified, along with the caption “rat.” Philadelphia’s Assistant Director of Victims Services, Leland Kent, described these posts as multiplying witnesses’ “fear factor exponentially.” Alex Wigglesworth, *Philly D.A. Asks Facebook CEO Mark Zuckerberg to Take Down Witness Intimidation Posts*, PHILADELPHIA METRO (Feb. 4, 2013).

¹⁴⁸ An Instagram account in Philadelphia posting pictures, police statements and the testimony of more than 30 witnesses is discussed later in the report.

¹⁴⁹ In Maryville, Maryland, Twitter and Facebook were used to post online threats against a rape victim and her family members who, unable to withstand the harassment, moved to another town. Dugan Arnett, *Nightmare in Maryville: Teens’ Sexual Encounter Ignites a Firestorm Against Family*, THE KANSAS CITY STAR (Oct. 24, 2013).

¹⁵⁰ In Erie County, a defendant was recently convicted of Intimidating a Witness in the Third Degree for having posted on Facebook the grand jury testimony and witness statements that he had obtained from his defense attorney during discovery. The defendant was incarcerated and awaiting trial on drug charges when he sent the materials to his girlfriend to post on Facebook. James Staas, *Man Convicted of Witness Intimidation after Grand Jury Testimony is Posted on Facebook*, THE BUFFALO NEWS (Oct. 30, 2013).

the defendant. Even if that pressure does not rise to the level of violence – indeed, even if it is never explicit – it can deter truthful cooperation and profoundly affect a witness’s life.

It is our view that the Task Force recommendations with respect to the disclosure of witness information would exact a significant human toll, and have a negative impact on the effectiveness and integrity of the criminal justice system. These considerations have not been adequately explored in the Task Force’s work, or appropriately weighed in reaching its conclusions.

V. The Task Force Cannot Rely on the Discovery Rules of Other States to Support its Proposals, Without Having Examined the Present-Day Experiences of Those States or the Broader Procedural Framework in which other States’ Discovery Rules Exist

The Task Force repeatedly asserts that the experience of other jurisdictions with more expansive discovery rules proves that its proposals are workable. It notes that, “Dozens of other States have employed systems of broad access to both parties’ evidence at an early stage of criminal cases for many years,” and that none have gone back to impose more restrictive rules.¹⁵¹ Its report is replete with references to specific discovery provisions which exist elsewhere, including provisions for the early discovery of witnesses’ names, addresses, and contact information, and claims that they have “worked for decades.”¹⁵² And it concludes that, “There is broad consensus nationwide that the principal benefits of criminal discovery reform hinge on requiring disclosures early in the case.”¹⁵³

Of course, if the mere endurance of a statutory scheme proved how well it works, the Task Force would be forced to concede that New York’s own laws are more than adequate. But longevity is not enough, and we emphatically agree that a study of discovery laws in other jurisdictions would be worthwhile. In fact, such a study, objectively and thoroughly undertaken, is fundamental to evaluating the costs and benefits of proposals as sweeping as those advanced here. The difficulty is that no such study has been conducted by the Task Force.

The significance of conducting a thorough and objective study was recognized from the time this Task Force was created. When we began our work, consideration was given to the formation of a subcommittee devoted exclusively to examining criminal discovery practices and procedures in

¹⁵¹ NYSBA Report, pp. 2-3.

¹⁵² NYSBA Report, p. 13.

¹⁵³ NYSBA Report, p. 31.

other states. That might have allowed for a careful evaluation of the systems and experiences the Task Force relies on.¹⁵⁴ It was also noted in a Task Force meeting that selected statutes cited with approval would be provided to us, so that we could dig deeply into their impact and implementation. Neither of these things occurred. Most critically, the subcommittee that drafted the proposals for expanded discovery appears not to have conducted any careful present-day study of its own, or to have explored the broader procedural contexts in which alternative discovery schemes exist.

We observe also that the Task Force ignores federal discovery law, an omission that highlights its selective approach. The federal system has discovery rules almost identical to the laws of New York State. As the largest jurisdiction in the country, encompassing nearly twice as many districts as there are states, that system merits careful study, particularly in a document that purports to rely on a “broad consensus nationwide.” It is thus troubling that the Task Force gives federal discovery procedures no attention at all.

The consequence is that the Task Force relies entirely on selectively cited and outdated reports, containing sweeping and questionable generalizations. The Task Force cites, for example, a report submitted to the New York State Assembly Codes Task Force in 1991.¹⁵⁵ That report concluded that discovery rules in other states did not result in a general problem of witness intimidation, and that even prosecutors approved of them. But we are given no way to evaluate the report; we know nothing of its authorship, its possible bias, or its methodology. Indeed we know with certainty only three things about it: its broad conclusion; that it is twenty-three years old; and that it failed to persuade the New York State legislature to adopt its recommendations.

The citations to two other documents are no more persuasive. One is to a law review article dating from 1989.¹⁵⁶ As far as we know, that article may have provided the basis for the 1991 report to the Assembly, in effect creating an echo chamber. The second is to a 2006 report by the New York County Lawyers’ Association, evaluating relatively liberal discovery programs instituted by

¹⁵⁴ The proposed list of subcommittees at the first meeting of the Task Force included one that would study “Criminal Discovery Practice and Procedures in Other States.” The reason for the decision not to form this subcommittee was never clear; however, concerns about the then-contemplated timetable for issuing this report seemed to have been a consideration. Clearly, time constraints do not justify making recommendations based on unexamined assumptions.

¹⁵⁵ NYSBA Report, p. 13.

¹⁵⁶ NYSBA Report, p. 13 (fn 23).

some of the District Attorneys in New York City. This eight-year-old study examined only misdemeanor cases and voluntary programs that involved far more limited discovery and were unevenly implemented.¹⁵⁷ No one can seriously argue that its conclusions, either about the results of those programs or the District Attorneys' own views of them, reflect anything meaningful about the proposals at issue here. Notably, none of the District Attorneys referenced were invited to share their views on the proposals under consideration by this Task Force.

It is difficult to believe that there is not more current, relevant literature available, particularly given the nationwide concern about witness intimidation and its obvious link to the disclosure of witnesses' identities. Yet none is referenced in the Task Force report.

In any event, a reliable evaluation of other states' statutes plainly requires far more than the citation of a few old reports. It requires some systematic effort to interview prosecutors, law enforcement personnel, and defense attorneys. It should include victims' representatives as well, since victims are stakeholders in the criminal justice system, and their concerns are not always obvious.¹⁵⁸ Time-consuming as this effort might be, it is impossible to assess the potential impact of the changes proposed by this Task Force without taking at least some steps in that direction. The Task Force has taken none.

Indeed, there is concrete reason to believe that the experiences of other states reflect a reality quite different from what the Task Force describes. For example, the Philadelphia prosecutor's office operates in a state system that mandates broad discovery and has, for some thirty-five years, required preliminary hearings at which victims and witnesses must testify in open court. That office has reported to us that these rules have contributed to widespread problems of witness intimidation, recantation, and failure to appear, as well as spiraling relocation costs.¹⁵⁹ In February 2014,

¹⁵⁷ NYSBA Report, p. 6.

¹⁵⁸ For example, victims of financial fraud may be particularly sensitive to public disclosure, which can cause embarrassment and compound their victimization. Such disclosure can also compromise their financial security, since "fraudsters" are known to target those individuals whom they perceive as most vulnerable to their schemes. Carolyn Bell and Caroline Heck Miller, *Discovery and the Crime Victims' Rights Act*, United States Attorney Bulletin, Vol. 6, # 5, p. 54 (Sept. 2012).

¹⁵⁹ This information has been provided by Ronald Eisenberg, Deputy District Attorney in the Philadelphia District Attorney's Office.

Philadelphia authorities reported having filed more than 2000 witness intimidation charges since 2011, as part of an effort to address the city's pervasive "no-snitching subculture."¹⁶⁰

These are not simply the complaints of disgruntled prosecutors in a single city. In fact, problems like those plaguing Philadelphia proved so widespread and acute that charging procedures employed statewide were recently altered. In June of 2012, a unanimous Pennsylvania Supreme Court adopted a policy allowing charges in selected crimes to be filed through grand jury proceedings conducted in secret. Ironically, that particular reform was inspired in part by the example of New York.¹⁶¹ Philadelphia prosecutors express the wish that the grand jury were more broadly available, as witnesses prove more comfortable and forthcoming in an environment in which their identities are protected.¹⁶²

A simple Google search – "witness intimidation Philadelphia" – reveals a trove of news accounts and public record information about the problems described by the District Attorney's Office.¹⁶³ Recent reports indicate that such problems not only exist, but are being exacerbated by social media. On November 9, 2013, the Philadelphia Inquirer reported that an anonymous social media account had been identifying witnesses to crimes across the city. The account, "rats215" (Philadelphia's area code is 215), used the photo-sharing website Instagram to post pictures, police statements, and testimony of more than thirty witnesses, with the stated intention of trying to "expose rats."¹⁶⁴

¹⁶⁰ Larry Miller, *Four Arrested for Witness Intimidation*, PHILLYTRIB.COM (Feb. 27, 2014); Kelly Bayliss, *Four Charged in Witness Intimidation Shooting*, NBCPHILADELPHIA.COM (Feb. 26, 2014).

¹⁶¹ Deputy District Attorney Eisenberg reports that several prosecutors travelled to New York with a state Supreme Court justice to study our grand jury system.

¹⁶² See footnote 159.

¹⁶³ A 2009 Philadelphia Inquirer series portrayed criminal courts plagued by rampant witness fear, exacting a heavy toll in no-show witnesses, recanted testimony and collapsed cases. Circulating witness statements was reported to have become a common tactic, aimed at striking fear in witnesses. And prosecutors were struggling to keep police reports and other "discovery" material out of the hands of defendants. Nancy Phillips, Craig R. McCoy and Dylan Purcell, *Witnesses Fear Reprisals, and Cases Crumble*, PHILADELPHIA INQUIRER (Dec. 14, 2009). These problems have led to "a host of new procedures" as the state looks to overhaul a "system that, according to its critics, failed at its core function of trying cases on their merits." Craig R. McCoy, *To Fight "No Snitch," Philly Using Indictment Testimony in Secret*, PHILADELPHIA INQUIRER (Feb. 17, 2013).

¹⁶⁴ According to the report, the account had nearly 7,900 followers. Among the comments posted was one saying, "Post some new rats. I needa put a hit out on them." Aubrey Whelan and Mike Newall, *Police Probe Website Targeting Crime Witnesses*, PHILADELPHIA INQUIRER (Nov. 9, 2013).

Google searches of the same type for New Jersey and Newark yield similarly alarming reports of widespread intimidation and violence against witnesses, with disastrous results for the justice system. In a 2007 series examining the problem of witness intimidation in New Jersey, entitled *Scared Silent*, the New York Times reported that the threats and dangers to civilian witnesses were so grave that the governor had directed police agencies in the state to use civilian witnesses sparingly. The series further reported that prosecutors have “grown weary of a familiar sequence of events: shortly after they provide defense lawyers with copies of a witness’s statement, as they are required by law to do, the threats, warnings and outright attacks begin.”¹⁶⁵

No such published information has been noted by the Task Force in its discussion of other states, despite its ready availability. This omission is particularly striking since both Pennsylvania and New Jersey are among those states listed as having discovery rules for witness information that have “worked for decades,”¹⁶⁶ and Philadelphia and Newark are specifically named as well.¹⁶⁷

These examples suggest that the Task Force has not made the most basic effort to verify that the results of the old studies it relies on – whatever their original validity – have stood the test of time. They show how critical it is to conduct a far more systematic and probing inquiry into the experiences of other states than has been done to date. We do not suggest that every state would report experiences like those of Pennsylvania and New Jersey, but they very well might. It is imperative that we find out.¹⁶⁸

It is important to note also that a meaningful evaluation of other states’ laws would require information not only about the experiences of practitioners, but also about the way their systems work. Discovery statutes, after all, exist within a broader framework of procedures and protections. Without knowing anything about that broader framework, there is no reliable way to assess whether a procedure that seems to work well in one jurisdiction would work equally well in another.

¹⁶⁵ David Kocieniewski, *In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES (Dec. 21, 2007). The articles by David Kocieniewski in this N.Y. TIMES series should be required reading for any task force or committee examining changes to New York’s discovery laws. *Keeping Witnesses off the Stand to Keep Them Safe*, (Nov. 19, 2007); *So Many Crimes and Reasons to Not Cooperate*, (Dec. 30, 2007); *With Witnesses at Risk, Murder Suspects Go Free*, (March 1, 2007); *Few Choices in Shielding of Witnesses*, (Oct. 28, 2007); *A Little Girl Shot, and a Crowd That Didn’t See*, (July 9, 2007).

¹⁶⁶ NYSBA Report, p. 13.

¹⁶⁷ NYSBA Report, p. 2.

¹⁶⁸ We note that, in preparing this response, we undertook no broad examination of other jurisdictions, which would have been beyond our mandate and our practical capacities.

In New York, for example, we often have a very short window of time in which to present a case to the Grand Jury, and we require non-hearsay testimony to secure an indictment. As a consequence, it is not enough for victims and witnesses to be interviewed by police officers, who may then testify to what has been reported. The witnesses themselves must appear in the prosecutor's office, often within days of a crime, at a time when the emotional impact of their experience is very strong and there has been no opportunity to foster a trusting relationship. Typically, their questions center on issues related to their own safety: will the defendant be present? Will he or his lawyer know that I testified? Will they know where to find me? And so on. Under current law, the answer to such questions is no, and that answer is frequently fundamental to securing their Grand Jury testimony.

New York is almost unique in these procedural requirements, which might well affect the impact of expanded discovery rules. They illustrate the obvious – that a reliable comparison with other states requires at least some basic understanding of a broader legal context.

In effect, the Task Force asks that we take it on faith that the discovery schemes employed in other states “work.” The significance of this fact cannot be overstated: unsupported claims about the experiences of other states are the only rebuttal the Task Force offers to the concerns we have raised in this response. No sensible parent hears the words, “Everyone is doing it,” without asking probing questions. Such questions have not been asked here, and until they are, we should not endorse these proposals.

VI. The Task Force Should Not Look to Civil Discovery as a Model When Considering Changes to Criminal Discovery

In both its “Stated Purpose,” set forth in writing in September of 2012, and in its ultimate report, the Task Force observes that the discovery rules governing civil and criminal litigation differ markedly. It notes that litigants in civil proceedings operate under a framework that gives both sides far broader and earlier access to witnesses and other information. The Task Force seems to take it as a given that the civil rules are inherently superior, and should provide a model for criminal discovery reform. But that assumption ignores the obvious: civil and criminal proceedings differ in fundamental ways, and the differences between the rules that govern discovery in the two systems embody a sensible recognition of that fact. Aside from that, the Task Force presents no evidence that civil discovery rules function well, even within the civil framework itself.

The fundamental differences between the civil and criminal systems are apparent and are not difficult to summarize. Clearly, the kind of even-handed reciprocity possible in civil litigation is out of the question in criminal matters, because of the legal privileges and protections afforded to criminal defendants. As a consequence, the attempt to model criminal discovery on civil rules results in a quite one-sided expansion of disclosure obligations. Moreover, the plaintiff in a civil suit is most often pursuing a private interest, as is the defendant; unlike prosecutors, neither one is expected, much less required, to seek justice in some broader sense.¹⁶⁹ By the same token, neither party has the same duties or ethical constraints as a prosecutor, whose very mission is defined in terms of his ultimate responsibility to the public, and who has *Brady* obligations with no parallel in the civil system. Likewise, the civil defendant is not shielded from baseless allegations by procedural safeguards like those embedded in the accusatory phase of our criminal justice system, or protected at trial by the reasonable doubt standard which is essential to due process.¹⁷⁰ And neither party to a civil suit has been found, based on legally sufficient evidence and to a standard of reasonable cause, to have committed a crime. Most importantly, civil litigation does not raise the same concerns about witness cooperation, intimidation, and potential violence. For that reason, broad civil discovery does not imperil society's core ability to enforce its laws and keep its citizens safe.

Each of these fundamental differences has implications for both the necessity and the wisdom of various possible discovery reforms. It is incumbent upon this Task Force to recognize them forthrightly, and to analyze their implications fairly and objectively. In the absence of that analysis, the bald assertion that the principles underlying civil discovery can somehow be imported into the criminal system is utterly unpersuasive.

By the same token, the Task Force seems to take it as a given that civil discovery “works” – that is, that the rules which govern discovery in the civil system serve the interests of the parties, of witnesses, of the courts, and of society, at least in the civil context. It is hard to understand what that assumption is based on; there seems to have been no investigation of the issue. In any event, it is almost certainly not true. Indeed, according to one recent scholarly analysis, “Since its inception in

¹⁶⁹ *United States v. Berger*, 295 US 78, 88 (1935).

¹⁷⁰ Notably, in discussing the reasonable doubt standard, the New York Court of Appeals explicitly referenced civil discovery, observing that the higher standard of proof was essential in a criminal trial for many reasons, including the fact that it, “compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants.” *Matter of Samuel W.*, 24 N.Y.2d 196, 205 (1969).

1938, pretrial discovery has been one of the most divisive and nettlesome issues in civil litigation in the United States. Discovery was designed to prevent trials by ambush and to ensure just adjudications. But it has fallen well short of these laudable goals. Instead, the pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively.”¹⁷¹

It is our view, in sum, that the comparison of civil and criminal discovery rules offered by the Task Force fails as an argument in favor of its proposals. It fails because the two systems are not comparable, and because there is scant evidence that the civil rules are working well even within the civil system itself.

VII. The Task Force Has Not Considered the Substantial Practical Difficulties and Considerable Costs of its Proposals

We have discussed at length the Task Force’s failure adequately to investigate, analyze, or weigh the implications of its recommendations for victims and witnesses, and by extension, for the integrity of the justice system. We believe there has been a similar failure to address the practical difficulties its proposals would create, and their costs.

This omission is hard to understand. The Task Force proposes a vast expansion and acceleration of discovery in every criminal prosecution in the state, both misdemeanors and felonies – more than one million cases a year.¹⁷² That its proposals would entail considerable costs in time, money, and scarce resources could not be more apparent. Notably, those costs would affect not only police and prosecutorial agencies, but the judiciary as well.

¹⁷¹ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform* DUKE LJ 60:547 at 549-550 (2010). The analysis goes on: “Plaintiffs’ attorneys routinely burden defendants with costly discovery requests and engage in open-ended ‘fishing expeditions’ in the hope of coercing a quick settlement. As a result, discovery frequently becomes the focus of litigation, rather than a mere step in the adjudication process. By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case. Discovery abuse also represents one of the principal causes of delay and congestion in the judicial system. These problems have led to perennial calls for discovery reform and have resulted in amendments to the Federal Rules of Civil Procedure (Federal Rules) in 1980, 1983, 1993, 2000, and 2006. Anxiety over abusive discovery practices has also led many federal and state courts to experiment with local reforms, but such efforts have been largely unsuccessful.” [Citations omitted.]

¹⁷² According to the NEW YORK STATE UNIFIED COURT SYSTEM 2011 ANNUAL REPORT, there were 4,055,065 cases filed statewide in trial courts, of which 41 percent (more than 1.6 million) were criminal filings.

The proposed reforms raise a host of issues that will require judicial scrutiny, resolution, or intervention. Some of these issues arise from the ill-defined and overbroad terminology used to describe the prosecution’s obligations. There is a troubling definitional haziness surrounding crucial aspects of the proposal, as well as the potential for unintended overreaching.

For example, what does it mean to require that the prosecution disclose the names of “all persons whom the prosecutor knows to have evidence or information relevant to an offense charged or to a potential defense,” as provided in connection with Phase One discovery? In a drug case, does this include the civilian who made a confidential complaint about drug dealing in his complex, regardless of the specifics or sources of his knowledge? In a robbery case, does it include the victim’s neighbor, with whom she spoke about the trauma she suffered? Does it include every member of the Police Department, from clerical personnel to the Commissioner, who acquired some knowledge related to a particular case?

More simply, what constitutes a “police report?” Does the term refer only to formal documents, such as the Complaint Report and the typewritten reports created by detectives – known in the N.Y.P.D. as DD-5’s? Does it include such items as memo book entries, handwritten notes, funding requests, and broad summaries based on generalized and unsourced information? Is the term so broad as to encompass internal memoranda that would expose police investigative techniques, such as how undercovers are utilized or surveillance is conducted?

Terms like these will spawn litigation not only as practitioners seek judicial guidance to make sense of them, but down the road, when questions of compliance must be resolved. Indeed, when it comes to compliance issues, the courts will be faced with additional definitional riddles, like the difference between “some” prejudice and “significant” prejudice,¹⁷³ the distinction between “significantly impugn” and “tend to impugn,”¹⁷⁴ and the meaning of “reasonable diligence”¹⁷⁵ or an “important witness.”¹⁷⁶ Similar issues are occasionally litigated now, but given the vast expansion of the prosecution’s discovery obligations, and the uncertainties surrounding their precise contours, the number of litigable discovery issues is sure to skyrocket. Each such issue will require some form

¹⁷³ NYSBA Report, p. 37.

¹⁷⁴ NYSBA Report, p. 24.

¹⁷⁵ NYSBA Report, p. 47.

¹⁷⁶ NYSBA Report, p. 24.

of proceeding by the court, frequently necessitating a factual inquiry into the surrounding circumstances and a judgment about the appropriate remedy.

There are a myriad other ways in which judicial resources will be sorely taxed. Prosecutors will be compelled to request protective orders in connection with a much larger universe of cases and for many more witnesses and documents. This follows from the proposed timetable, the drastically expanded scope of witness information and police reports required to be provided, and the sweeping pool of “persons” likely to be affected. Likewise, “lawyer only” disclosures will undoubtedly create difficult legal, procedural, and enforcement problems. All such issues can and will spawn litigation, and require factual inquiries that can be searching and difficult. They will strain the resources of the courts, as well as of police departments and prosecutors.

We anticipate that the extra burdens borne by the judiciary will be significant. But the burdens on the scarce resources of prosecutor’s offices and police departments will be far greater. It may sound like a simple matter to acquire the various materials required to be disclosed within the short time frames provided for in the Task Force recommendations, but it is not. Practical difficulties arise in connection with all manner of seemingly simple tasks, from contacting a police officer who works steady midnights, to compiling an accurate list of everything “allegedly possessed by” a defendant or co-defendant, to identifying an Emergency Medical Technician who transported a defendant or victim to the hospital.

Some of the tasks required are, even on their face, not simple at all. It is unthinkable that the prosecution would turn over the name and contact information of a witness without first interviewing him and alerting him to the impending disclosure. Even in a straightforward shoplifting case, a security guard may have made an apprehension witnessed by a half-dozen sales personnel, all of whom would have to be contacted and notified of the law’s impact on them.

Witnesses whose interviews now focus on obtaining a complete and accurate account of events will require far more time and attention, to facilitate the kind of meaningful interaction necessary before such disclosures are made. Fears, privacy concerns, and a heightened reluctance to become involved will have to be addressed. Safety issues will have to be explored. Certain witnesses must be cultivated over a prolonged period of time, particularly in violent crime and gang cases, in order to develop the trust essential to securing their full cooperation. Such witnesses will instead have to be interviewed intensively in the earliest stages of the case, in the hopes of

overcoming their reluctance in a drastically compressed time frame. People whose identity might, under current law, never become known, or who would not be compromised until a trial was in the offing, may have to be relocated. The expense to the state could be considerable – though far less than the costs inflicted upon witnesses uprooted from their homes.

These new necessities will be burdensome and costly at every level of the system. In local criminal courts, where prosecutors carry caseloads in the hundreds,¹⁷⁷ compliance with the mandates proposed by the Task Force may not be possible at all.

The full costs of the Task Force proposals cannot be understood without acknowledging the practical implications of one obvious fact: the overwhelming majority of criminal cases are not resolved by trials, but by pleas of guilty. Because of that, the proposals would require that significant time and resources be expended doing work which, under current law, is often not required.

Every conscientious prosecutor learns the critical evidence in his case at its inception. But because most cases result in guilty pleas, the more intensive preparation of the average case may not take place until it seems likely that there will actually be a trial. Indeed, precisely because of the costs to the state, it is commonplace for plea offers to be withdrawn at the point where intensive trial preparation begins. That fact is an accepted part of criminal practice, and is hardly considered unreasonable; on the contrary, its legitimacy has been recognized by the United State Supreme Court.¹⁷⁸ Yet the Task Force proposal would alter the landscape to require that much of what is now accomplished during “trial preparation” take place far earlier. And if a defendant ultimately pleads guilty, significant resources will have been consumed accomplishing tasks which would not be necessary under our current procedures.

The Task Force report suggests that the burdens imposed by the reform package may be mitigated by a likely increase in or acceleration of guilty pleas. This hypothesis is conjectural, as the

¹⁷⁷ For example, Assistant District Attorneys in Rockland County can carry between 400 and 700 misdemeanors cases along with a felony caseload.

¹⁷⁸ In *United States v. Ruiz*, a unanimous Supreme Court rejected the argument that there exists a constitutional obligation to provide impeachment information during the plea bargaining process, noting that such a requirement “...could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.” The Court went on to note that such a principle “...could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea bargaining process of its main resource-saving advantages.” *United States v. Ruiz*, 536 U.S. 622, 631-632 (2002).

report offers no empirical evidence to support it. It is more likely that the proposed changes will delay pleas as many defendants wait for discovery deadlines to make a decision. Moreover, no one should doubt that there will be defendants who, despite an intention to plead guilty, will run out the discovery clock in order to “out” the witnesses against them, just as no one should doubt that the exposure of witnesses’ identities will lead to more tampering and intimidation. In fact, there is good reason to believe that the number of guilty pleas will fall as witnesses refuse or cease to cooperate, offer false recantations, or disappear.

VIII. The Task Force Fails to Distinguish Between the Need to Safeguard a Defendant’s Trial Confrontation Rights and Other Discovery Considerations That Do Not Touch on Constitutionally Protected Interests

The Task Force argues that the preponderance of guilty pleas militates in favor of the kind of expanded and accelerated discovery for which it advocates. It contends that without such discovery, counsel is hamstrung in offering plea advice. This highlights a critical weakness in the Task Force report – that it conflates a number of considerations which do not have the same weight, legitimacy, or support in the law, and ascribes the same value to all of them.

While defendants have constitutional rights to confrontation at trial and effective assistance of counsel, those rights have never been held to require the disclosure of non-exculpatory information prior to trial, much less prior to a plea. Indeed, there is no constitutional right to discovery.¹⁷⁹ Of course, we recognize the importance of providing the defense with information, such as witness statements, in time to review it carefully and prepare intelligently for its use at trial. We recognize as well that this sort of careful and intelligent work requires some time, and can be difficult when information is turned over only once a proceeding is underway. But those factors are quite different from the notion that defendants are entitled to broad discovery in time to make strategic decisions about whether to plead guilty.

The Task Force glides past the obvious fact that a defendant himself knows whether he committed the crime of which he is accused. He does not need police paperwork, witness statements or contact information at the earliest stage of the proceedings to decide whether he is factually guilty. What the defendant may not know is the strength of the prosecution’s case, and therefore

¹⁷⁹ *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Miller v. Schwartz*, 72 N.Y.2d 869, 870 (1988).

how likely it is that he can “beat” the charges despite his guilt. That, however, is a very different issue. It implicates his ability to make a tactical decision regarding whether to plead guilty, rather than his ability to defend himself fairly at trial. It is a consideration that undoubtedly has far less societal support and is entitled to much less weight.

The Task Force has not distinguished between these very different types of considerations. It needs to do so, because they carry different implications for the timing and nature of various disclosures. As we noted at the outset, we believe that it is possible to provide for disclosure of witness statements and other information before the actual commencement of a hearing or trial, to allow the defense a better opportunity to prepare. But we believe that such disclosures should not be mandatory until much later in the process – generally when it is clear that there is actually going to be a hearing or trial, rather than a guilty plea – and that any proposal for such disclosures requires a balancing of interests very different from what is embodied in the Task Force report.

IX. The *Brady* Proposals

We agree with the Task Force *Brady* recommendations regarding training, the impracticalities of pre-plea discovery, and judicial involvement in the discovery process.¹⁸⁰ We do not, however, endorse its recommendations for tracking, evaluating, and implementing internal and external disciplinary procedures for *Brady* violations. While we share the objectives that lie behind these recommendations, the Task Force has provided few, if any, specifics regarding the proposed procedures. Thus, the report leaves too many unanswered questions as to how the proposals would be implemented.

We also express our concern that in considering the timing of disclosures, the Task Force report recognizes no distinction between exculpatory information as described in *Brady v. Maryland* (“*Brady* information”), and impeachment information as described in *Giglio v. United States* (“*Giglio* information”). *Brady* and *Giglio* information must both be disclosed, at a minimum, in time to afford the defense a meaningful opportunity to use the information at the relevant proceeding.¹⁸¹ *Brady* information should be disclosed, at least presumptively, as soon as practicable after the information and its significance become known to the prosecution. But the very nature of

¹⁸⁰ Our objection to requiring certificates of compliance, however, is noted below.

¹⁸¹ *United States v. Rodriguez*, 496 F3d 221 (2d Cir 2007).

Giglio information dictates a different timetable for its effective use in impeaching witnesses at testimonial proceedings, and the interest served by its early disclosure must be balanced against other significant interests. Those interests include the security of witnesses and confidential informants, as well as possible harm to ongoing investigations. It is firmly established that the need to protect such interests may justify postponed disclosure, and the distinction between *Brady* and *Giglio* information with regard to the timing of disclosures is well recognized.¹⁸² This distinction should be acknowledged in any balanced discussion of the issues before us.

We have concerns as well about the recommendation of a new statutory standard for *Brady* and *Giglio* disclosures that would eliminate the materiality requirement. Those joining in this response recognize and share the concerns the Task Force expresses about the difficulties of assessing the materiality of information before trial. We certainly believe that prosecutors must take a broad view of materiality, resolving questions in favor of disclosing potentially exculpatory or impeaching information. But the statutory change proposed by the Task Force raises problems that the report overlooks.

For example, the Task Force proposal requires that the prosecution turn over, within 90 days of arraignment, all information that “tends to impugn” the credibility of any prosecution witness, informant or evidence.¹⁸³ The proposed rule would treat *Giglio* information like *Brady* information, by encompassing information known to either the prosecution or the police. And it would apply without regard to materiality.¹⁸⁴

As the Court of Appeals has stated in the *Rosario* context, omissions, contrasts, and contradictions that may discredit a witness are not as readily apparent even to a judge as they are to

¹⁸² *United States v. Ruiz*, 536 US 622 (2002) (holding that a defendant has no federal right to the disclosure of *Giglio* information prior to entering a valid guilty plea and recognizing that pre-plea disclosure could expose witnesses to intimidation or harm, disrupt ongoing investigations and require the prosecution to devote substantially more resources to pre-plea trial preparation); *United States v. Frank*, 11 F. Supp. 2d 323, 323, (S.D.N.Y. 1998) (“The issue of when *Giglio* material should be disclosed, however, must be analyzed separately [from exculpatory information].”); *United States v. Dames*, 380 F. Supp. 2d 27, 272-73 (S.D.N.Y. 2005).

¹⁸³ If information known to the prosecution “significantly” impugns the credibility of an “important” witness, informant or evidence, the proposal requires disclosure within 15 days of arraignment.

¹⁸⁴ The Task Force cites to the NEW YORK STATE RULES OF PROFESSIONAL CONDUCT, Rule 3.8(b), as an example of a rule that requires disclosure of exculpatory information without regard to materiality. What the report fails to mention is that Rule 3.8(b) does not apply to impeachment information and does not hold the prosecutor responsible for information that is only in the possession of the police.

single-minded counsel for the accused.¹⁸⁵ The same, of course, holds true for a prosecutor, particularly since defense theories and evidence that might shed light on the potential utility of seemingly irrelevant information are not subject to discovery or revealed to a prosecutor before trial. This fact, adduced in support of the materiality proposal, actually highlights its pitfalls.

Has the prosecutor who turned over a witness statement as *Rosario* material shortly before trial committed a statutory “*Brady*” violation under the proposed new statute if a defense attorney can imagine some way, not perceived by the prosecutor, in which that statement “tends to impeach” a witness? Will the prosecutor then be subject to sanction or reported under the proposed violation tracking system, even if the utility of the statement on cross-examination is not impaired by the timing of the disclosure? To guard against a statutory violation and its associated repercussions, a prudent prosecutor would effectively have to engage in something close to open file discovery. For this reason, the statutory elimination of materiality would not simply be a mechanism to ensure that a prosecutor fulfills his constitutional obligations; it would in effect create a very broad, general discovery obligation tied to accelerated deadlines. And it would create such an obligation regardless of whether the other proposals made by this Task Force were enacted or rejected.

In other words, the proposed statutory standard threatens to subsume the larger discovery framework, of which it should be one component. The broad analysis of the potential costs and benefits of expanding and accelerating mandatory discovery is the mission in which this Task Force is engaged. The prospect that rules which require broad and early discovery may prevent unintentional *Brady/Giglio* violations is one factor to consider. That possibility must, however, be carefully balanced against the host of other considerations which we have detailed in this submission. We should not circumvent that analysis by statutorily eliminating the materiality standard. As the Task Force appropriately recommends, effective training and thoughtful monitoring are critical to reducing *Brady/Giglio* violations. Erecting a statutory disclosure standard that is difficult for prosecutors to meet without compromising other compelling interests is not the answer.

¹⁸⁵ *People v. Rosario*, 9 N.Y.2d 286, 290 (1961).

X. Additional Areas of Concern

There are additional Task Force recommendations that we do not support. While the primary focus of this report is on those proposals that will have the greatest impact on civilian cooperation and safety, we do not believe these other recommendations received the time and careful study they merit. To illustrate, we highlight some of these proposals and briefly address our concerns below.

Access to crime scenes and other “relevant” premises. The Task Force proposes that defendants be given court-ordered access to crime scenes and other “relevant” premises, with the right to “inspect, photograph, and measure” them, and a directive that their condition remain unchanged until such inspection takes place.

It is unclear how wide-ranging and intrusive an “inspection” might be. Putting that troubling issue aside, the proposal would plainly have a significant adverse impact on a whole range of individuals and institutions – on victims, witnesses, and other private citizens when crimes are committed in their homes or businesses, on people whose homes or businesses are somehow deemed “relevant,” on the general public when a crime has occurred on public property, and on a host of other institutions whose premises might fall within the statute’s broad ambit. It would deny people access to or use of their homes, businesses, or other premises well beyond the time required for a police investigation; it would violate the privacy of those forced to open their homes for inspection; and it would undoubtedly cause significant emotional distress, particularly to victims and witnesses. On a practical level, the proposal would require that substantial police resources be devoted to preserving crime scenes even after the completion of the necessary processing.

This proposal is a particularly striking example of the insensitivity to victims and witnesses which we believe pervades the Task Force report, and which we have noted previously. Were it to be enacted, victims who have been burglarized, robbed, raped, or otherwise violated in their homes or workplaces would lose control of their own property. They would be compelled to allow entry and inspection on behalf of the very person believed, based on legally sufficient evidence, to have committed the crime against them. While the victims would be entitled to be heard – an imposition in and of itself – their objections to this invasion of their property rights and disruption of their lives would not be controlling.

The right to enter people’s private spaces without their consent is one granted to our government only under limited circumstances, because we recognize the extraordinary intrusion it

represents. The Task Force proposal would grant that right to defendants by virtue of the fact that they have been accused of crimes, arguing that doing so will enhance fairness. The Task Force fails to make the case that this consideration outweighs the proposal's extraordinary impact on the interests of victims, witnesses, and other private citizens. What is most telling is that those interests are simply not mentioned. There could be no clearer example of the imbalance reflected in the report as a whole.

“Catch all” discovery. Discovery rules enacted by the legislature after careful study should govern all aspects of discovery. A “catch all” provision allowing discovery beyond what is contained in such carefully crafted legislation, and leaving it to the discretion of individual judges, would circumvent and undercut the legislative process. It would also introduce an unevenness from judge to judge that our system should not countenance.

Certificates of compliance. The Task Force states that its proposal to require Certificates of Compliance is designed to create a record, and to help “foster compliance” and “personal responsibility” by lawyers. Statutes are not an appropriate vehicle to foster personal responsibility. The Task Force already envisions judges taking a greater role in the discovery process. Monitoring compliance and ensuring that adequate records are made is a traditional role for a judge. The Task Force states “emphatically” that the purpose of its proposed requirement is not to spawn litigation. This is unrealistic. It will inevitably spawn litigation, and there is no valid reason for its adoption.

Requiring discovery to be automatic. As noted earlier, the Task Force proposals call for sweeping changes that, if adopted by the legislature, will have a profound impact on law enforcement and prosecutorial resources. Eliminating demands will exacerbate these challenges. Under the current statute, a defendant has up to 30 days from arraignment to file a demand, the prosecutor has 15 days to respond, and the materials that must be provided to the defense are more limited than those that the Task Force proposals would require. Prosecutors with heavy caseloads may be assigned multiple cases on any given day. For them, even now, a requirement that discovery be initiated through demands is critical to their ability to manage their caseloads, since demands in some cases may not come at all, and demands in others are spread over a 30-day period. The demand requirement will become still more important if discovery obligations are expanded.

Subpoena law. The Task Force recommends eliminating the requirement that prosecutors be served with defense subpoenas directed to governmental agencies. The report suggests that the one-

day notice to the prosecutor that is now required can lead to evidence being permanently lost. It is hard to imagine that such a minimal delay is a significant concern. What is significant, however, is that a government agency may not be aware that subpoenaed reports in its possession contain information that may compromise a civilian witness's safety or privacy, or reveal an ongoing investigation. The prosecution must be made aware of the intended service of the subpoena to ensure that such concerns are brought to the attention of the issuing court and the government agency.

XI. Appropriate Areas for Legislative Change

There are persuasive reasons to consider some changes to our discovery laws. While we have expressed our grave concerns with the central proposals made by this Task Force, as well as the process by which it has come to its findings and recommendations, we support a number of the Task Force proposals.

(a.) *Reforms to CPL §710.30:* We agree with all the recommendations proposed by the Task Force with regard to amending CPL §710.30, with one important caveat. We note that the initial recommendation of the subcommittee that examined this area was that, in the case of a notice violation, the law should impose “remedies” for harm actually done and not “sanctions” on the prosecution. Subsequently, the recommendation was changed so that a violation would result in preclusion if the prosecutor failed to act with “due diligence.”

We object to the newly proposed standard. Preclusion of evidence, with its negative impact on the fact finder's ability to determine the truth, should be the ultimate sanction, reserved for constitutional violations and intended to deter gross misconduct.

Related to this issue is the fact that the proposed changes to CPL §710.30 add two new areas of discovery under that section – physical evidence and photo arrays. We had no objection to adding these areas under the earlier proposal, but the specter of seeing more probative evidence precluded from use without consideration of harm and alternative remedies – in effect suppressed – because of a discovery error should be disturbing to all members of this Task Force. If the Task Force proposes preclusion as the sanction for a failure to exercise due diligence in providing 710.30 notice, we oppose adding any new discovery obligations to that section.

(b.) *Additional Discovery under CPL §240.20*: We agree, in principle,¹⁸⁶ with the Task Force that the following proposed areas are appropriate for additional discovery under CPL §240.20:

1. Tangible property that the People intend to introduce in its case in chief.
2. Expert opinion evidence.
3. Tangible property that was in the possession or believed to be in the possession or control of the defendant during the alleged commission of the crime (*see* CPL §710.30 discussion).
4. Search warrants and related documents (subject to redactions at the discretion of the prosecutor).
5. Photo array information (*see* CPL §710.30 discussion).

(c.) *Witness Criminal History Information*: The Task Force correctly points out that while CPL §240.45 requires the prosecutor to make available the known criminal history information of the prosecution witnesses, it does not require the prosecutor to run a criminal record search on its civilian witnesses. We support a recommendation that the prosecutor be required to do so¹⁸⁷ and to provide that history to the defendant, along with the histories of the defendant and any co-defendant, in accordance with the provisions of CPL §240.45.

(d.) *Improving the Flow of Information between Law Enforcement and Prosecutors*: We agree with all of the Task Force recommendations for improving the flow of information between law enforcement agencies and prosecutors.

(e.) *Earlier Production of Rosario Material*: Perhaps the best example of an area in which change could be considered involves *Rosario* material. As noted previously, current rules call for providing *Rosario* material to the defense, at pretrial hearings, after the witness has completed direct testimony, and at trial, before opening statements. While prosecutors often turn this material over sooner, this Task Force might well have focused its efforts on finding ways to provide for somewhat earlier *Rosario* disclosure, prior to hearing and trial, had it been more cognizant of the need to balance defense discovery objectives with the other compelling interests outlined in this report. Described below are two areas that merit consideration.

¹⁸⁶ While we agree in principle that these are areas where additional discovery is reasonable, more time would be required to examine the sample statutory language and specifics of the recommendations set forth in the Task Force proposal.

¹⁸⁷ The prosecution would be required to check for a criminal record using the name and date of birth of the witness, but we would object to any proposal that would require the fingerprinting of prosecution witnesses.

In the federal system, the *Rosario* equivalent is known as Jencks or 3500 material. The federal discovery rules call for disclosure of that material after the direct examination of the witness, which is later than what is called for under New York's discovery laws. In the federal system, however, prosecutors routinely turn over 3500 material earlier than the statute requires, and judges are often directly involved in facilitating that process. In contrast, state court judges have traditionally taken a more passive role in such matters. As the Task Force recommended in the *Brady* context, there is room for a greater judicial role in this area.

The Uniform Rules of Criminal Court, specifically Rule 200.12, already contemplate conferences to discuss matters such as discovery, motions, and trial dates, a tool that is rarely used. Rule 200.12 also permits the court to schedule additional conferences. Consideration should be given to requiring that judges order pre-trial conferences when motion practice has been concluded, decisions rendered, and the possibility of a plea bargain fully explored, since at that point they can fix a date for hearing and trial. At that conference, the court can set a date for the production of *Rosario* material, taking into account any concerns raised by either party. In our view, the date should be no more than 10 days before trial except in cases of unusual complexity and involving voluminous *Rosario* material.¹⁸⁸

There may be other opportunities to allow discovery of *Rosario* material to take place even earlier, in contexts that would not involve compromising civilian cooperation and safety. For example, a substantial percentage of criminal cases, like street-level narcotics "buy and bust" and "observation sale" cases, involve only police witnesses. Early disclosure of the *Rosario* material of police witnesses in these cases – specifically those who testified in the grand jury and are likely to be hearing or trial witnesses – may be possible without substantial countervailing costs. This

¹⁸⁸ When this suggestion was raised at a Task Force meeting, it was never properly explored, ostensibly because, in contrast to the federal system, trial dates are rarely "certain" in state court. This was hardly a reason not to discuss the idea fully. Judges should certainly take into account the likelihood of a plea bargain and the prospective readiness of the parties in determining the timing of *Rosario* disclosures. Even so, there would no doubt be instances where *Rosario* was turned over in advance of a trial date that was subsequently adjourned. That said, at least this proposal involves a point relatively late in the criminal proceeding, when the prosecution is in a far better position to assess such concerns as witness safety than at the inception of a case. A proposal along these lines must also permit the prosecution to redact *Rosario* material in advance of trial provided the defendant is given the opportunity, upon motion, to challenge any redactions. In determining the appropriateness of any redactions, upon a defense challenge, the court should consider those factors outlined in CPL §240.50 as well as any expressed concerns of a witness regarding the disclosure of information that might reveal his identity prior to trial.

unexamined possibility represents another potential reform that should have been explored by this Task Force.

XII. Conclusion

The New York State Bar Association Discovery Task Force was formed in order to examine and consider changes to the state's discovery laws. That endeavor requires a careful and delicate balancing of conflicting interests. But since its very formation, the Task Force has seemed singularly focused on the objective of mandating the earliest and broadest possible disclosure of information from the prosecution to the defense. Some of its members appeared convinced that the radical restructuring such a mandate entails should be our goal before undertaking the objective investigation and analysis essential to arrive at that conclusion. In fact, as we argue above, that investigation and analysis have never been properly conducted.

As we have explained, we believe that the Task Force has not adequately considered the practical impact of its proposals, which would exact a potentially unsustainable toll in money and resources. That failure is serious. But what is most troubling is its failure to weigh appropriately the effect its proposals would have on those caught up in the criminal justice system as victims, witnesses, or "persons with relevant evidence or information." As one court has noted, "The government chooses to be a litigant in each case it prosecutes, and the defendant is permissibly forced into that role upon a showing of probable cause. But individuals covered by the Crime Victims' Rights Act have done nothing that warrants intrusion into their lives...."¹⁸⁹ The same may be said of the much broader range of private citizens whose privacy, safety, and peace of mind would be deeply affected by the proposals this Task Force has put forth.

Ultimately, of course, to the extent that our discovery laws discourage citizens from cooperating in the investigation and prosecution of crime, they will compromise the ability of our courts to ensure justice, and the safety of us all. For that reason, it is critical to strike the appropriate balance between the valid concerns of the defense and the myriad other considerations we have detailed above. We believe strongly that the proposals advanced by this Task Force fail to do so. Accordingly, we respectfully submit this response.

¹⁸⁹ *United States v. Turner*, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005).

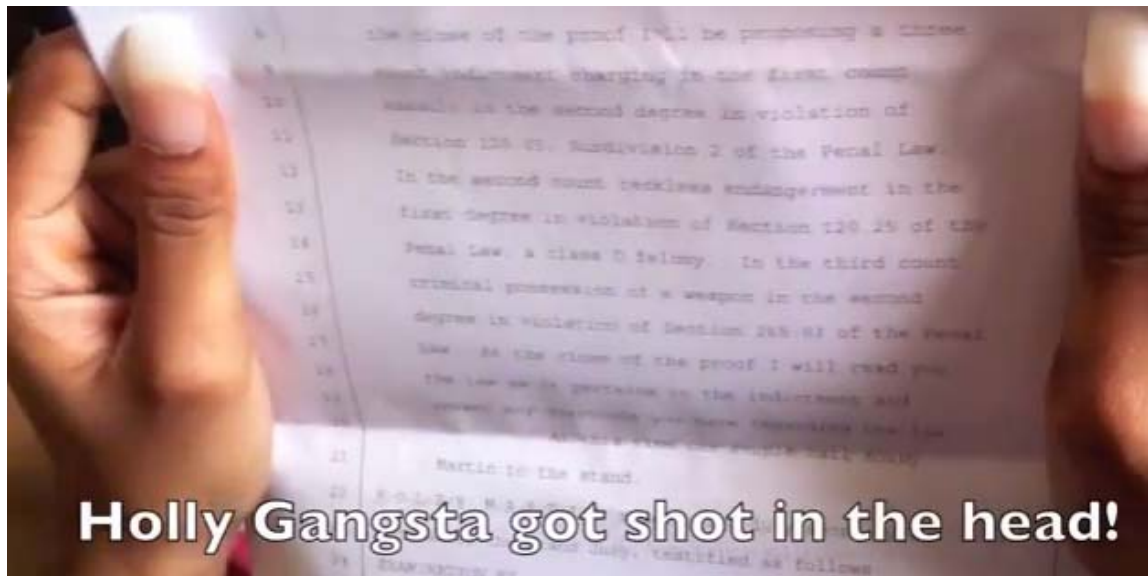
Exhibit for Response to Majority's Report

The following sampling of webpages illustrates the impact of the Internet on the issues under consideration by this Task Force. The Internet and social media have made it possible to identify witnesses worldwide, to disseminate their personal information, to threaten and intimidate them, to use criminal discovery material as proof of their cooperation, and to discourage others from cooperating. And they are increasingly being used for that purpose.

1. **“Keep it gutta presents...Holly Gangsta Grand jury minutes (official paper work) part 1”**

<http://www.youtube.com/watch?v=t8972Z4ZTrk>

YouTube video in which Grand Jury minutes are read out loud by the older brother and female friend of the defendant. The video then posts a caption claiming that the Grand Jury witness “got shot in the head!” This video has 1,500 views on YouTube.



2. “Snitches R Us”

<https://www.facebook.com/pages/Snitches-R-Us/495882637108713>

Facebook group dedicated to exposing “snitches” by posting their photos and personal information. The group also posts threatening status updates, and warnings related to “snitching” like those pictured below.



3. **“ricky kelly aka r-kelly of louisville,ky snitching in court on his partners "derek,big mark"tarc" n”**

<http://www.youtube.com/watch?v=Ys6CGBTgcJY> (Part 1)

XIII. **“ricky kelly aka r-kelly snitching PART2, PART 3-4 is coming of him snitching on lil fred n jimmy jay”**

http://www.youtube.com/watch?v=DUMD24_jcvA (Part 2)

A two-part YouTube video series of a confidential informant testifying in a narcotics-related trial. These two videos combined have over 20,500 views.



4. **“Snitches get stitches”**

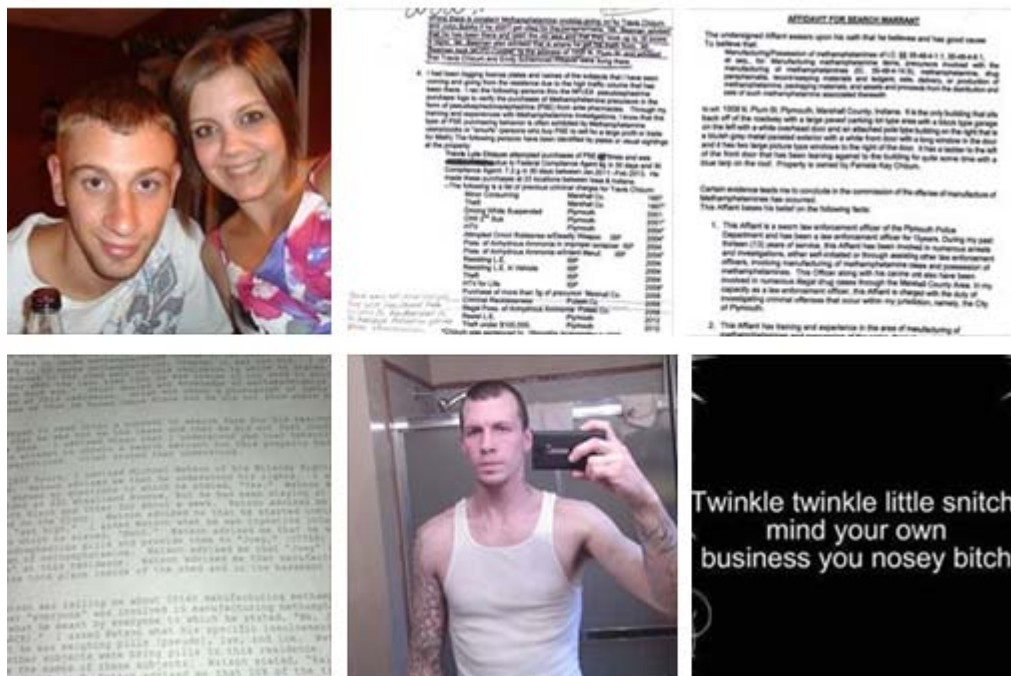
<https://www.facebook.com/pages/Snitches-get-stiches/129851527059369>

Facebook group that posts photos of “snitches” and “rats,” along with “status updates.”



5. **“Indiana Snitch Watch”**
<https://www.facebook.com/indianasnitchwatch>

Facebook group dedicated to informing its members of the identities of “snitches” by posting their photos and court/police document images.





6. “snitches get beat up”
<http://www.youtube.com/watch?v=4JWSUxwB86k>

YouTube video of a teenage boy getting jumped at school by two classmates for being a “snitch.” The video has almost 2,700 views.



71littlefield 1 year ago
 if he snitched then thats what he gets...

7. **[“HORRIBLE! Gang Of Violent Hoodlums Brutally Confront Thug For Snitching”](http://www.youtube.com/watch?v=E2IWNW9BDc4)**
<http://www.youtube.com/watch?v=E2IWNW9BDc4>

YouTube video depicting young male being beaten up for “snitching.” This video has over 1,300 views.



8. **[“Informant Tracking”](http://earthfirstjournal.org/newswire/informant-tracking/)**
<http://earthfirstjournal.org/newswire/informant-tracking/>

Keeps you up-to-date on the “whereabouts and status of informants and ‘snitches’ who are cooperating with, or working for, the State in effort to monitor and/or repress ecological resistance movements.” We have highlighted below the type of detailed personal information websites like this disseminate.


Currently Walking Free:

Justin Clayton Samuel (DOB: Dec. 31, 1978) of Snohomish, Washington; Height: 6' 0". Weight: ~165 lbs. Hair: brown. Eyes: hazel. Race: white

Informant Status: Testified against Peter Young in charges related to cutting fences and liberating mink from a series of fur farms in October 1997.

He was sentenced to two years in federal prison plus a year supervised release and ordered to pay \$364,106 in restitution in exchange for his cooperation.

Current Information: He was released on 11-28-2001. As of 2010, he had gone into the computer security field, working for Firefox, and was a PhD student at UC Berkeley. His school department profile: www.eecs.berkeley.edu/~jsamuel His twitter: <http://twitter.com/#!/jstnsm1>



Currently Serving Time:

Briana Waters (DOB: ~1975), formerly of Oakland, California

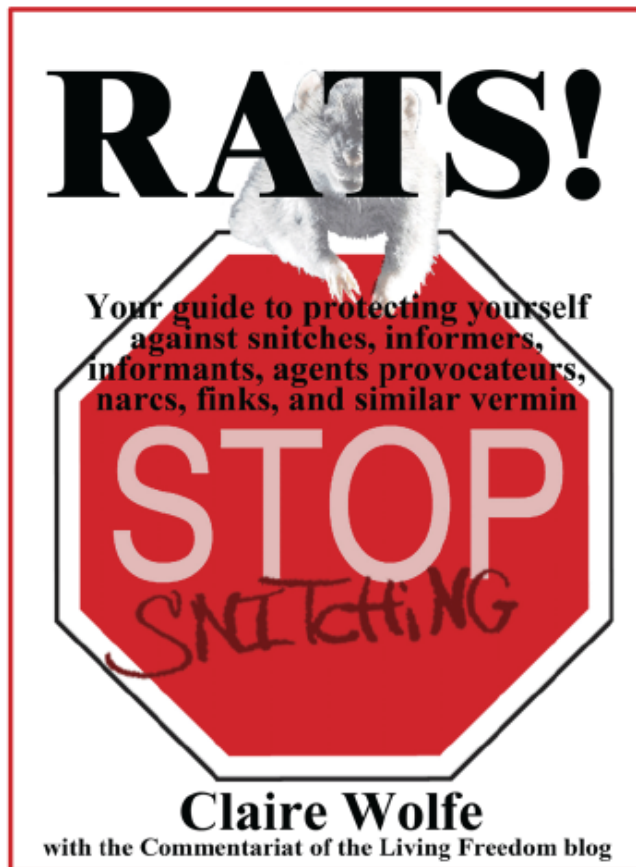
Informant status: Sadly, this former non-cooperating ELF prisoner, took a cooperating plea deal in the prosecution of two 2001 ELF acts of arson. She had been released earlier this year after a mistrial and is expected to testify against former boyfriend Justin Solondz, who was captured as a fugitive in China, is now in US custody for alleged ELF activity.

Current Information: She has a young daughter and was working as a violin teacher prior to arrest. As of December 2012, she is in a halfway house in Sacramento, CA scheduled for release on 06-27-2013.



9. **“RATS! STOP SNITCHING: Your guide to protecting yourself against snitches, informers, informants, agents, provocateurs, narc, finks, and similar vermin”**
<http://rats-nosnitch.com/rats.pdf>

A 71-page guide discussing how to recognize and avoid “snitches,” what to do when you uncover a “snitch,” and what happens when you get busted by a “snitch.”



How do YOU treat an exposed snitch?

Spread the word. Use social networks both online and in the real world to notify others that the person is an informant. Be as factual and give as much evidence as possible. (There is even a website that contains a national database of known rats, but since it's a paid membership site, we're not recommending it here. Do a [Startpage.com](http://www.startpage.com) or

10. “Uncle Murda - Please Don't Snitch”

http://www.youtube.com/watch?v=pLbupqP7A_8

YouTube rap music video about “snitching.” This video has over 110,000 views and discusses the consequences of “snitching.”

Lyric examples:

“Talkin’ to the po’ po’. I’m a pop him in his head, tell him that’s a no no”.

“Know if they snitchin’, not just you, your whole family gon’ get it”



11. **“Get That Snitch”**

<http://www.youtube.com/watch?v=SFxxWQTjhnk>

YouTube rap music video about “snitching.” This video has almost 214,000 views and discusses the consequences of “snitching.”

Lyric examples:

“you wanna tell tell, midnight you’ll be swimming with the seashells”

“Get that snitch, get the strap, don’t give a fu*k, pop pop pop”

“Boom boom boom boom let a snitch know” (with gunshots in the background)



12. **“SnitchWire”**

<http://snitchwire.blogspot.com/>

This blog exists for the purpose of “investigating and objectively reporting on the existence and actions of known informants, infiltrators, rats, snitches, and provocateurs.”




13. “Who’s a Rat?”

<http://www.whosarat.com/>


The “largest online database” revealing information on more than 5,500 informants and undercover law enforcement agents, as well as court documents of plea deals that informants received (membership needed).




rats of the **week**



Kevin Novosel
Kansas City
Kansas, USA.
[+ View Profile](#)



jason sykes
watonga
oklahoma, USA.
[+ View Profile](#)



GAYLE KORUM
BEAVERTON
OREGON, USA.
[+ View Profile](#)

- [+ VISIT OUR STORE](#)
- [+ REFER A LAWYER](#)
- [+ AFFILIATES](#)
- [+ LINK TO US](#)
- [+ LATEST NEWS](#)
- [+ TOP SECRET DOCUMENTS](#)
- [+ MAKE A DONATION](#)
- [+ IMPORTANT CASE LAW](#)
- [+ MEMBERS LOGIN](#)
- [+ FEEDBACK](#)
- [+ MESSAGE BOARD](#)
- [+ LEGAL INFORMATION](#)

Total Profiles - 5690
Informant - 5213
Agent Profiles - 477

MAJORITY’S REPLY TO THE TASK FORCE DISSENTERS

The “response” to this Task Force’s report raises apocalyptic predictions of the collapse of the criminal justice system, victims and witnesses no longer reporting crimes, and blood flowing in the streets – all if New York simply joins the national mainstream and adopts criminal discovery rules like those used in most other States.

Yet the response offers no explanation for why, if expanded discovery is really so unworkable and dangerous, conservative States such as Texas (2014) and North Carolina (2004) have recently decided to enact broad discovery systems; why Ohio, which already had fairly broad discovery, recently made its procedures even more broad (2010); or why, if giving discovery of witnesses removes what the dissenters call prosecutors’ “most powerful tool,”¹⁹⁰ legislatures around the country are not scrambling to repeal their statutes (to date, none have).

Likewise, the response fails to explain how, if broad discovery is too administratively burdensome and jeopardizes “society’s ability to solve crimes in the first place,”¹⁹¹ some of the largest counties in this State, such as Kings County (Brooklyn), have managed to voluntarily turn over “open file” discovery for decades.

The dissenters simply cannot avoid the inescapable fact that, far from being “extreme,”¹⁹² the Task Force’s recommendations are time-tested and represent the mainstream of State criminal practice in the nation. Furthermore, the Task Force’s proposals are balanced and cautious, since they go beyond other States with measures to ensure the reforms would be achievable (including a calibrated, two-stage discovery time frame) and provide a range of options for prosecutors and courts to protect witnesses as necessary (including several flexible alternative procedures that a prosecutor may choose to employ that are not part of most States’ discovery statutes).¹⁹³

¹⁹⁰ Response, section IV, p. 87 (commenting that: “The most powerful tool a prosecutor has is . . . the ability to explain to a witness that grand jury proceedings are secret, and that no one will know of his cooperation unless and until there is a trial”).

¹⁹¹ Response, section IV, p. 87; section VII, pp. 98-100.

¹⁹² Response, section I, p. 77.

¹⁹³ See Task Force Report, II-D, pp. 31-36; II-A-2, pp. 15-21.

Given the commonplace nature of the Task Force’s major recommendations, it is not surprising that the dissenters couch many of their objections in the form of a call for further “study” and claim the Task Force did not adequately examine the issues.¹⁹⁴ The well-known quip about lawyers attacking the *process* when they cannot convincingly argue the *merits* applies to the response’s efforts. But the dissenters’ claims regarding both the process and the substance of our report are wrong. We will now address them.

(1.) *The Task Force’s Process Was Thorough:* The Task Force Subcommittee that drafted our statutory reform recommendations constantly took into consideration the views of leading practitioners from other States, both during its meetings and outside of them. (We respectfully note that, of the three authors of the response, the one who served on that principal Task Force Subcommittee failed to attend some of its key meetings; thus, he may be unaware of the range and contents of our deliberations.) Subcommittee members have been among the leaders of the current debate over discovery reform in New York State. They have widely participated in forums on the subject for years, and have heard presentations and testimony from experts and practitioners from around the country.

In particular, the Subcommittee considered and relied on statements made by several prominent out-of-state District Attorneys, who strongly denied that there are unmanageable witness safety problems as a result of broad discovery and confirmed that they do in fact have the tools to protect witnesses. These sources included the District Attorney of Suffolk County, Massachusetts (Boston), who explained to an audience of New York criminal law practitioners on September 21, 2012, that his prosecutors are able to safeguard witnesses and that their broad discovery system works; the elected District Attorneys from jurisdictions including Dallas, Milwaukee, St. Paul and Dayton, who each told an audience in New York City, on November 15, 2009, that they had the means to successfully protect witnesses and supported early and liberal discovery; and many other out-of-state practitioners, including judges, prosecutors, and defense lawyers who practice in both State and Federal courts.¹⁹⁵

¹⁹⁴ Response, section I, p. 76; section V, pp. 90-95; section XII, p. 110.

¹⁹⁵ For instance, a Wisconsin State Public Defender who described in detail that State’s procedures for issuance and implementation of protective orders was the source for the Task Force’s recommendation regarding a procedure for restricting disclosure of *physical copies* of discovery materials to the defendant in appropriate cases, when the defendant is afforded reasonable access to inspect (not obtain copies of) redacted versions at a supervised location such as a prosecutor’s office, police station, facility of detention or court.

Likewise, the Task Force examined the discovery rules used in every State and in the Federal system, as well as the one-directional history of legislatures broadening and accelerating discovery nationwide. Task Force members also looked at the surrounding context of States' criminal procedure laws beyond just discovery statutes; that is how we learned, for example, that disclosure of witnesses' names and addresses is even more common than we had previously believed, since in many States this requirement is contained in other parts of their procedure codes, outside of the discovery articles.¹⁹⁶ We saw no reason to discuss the discovery rules used in the Federal courts as part of our report,¹⁹⁷ simply because that restrictive system closely resembles New York's current regime which we believe is fundamentally flawed.

The response also wrongly claims that the Task Force failed in its promise to provide members with "selected statutes cited with approval . . . so that we could dig deeply into their impact and implementation."¹⁹⁸ The Task Force Subcommittee that drafted our statutory reform recommendations did, in fact, have access to a 206-page compendium of other States' discovery rules, which was made available to each of its participants from the outset (in fact, prior to the Subcommittee's first meeting).¹⁹⁹ In any event, every State's discovery statute is readily available online, so there was never an impediment to reviewing them.

While this State Public Defender described that the procedure is used in appropriate cases in Wisconsin as a matter of practice, the Task Force has recommended that the option be highlighted as part of the protective order provision in New York's discovery statute. *See* NYSBA Report, section II-A-2-i, p. 16 & n.29.

¹⁹⁶ *See* Task Force Report, II-A-1, pp. 9-10 & n.17.

¹⁹⁷ *See* Response, section V, p. 91 (commenting that: "The federal system has discovery rules almost identical to the laws of New York State. . . . It is thus troubling that the Task Force gives federal discovery procedures no attention at all").

¹⁹⁸ Response, section V, p. 91.

¹⁹⁹ *See* "Some Materials Criminal Discovery Practice and Procedures in Other States: Assembled for NYSBA's Task Force on Criminal Discovery", dated October 17, 2012 (202 pages, including: [i.] Prof. Wayne R. LaFave's overview of nationwide discovery rules, excerpted from his treatise *Criminal Procedure* [Nov. 2011]; [ii.] the full criminal discovery statutes, and summarizes of their highlights, of Massachusetts, Arizona, California, Colorado, Florida, Illinois, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania; [iii.] the American Bar Association's discovery standards; [iv.] the National Prosecution Standards for discovery; and [v.] the 2010 version of The Legal Aid Society's discovery reform proposal). Notably, the drafter of the Response who served on that Subcommittee made no request for them at the time. The dissenters' complaint is, instead, raised a year-and-a-half later simply to cast doubt on recommendations they dislike.

The response further protests that it is “difficult to believe” that there is not more “current, relevant literature available” on the effects of expanding criminal discovery.²⁰⁰ But surely the dissenters themselves would have found and mentioned such studies, if they existed. We think they do not.²⁰¹ A likely explanation is that, since all large States have already adopted broad discovery systems (except New York and Virginia), it is no longer perceived in the academic and professional communities as a subject needing further study, especially since most of these States adopted their discovery rules decades ago. There is certainly no literature advocating a counter-movement towards more limited discovery.

Within the past decade, the legislatures in North Carolina, Ohio, and Texas each closely examined criminal discovery reform and broadened their discovery systems. Evidently they were satisfied with the track record of experience with open discovery in other States. As Governor Rick Perry of Texas declared when signing into law that State’s expanded criminal discovery rules in 2013: “Texas is a law-and-order state, and with that tradition comes a responsibility to make our judicial process as transparent and open as possible. [The new discovery bill] helps serve that cause, making our system fairer and helping prevent wrongful convictions and penalties harsher than what is warranted by the facts.”²⁰² This Task Force urges New York’s legislators to follow course, and to also enact these well-established and highly beneficial reforms.

(2.) *The Warnings of “Devastating” Results Are Baseless:* The response would have us believe that where discovery is broadened, chaos ensues.²⁰³ The dissenters paint a bleak

²⁰⁰ Response, section V, p. 92.

²⁰¹ See, e.g., Janet Moore, “Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*,” 77 Brook. L. Rev. 1329, 1373 (2012) (“Full open file discovery reform also has received little scholarly attention”); cf. *id.* at 1383 (providing additional anecdotal support for open file discovery based on the author’s interviews with North Carolina practitioners, including the Chief Resource Prosecutor of the North Carolina Conference of District Attorneys, and summarizing them as follows: “Observations from those involved with training and implementation indicate that after initial resistance, primarily from some of the more experienced prosecutors and law enforcement officers, full open file reform is finding increasingly broad acceptance”).

²⁰² Press Release, Office of Governor Rick Perry, “Gov. Perry Signs Senate Bill 1611, The Michael Morton Act,” 5/16/13 (available at: <http://governor.state.tx.us/news/press-release/18521/>); see also Chuck Lindell, “Perry signs Morton Act into Law,” *AUSTIN AMERICAN-STATESMAN*, 5/16/13.

²⁰³ See, e.g., Response, section I, p. 76 (“a potentially devastating impact on our ability to secure the cooperation of civilian witnesses and ensure their safety”); section IV, p. 87 (“it is not only ongoing prosecutions that will be affected; it is society’s ability to solve crimes in the first place”); section IV, p. 88 (“Under the Task Force’s scheme, it is hard to imagine that anyone from any neighborhood, testifying in any

picture of jurisdictions with broad discovery descending into turmoil, and they quote some alarming newspaper articles on crime problems in selected areas.²⁰⁴ But even in the areas they focus on, the picture they present is misleading.

For instance, one would never guess from the dissenters' response that in the broad-discovery State of New Jersey, violent crime actually decreased by 9% from 2003 to 2007 (*i.e.*, the year of the articles they cite), then decreased again by 9% from 2008 to 2012; and overall crime decreased by 20% in the same ten-year period.²⁰⁵ Nor would one guess that in the broad-discovery State of Pennsylvania, violent crime decreased by 10% from 2007 to 2012 (the last year for which detailed statistics are available as of this writing).²⁰⁶ In North Carolina, which passed the broadest "open file" criminal discovery statute in the nation in 2004, there was a 17.6% drop in overall crime from 2004 to 2012, and a 19.7% drop in violent crime.²⁰⁷ The response's warnings of a "devastating" impact on crime control if a State provides greater discovery are simply not borne out.²⁰⁸

Interestingly, neither the many newspaper articles cited in the response (including the series the dissenters describe as "required reading"), nor the National Center for Victims of Crimes study upon which they rely, calls for rolling back or repealing any criminal discovery statutes.²⁰⁹ They instead highlight that the problems of witness cooperation have complex roots, including in historically poor police-community relations.²¹⁰

Likewise, an exhaustive 2013 report on witness intimidation in Philadelphia by Pennsylvania's Joint State Government Commission actually urged prosecutors to provide

case, would feel secure in stepping forward as a witness"); section XII, p. 110 ("they will compromise the ability of our courts to ensure justice, and the safety of us all").

²⁰⁴ See Response, section V, pp. 92-94.

²⁰⁵ See <http://www.njsp.org/info/stats.html> (2012 Uniform Crime Report, p. 16; and 2007 Uniform Crime Report, p. 16).

²⁰⁶ See <http://www.paucrs.pa.gov/UCR/Reporting/Annual/AnnualSumArrestUI.asp>; and <http://www.paucrs.pa.gov/UCR/Reporting/Annual/AnnualFrames.asp?year=2012> (under "Violent Crimes" and "Five-Year % Change").

²⁰⁷ See <http://www.ncdoj.gov/crime/view-crime-statistics.aspx> ("2012 Crime Statistics" and "2004 Crime Statistics").

²⁰⁸ Response, section I, p. 76.

²⁰⁹ See Response, section IV, p. 87-90; section V, pp. 93-94 & n.165.

²¹⁰ See http://www.nytimes.com/2007/12/30/nyregion/30witness.html?pagewanted=all&_r=0, cited in Response, section V, p. 94, n.165.

discovery *even earlier* than they currently do. Not a single member of the Commission (in either the majority or the dissenting statements) found fault with the State’s discovery statutes or advocated changing the discovery rules in any way. Quite simply, the claims that early and broad discovery is to blame for problems with intimidation of witnesses in Philadelphia have been authoritatively rejected.²¹¹

Similarly, the “Exhibit” that the dissenters have assembled quotes from several webpages that supposedly document a “growing” anti-snitching culture.²¹² But these webpages actually support the Task Force’s conclusion that problems of witness intimidation are mostly related to gangs (albeit some of the lyrics quoted in the Exhibit actually were written by comedy writer Mikis Michaelides, not by real gang members).²¹³ The Exhibit examples, moreover, focus on criminal defendants who have entered cooperation agreements, and include writings by fringe political groups such as environmental activists engaging in industrial sabotage. These situations are troublesome, but concentrated in particular types of cases where the need for protective orders is obvious and their issuance would be routine. The Task Force’s recommendations make protective orders to limit or withhold discovery in gang, confidential informant, and other appropriate cases readily obtainable.²¹⁴

The Task Force has agreed, throughout our Report, that concerns about witness safety are vitally important. We discuss the topic at greater length than any other. We call for the enactment of alternative procedures well beyond those used in other States that would give courts, prosecutors, and defense lawyers various choices and tools to help “to protect the witnesses upon whom the system depends and to whom it must afford security.”²¹⁵ As for the

²¹¹ See Joint State Government Commission, “Report of the Advisory Committee on the Criminal Justice System in Philadelphia” (January 2013), p. 13 (the report’s sole recommendation involving discovery states: “To the extent possible, the District Attorney should provide electronic discovery to defense counsel as early as possible to aid in an appropriate resolution of each case. Providing a copy of the police (PARS) report in advance of arraignment will also aid in the efficient and appropriate resolution of cases”). Report available at: <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2013-290-SR%20344%20Report%20-%20Final.pdf>.

²¹² Response, section IV, p. 86.

²¹³ Response, Exhibit p. 119 (#11).

²¹⁴ See Task Force Report, II-A-2, pp. 15-20.

²¹⁵ See Task Force Report, Introduction, p. 1; II-A, pp. 9-20.

response’s denunciation that “[t]he Task Force has given no consideration to the effect its proposal will have on witness cooperation”²¹⁶ – that claim is simply wrong, since these issues plainly occupied the bulk of the Task Force’s deliberations.

(3.) *The Dissenters Fundamentally Oppose Meaningful Discovery Reform*: Perhaps the most striking feature of the response is its categorical insistence that discovery of written or recorded witness statements (“*Rosario* material”) should only occur after “the possibility of a plea bargain [has been] fully explored” and in any event “no more than 10 days before trial” (with the exact time to be determined by the judge).²¹⁷

The dissenters explain that only such a minor change in New York’s current discovery rules for witness statements is needed, because it is an “obvious fact that a defendant himself knows whether he committed the crime of which he is accused” and so he “does not need police paperwork, witness statements or contact information at the earliest stage of the proceedings to decide whether he is factually guilty.”²¹⁸ In their view, the only rationale for providing early discovery would be to help the defendant gauge “the strength of the prosecution’s case, and therefore how likely it is that he can ‘beat’ the charges despite his factual guilt.”²¹⁹

This stance is embarrassingly simplistic. For one thing, the dissenters seem oblivious to the plight of innocent or overcharged defendants – who must conduct early investigations if they hope to secure exculpatory evidence and witnesses, and who must make rational decisions about plea offers given what are often enormous sentencing ranges. The dissenters seem equally oblivious to the Supreme Court’s recent reminder that the system has been transformed in recent decades from “a system of trials” into a “system of pleas,” and the Court’s insistence that defense lawyers have “the critical obligation . . . to advise the client of

²¹⁶ Response, section IV, p. 86.

²¹⁷ Response, section XI-e, p. 108; section VIII, p. 102. The only qualifications the dissenters acknowledge with respect to their “10 days before trial” when “a plea bargain has been fully explored” counterproposal are: (1.) “cases of unusual complexity and involving voluminous *Rosario* material,” and (2.) their uncertain remark that it “may be possible without substantial countervailing costs” to provide earlier disclosure in “street-level narcotics ‘buy and bust’ and ‘observation sale’ cases [that] involve only police witnesses.” See Response, section XI-e, pp. 108-109.

²¹⁸ Response, section VIII, p. 101-102.

²¹⁹ Response, section VIII, pp. 101-102.

‘the advantages and disadvantages of a plea agreement.’”²²⁰ As we have explained in our report, without discovery defense lawyers are frequently unable to give any informed advice about the advantages and disadvantages of a plea, beyond warnings about sentencing ranges.²²¹

The dissenters’ reasoning becomes most confused when they try to distinguish between “trial confrontation rights” and “other discovery considerations that do not touch on constitutionally protected interests.”²²² Numerous decisions have held that the constitutional right to the assistance of counsel includes not only the lawyer’s duty to give meaningful plea advice, but also the duty “to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits.”²²³ Without access to any written and recorded witness statements, how can defense lawyers possibly satisfy these constitutional duties and how can innocent or overcharged defendants receive justice?²²⁴

The dissenters’ naïve assumption that defendants “know” when they are guilty, and that early discovery of witness statements would merely let defendants “beat” convictions, also overlooks the vast category of cases where assessing “guilt” is unclear and where

²²⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010) (stressing “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement’”); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays. . . .”); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (“plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system”) (emphasis in original).

²²¹ See Task Force Report, II-A-1, pp. 9-11.

²²² Response, section VIII, pp. 101-102; section I, p. 77.

²²³ *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); accord, e.g., *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”); *People v. Oliveras*, 21 N.Y.3d 339, 348 (2013) (“Trial counsel did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action for his or her client”); *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) (“the defendant’s right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed”).

²²⁴ What the dissenters do not seem to appreciate is that, while the “*Rosario* rule” itself is not a constitutional right, it makes the constitutional right of confrontation meaningful. See *People v. Rosario*, 9 N.Y.2d 286, 289 (1961) (creating this rule based on “a right sense of justice”). In the same way, while improving pre-plea discovery is not itself a constitutional command, it would result in improved fairness and reliability and make the constitutional right to assistance of counsel meaningful both in terms of (1.) the duty to investigate the case, and (2.) “the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea.’” See *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Since all these discovery rules further constitutional interests, the distinction the dissenters insist on is without legal basis.

providing informed legal advice requires evaluating what witnesses have said. Why should a defendant who is charged with participating in a confusing fight and honestly believes that he acted in “self-defense” (a nuanced and complicated legal issue) have to make a final decision about pleading guilty with no awareness of what other witness would say about the incident? Why should a defendant who may have an “agency” defense to a drug sale charge have to decide whether this complicated defense is viable without knowing any of the evidence? What should a defendant who was so intoxicated that he honestly cannot remember much of what happened do about a plea offer, when he may or may not be guilty but does not know? What advice can a defense lawyer give a client whose serious mental impairments make it difficult for the lawyer to assess the validity of information her own client has provided, without knowing what other witnesses have said? And most importantly of all, what about the defendant who is completely innocent of any crime, who faces stiff penalties after trial but is being offered a non-jail sentence that would keep him at liberty – yet nonetheless mark him as a “convict” for the rest of his life?

These situations arise daily in our criminal justice system. The dissenters’ inability to appreciate these routine complexities causes them to perceive no legitimate need for requiring early discovery as part of evaluating plea offers and investigating criminal charges. We do.

(4.) *Other Arguments in the Response*: The response repeatedly characterizes the current discovery statute, Article 240, as the result of a careful legislative “balance” undertaken in 1979 and supposedly designed to endure.²²⁵ The dissenters ignore the key fact that this legislation was described, by its drafters and by the Governor who signed it into law, as simply a starting point for future reforms which hopefully would broaden discovery even further one day – not as the last word on discovery in New York.²²⁶

²²⁵ Response, section I, pp. 78-79.

²²⁶ Specifically, then-Governor Carey proclaimed upon signing the bill into law (echoing a nearly identical statement in the bill’s Sponsor’s Memorandum): “It is hoped that prosecutors and defense counsel, encouraged by the enactment of these bills, will experiment with even broader discovery on a voluntary basis and that further discovery legislation may be developed in the near future.” See Governor’s Mem. approving L.1979, ch. 412, 1979 McKinney’s Session Laws of N.Y., at 1801; accord Sponsor’s Memorandum, p. 4 (Bill Jacket, L.1979, ch. 412).

Other arguments in the response are self-contradictory or illogical. For instance, the dissenters protest against our proposal for a “catch-all” provision that would give judges discretion to order discovery of a potentially significant item not otherwise covered by the statute, claiming that this would “circumvent and undercut the legislative process.”²²⁷ How a legislature’s own enactment of a statute that gives discretion to judges would “undercut” the legislative process is puzzling. Legislatures frequently leave specific questions to judges, who are in a position to appreciate particular facts in a case. Indeed, the dissenters elsewhere suggest that the legislature should vest judges with discretion in the timing for turning over *Rosario* material (albeit for the dissenters, such discretion ought to be available only after “the possibility of a plea bargain [has been] fully explored”).²²⁸

Likewise, the response proclaims that letting judges make discretionary decisions about granting discovery “would also introduce an unevenness from judge to judge that our system should not countenance.”²²⁹ This reflects feigned ignorance of how the criminal justice system actually operates in this State – since “unevenness” is one of its hallmarks, especially with regard to discovery. Article 240 originally was enacted with the hope “that prosecutors and defense counsel, encouraged by the enactment of these bills, will experiment with even broader discovery on a voluntary basis.”²³⁰ In the intervening years, many District Attorneys and individual prosecutors have taken up that call to provide voluntary discovery, but others have not. Thus, the typical defendant in Brooklyn receives virtually all of the police paperwork within a fairly short time of arraignment, whereas a defendant across the East River in Manhattan, who may be housed in the same jail with the Brooklyn defendant, does not receive any of it until the trial has begun. The dissenters care little about this manifestly unfair “unevenness” from county to county across the State (and even from prosecutor to prosecutor within a single county) – evidently because *prosecutors* are allowed to make these particular decisions.

²²⁷ Response, section X, p. 106.

²²⁸ Response, section XI, pp. 108-109 (advocating that pre-trial conferences should be held after motion practice has concluded and the possibility of plea bargaining has been fully explored, at which “the court can set a date for the production of *Rosario* material, taking into account any concerns raised by either party”).

²²⁹ Response, section X, p. 106.

²³⁰ See Governor’s Mem. approving L.1979, ch. 412, 1979 McKinney’s Session Laws of N.Y., at 1801.

The response claims that the administrative costs of expanding discovery would be virtually insurmountable and would practically bankrupt prosecutors' offices (and, indeed, "where prosecutors carry caseloads in the hundreds, compliance with the mandates proposed by the Task Force may not be possible at all").²³¹ But yet again, the dissenters ignore that many District Attorneys Offices in this State are already doing it successfully today under "Discovery By Stipulation" agreements. Similarly, many other States currently have statutes that provide for broad discovery very early in the case.²³²

The dissenters pretend not to comprehend the function of protective orders and related procedures to ensure safety of witnesses proposed by the Task Force. Our recommendation sets forth extremely broad grounds for issuance of such orders, which would effectively suspend discovery where likely dangers to witnesses exist. Yet the dissenters not only dismiss these as "inadequate," but then write most of their response as though the provisions would never be employed.²³³ For instance, one of the most dramatic passages in the response describes a need to relocate victims "in violent crime and gang cases" because, under a statute such as the Task Force proposes, these witnesses' identities would have to be disclosed early in the case. "The expense to the state could be considerable," the dissenters write, "though far less than the costs inflicted upon witnesses uprooted from their homes."²³⁴ But it is hard to imagine that the prosecution would invest resources in relocating a witness due to discovery obligations, without first seeking a protective order – and under the flexible and lenient standards proposed by the Task Force, the granting of such an order would be virtually assured. Moreover, if somehow the

²³¹ Response, section VII, pp. 100-101.

²³² See, e.g., Fla. R. C.P. 3.220(b)(1) (within 15 days of demand); Hawaii R. Penal P. 16(e)(1) (within 10 days of arraignment); Mo.R.Crim.P. 25.02 (within 10 days of demand); N.J. CT. R. 3:13-3(b)(1) (within 7 days of unsealing of indictment); N.M.Dist.Ct.R.Crim.P. 5-501(A) (within 10 days of arraignment); see also Ariz. R.Crim.P. 15.1(c) (30 days after arraignment); Colo. R.Crim.P. 16 Part I (b)(1) (21 days after first appearance); Md. R. 4-263(h) (within 30 days after first appearance); Mich. CR 6.201(F) (within 21 days of demand); N.H. R. C.P. 12(b)(1)(B)(i) (within 30 days of not guilty plea); R.I. R.Super.Ct. R.C.R.P. Rule 16(f) (within 30 days of arraignment).

²³³ Response, section III, pp. 81-84; section IV, pp. 87-89; section VII, pp. 99-100

²³⁴ Response, section VII, p. 100.

application were denied, the prosecution could, under another of our proposals, obtain expedited review of that decision by an appellate judge.²³⁵

The dissenters' objections are based on the proposition that prosecutors and judges, in considering when to apply for or to grant a protective order, are wholly unable to make any viable predictions or to gauge the risks to witnesses in any kind of case.²³⁶ But prosecutors and judges around the country are able to make these often easy, and occasionally difficult, decisions and still provide fair and timely discovery to defendants. Practitioners in other States also describe that, very commonly, defense lawyers do not contest the prosecutor's redactions since they realize that seeking a contrary ruling from the judge would be futile. The protective order process is far more efficient and predictable than the dissenters assert.²³⁷

The response paints a picture of prosecutors hopelessly confused and uncertain about the discovery obligations we recommend. In particular, they complain that certain "terminology" recommended by the Task Force would be too problematic for prosecutors and courts to interpret (such as the terms "police reports," "relevant" witnesses, or "reasonable diligence").²³⁸ Yet the standards we have recommended are based on existing statutory provisions *currently being used* in States such as Florida, Minnesota and New Jersey, and are also recommended by the American Bar Association. We believe New York's prosecutors and judges would be no less competent in interpreting them than prosecutors and judges in these other States.²³⁹

Furthermore, our proposals do not impose draconian penalties on prosecutors for errors in compliance, or any penalties at all in most instances. The Task Force has emphasized that, with respect to the consequences of discovery violations, remedies provided by courts should be based on forgiving standards designed to rectify actual harm. A prosecutor who has acted in good faith and with reasonable diligence will, therefore, face no

²³⁵ See Task Force Report, II-A-2-i, pp. 15-19.

²³⁶ See, e.g., Response, section III-a, pp. 81-84.

²³⁷ Response, section VII, p. 99.

²³⁸ Response, section VII, pp. 98-99.

²³⁹ See Task Force Report, II-A-1, p. 15.

consequences for a mere mishap during the discovery process.²⁴⁰ The crisis the response predicts has not happened elsewhere, and will not happen here.

The underlying thread is simply opposition to any meaningful discovery reform. The response fails even to acknowledge that much of its distress comes from lessening of the huge tactical advantage for prosecutors gained through the current restrictive discovery system. It does not seem to recognize the plight of defendants, or the significant problem of wrongful convictions which this Bar Association's Task Force on Wrongful Convictions described in a prior report.²⁴¹ Perhaps most revealing is the adamant refusal even to consider *Brady* reform, aside from increased training.²⁴² Despite claims that certain of the mildest reforms the Task Force proposes would be acceptable,²⁴³ the dissenters oppose any true discovery reform that will enable defense lawyers to investigate cases, give informed advice on pleas, and properly prepare for trials.

The response is based on a flawed premise that New York State is somehow exceptional, and that reforms that have worked for decades in the rest of the country would not succeed here. But these reforms are badly needed and long overdue in New York. They would not only help to avoid wrongful convictions, but would enhance the fairness and reliability of our criminal justice system. We strongly urge adoption of the recommendations in our report.

²⁴⁰ See Task Force Report, II-E, pp. 36-37.

²⁴¹ See New York State Bar Association, "Final Report of the New York State Bar Association's Task Force on Wrongful Convictions" (2009), pp. 19-44; see also http://www.innocenceproject.org/Content/Lessons_Not_Learned_New_York_Leads_in_the_Number_of_Wrongful_Convictions_but_Lags_in_Reforms_That_Can_Prevent_Them.php ("Only two other states in the nation, Texas and Illinois, have seen more convictions overturned by DNA evidence [than New York]").

²⁴² Response, section IX, pp. 102-103.

²⁴³ Response, section XI, pp. 107-109.

APPENDIX A OF REPORT AND PROPOSALS

A Small Sample of Cases that Illustrate Why Discovery of Witnesses is Vital to Improving the Reliability, Fairness, and Efficiency of New York State's Criminal Justice System:

Examples:

- (1.) In a murder trial, the eyewitness testified that he saw the murder in the company of his girlfriend. The 18-b defense lawyer was not given the witness's name before trial, thus precluding any investigation, including of the girlfriend. Defendant was convicted. In post-conviction proceedings, Legal Aid tracked down the witness's girlfriend, who emphatically contradicted the witness's story about seeing a murder.

The court ultimately vacated the conviction, after the defendant had spent eight years in prison. The State had to pay \$2.4 million for the wrongful conviction.

- (2.) In an assault case charged as a violent felony, the prosecutor refused to give contact information for a person whose name was redacted in a Sprint report. However, because a phone number was inadvertently not redacted, the defense was able to speak to the witness. He gave an exculpatory and mitigating account of defendant's role in the assault incident.

When defense counsel confronted the prosecutor with this evidence, the case was disposed of as a disorderly conduct violation, rather than a violent felony.

- (3.) The four-day trial in a felony identity theft case began on Wednesday afternoon. The defense received the name and address of a witness for the first time on that day. Because the trial had not finished before the weekend, there was time for the defense to track down the witness on Saturday and Sunday. The witness testified for the defense on Monday, and clearly exculpated defendant. The jury acquitted the next day.

Had this trial started on a Monday and thus concluded by Friday, there would have been no opportunity to find and interview the exculpatory witness. Being able to

present the testimony of exculpatory witnesses to the jury should happen as a matter of right in New York State, not of luck.

- (4.) In a first-degree assault and attempted robbery case, the identity of the 911 caller was not disclosed until the eve of trial. No judge would order disclosure before trial. Counsel contacted the caller and interviewed her over the telephone. Her testimony was exculpatory. The defendant was acquitted.

The defendant was incarcerated for more than 20 months before disclosure of the name of the exculpatory witness.

- (5.) Two years after speaking to a witness of an alleged assault, the ADA gave the defense his contact information. The defense called the witness at trial. He was an accountant and a neutral witness, whose objective account of what he had observed contradicted the complainant and her two family members about the altercation near a coffee cart. The judge acquitted the defendant.

The defendant had had to come to court 17 times over the two-year life of the case. Because of an order of protection during the case, he had to give up his livelihood, the coffee cart, when the complainant installed her cart at the same location.

- (6.) In a robbery case, the prosecutor refused to disclose the complaining witness's name until trial started. This prevented the defense from getting court files from his 1998 conviction for gun possession. The witness gave a sanitized version of this incident at trial, claiming that he had merely failed to register an otherwise legal hunting rifle, and that there was no ammunition in his apartment.

Two months after trial, the court records of the witness's prior case finally arrived. They revealed that he had actually possessed multiple weapons, including a handgun, ammunition, a bulletproof vest, and a police badge and other police identification that did not belong to him. The jury thus had been given a false version of important information directly bearing on the key witness's credibility, which the defense could not contradict.

- (7.) Defendant was accused of attempted rape. The complainant alleged that she did not know him, but was attacked by a stranger. The defendant firmly claimed from the outset that he was being set up by drug dealers. Defense counsel happened to learn the complainant's name from a court document – an unusual occurrence. With the name, counsel was able to subpoena phone records that showed that a third party had been calling both the complainant and defendant hundreds of times around the time of the reported rape, and revealed other connections between them.

This process of subpoenaing phone records took months. After the prosecutor received this information, she dismissed the case – but it was two years after the alleged incident. This case is reminiscent of a recent appellate decision, in which the Fourth Department ordered a retrial because of “newly discovered” evidence in the form of phone records that contradicted the complainant's accusations.²⁴⁴ The evidence was “newly discovered” only because the prosecution had frustrated defense efforts to gain the records, by delaying disclosure of the complainant's records and other information until trial.

Examples of How Prosecutors' Withholding of Witnesses' Names Until the “Eve of Trial” Regularly Leads to Conflict-of-Interest Problems and Enormous Inefficiencies:

- (1.) In a kidnapping case, a jury was selected and only then did the prosecutor turn over the witnesses' prior statements and their identity. The information revealed that a witness was cooperating with the prosecution in order to benefit himself on another matter, and that the witness was represented on that cooperation agreement by the same organization as defense counsel. New counsel was assigned to inform the defendant of the conflict, and after being advised he was unwilling to waive it. A mistrial was declared after defense counsel had been working on the case for a year and had completely prepared the trial. The defendant was incarcerated for the entire time.
- (2.) During a first-degree assault trial, a prosecution witness stopped as he entered the courtroom and greeted the defense attorney. The attorney realized that he had

²⁴⁴ See *People v. Madison*, 106 A.D.3d 1490, 1493-94 (4th Dept. 2013).

represented the witness on a drug sale the year before. When informed of the conflict, the court had to declare a mistrial and relieve defense counsel.

- (3.) On the eve of a statutory rape trial, defense counsel was removed from the case due to a conflict because it was only then that he learned the name and school of the complaining witness. The complainant was a minor who was being taught by the trial attorney's wife. The defendant already had been in jail for 5 months by that point.

APPENDIX B OF REPORT AND PROPOSALS

Sample Discovery/*Brady* Checklist

This checklist includes types of evidence that may exist in a criminal case. Such evidence may constitute “discovery” or “*Brady*” material. The prosecutor must turn over “discovery” and “*Brady*” materials to the defendant in compliance with all state and federal law.

Defendant name: _____ Date: _____

Docket No. _____

Indictment No. _____

ADA: _____
(Name) (Phone Number)

(Address)

I. POLICE REPORTS

- _____ Arrest Report
- _____ Prisoner Movement Slip
- _____ Property Voucher #'s of Recovered Property/Evidence ____, ____, ____,
- _____ Property Voucher Sheet
- _____ Memo Book Entries
- _____ Police Complaint Report
- _____ Omniform System Arrest Report
- _____ Fingerprint Response Summary
- _____ Detective follow-ups (DD-5 in NYC) #1 ____, #2 ____, #3 ____,
- _____ Detective/Police Officer Typed Report of (defendant/witness statement)
- _____ Detective/Police Officer Written notes of (defendant/witness statement)
- _____ Defendant Injury/Medical Records (**if in the possession of law enforcement**)
- _____ Crime Scene Reports
- _____ Vehicle Accident Report
- _____ Tape Recordings and Transcripts
- _____ Defendant's Statement (written, video-taped, recorded, transcript)
- _____ Photo Array Report
- _____ Line-up Report
- _____ Show-up Report
- _____ Other _____

a. PHOTOGRAPHS

- ___ Photo(s) taken on ___(date), by (name of photographer) of _____
- ___ Photo arrays
- ___ Line-up photos
- ___ Crime Scene photos
- ___ Other _____
- ___ Photos of: _____
- ___ Photos of: _____
- ___ Photos of: _____

b. DIAGRAMS

- ___ Diagram(s) made on (date), by (name of creator) of _____
- ___ Diagram of: _____
- ___ Diagram of: _____
- ___ Diagram of: _____

c. RECORDINGS

- ___ Recording of 911 call made on (date) of _____
- ___ Sprint sheet of 911 call made on (date) of _____
- ___ Tape recordings (defendant, victim, witness)
- ___ Tape or Video recording of defendant while in custody
- ___ Any report of conversation between the arrestee and law enforcement personnel prior to the commencement of video or audio recording.
- ___ Wire tap reports, transcripts, recordings (defendant, victim, witness)

II. DISTRICT ATTORNEY DOCUMENTS

a. Complaint Room

- ___ DA Notes from witnesses interviewed
- ___ DA Write-Up Typed Notes
- ___ DA Written Notes from witnesses interviewed
- ___ Copy of DA Folder Write-up

b. Grand Jury

- ___ Grand Jury minutes of each victim/witness (including expert witnesses)
- ___ Grand jury minutes of defendant

c. Prior Testimony/Prior Discovery Material

___ Prior relevant testimony of Victim/Witness from prior proceedings (grand jury, Family Court, Civil Court, Federal Court, Administrative Proceedings, etc, **if in the possession of the prosecution and/or law enforcement**)

___ Prior relevant discovery material from prior proceedings (grand jury, Family Court, Civil Court, Federal Court, Administrative Proceedings, etc., **if in the possession of the prosecution and /or law enforcement**)

III. FORENSIC/LABORATORY REPORTS

- ___ Ballistics
- ___ Narcotics
- ___ Rape Kit (Serology, DNA, etc.)
- ___ Toxicology
- ___ Breathalyzer
- ___ Blood
- ___ DNA
- ___ Voice Exemplars and Reports
- ___ Hand Writing Exemplars Reports
- ___ Bench notes of lab technician/analyst prior to final version
- ___ Other: _____

a. MEDICAL REPORTS (If in the possession of the prosecution and/or law enforcement)

- ___ Victim/Witness hospital records
- ___ Defendant hospital records
- ___ Emergency Medical Technician records of Victim/Witness
- ___ Emergency Medical Technician records of Defendant
- ___ Psychiatric records of Victim/Witness
- ___ Psychiatric records of Defendant
- ___ Dental records of Victim/Witness
- ___ Dental records of Defendant
- ___ Other: _____

b. MEDICAL EXAMINER REPORTS

- ___ Medical Examiner report (autopsy)/diagrams
- ___ Medical Examiner Written drafts

___ Medical Examiner Photographs/Videos/Audio Recordings of comments as autopsy is conducted

___ Other: _____

IV. VICTIM/WITNESS INFORMATION

___ Written/verbal statements

___ Financial documents, certified documents, audit reports, accounting documents, etc.

___ Photos of _____

___ E-mails, text messages, correspondence to/from _____

___ Vision, Memory, Physical or Mental Impairment Evidence (**if in the possession of the prosecution and/or law enforcement**)

___ Records obtained from agencies **not under** the direction or control of the prosecution and/or law enforcement

___ Other: _____

V. PHYSICAL EVIDENCE REVIEW (Make available for review/testing by the defense)

___ Knife

___ Firearm (ballistics evidence)

___ Weapon of any type

___ Clothing

___ Stolen Property

___ Vehicle (automobile, boat, motorcycle, etc.)

___ Narcotics

___ Specimens/samples (serology, blood, DNA, etc.)

___ Documents (financial, correspondence, receipts of purchase, travel documents, hard copies, soft copies, electronic or digital, etc.)

___ Other: _____

VI. EXPERT WITNESS

___ Bio or Resume of Expert

___ Expert Witness Report or Opinion

VII. POSSIBLE *BRADY* MATERIAL

(If in the possession of law enforcement and/or the prosecutor's office)

- _____ Evidence supporting defendant's defense (self-defense, agency, entrapment, mis-identification, non-identification, alibi, defendant's false inculpatory statement, etc.)
- _____ Victim/Witness Services: (*i.e.*, financial benefits, relocation assistance, etc.)
- _____ Cooperation Agreement(s) between witness and law enforcement or prosecutor
- _____ Offer of leniency in exchange for testimony or cooperation
- _____ Inconsistent statements by victim/witness (verbal, written, recorded)
- _____ Prior inconsistent testimony of victim/witness (grand jury, hearings, trials, Family Court, Federal Court, Civil Court, Administrative Proceedings, etc.)
- _____ Recantation of victim/witness (partial or full: verbal, written, and recorded)
- _____ Misidentification or non-identification of defendant by victim/witness (show-up, photo array, line-up)
- _____ Impeachment information of victim/witness (criminal record, bad acts, previous dishonesty, intoxication, drug use, mental deficiency, impaired vision, impaired memory, bribery or threat to testify falsely, any motivation to testify falsely)
- _____ Destruction, corruption or falsification of evidence (by victim, witness, law enforcement, prosecutor)
- _____ Mix-up of evidence or reports (evidence from unrelated case, *i.e.*, narcotics, serology, toxicology, medical, forensic, ballistics, weapons, DNA, photos, etc.)
- _____ Other: _____

Defense Attorney: _____
 (Print Name Above) (Address + Phone Number)

 (Signature) (Date)

I affirm that I have received copies of the above-mentioned documents and have duly acknowledged such receipt.

DEFENSE COPY

***Please return signed copy to the address listed above.