FAIR AND JUST PROSECUTION
Promoting justice through leadership and innovation

ISSUES AT A GLANCE

Promoting Transparency and Fairness Through Open and Early Discovery Practices

Fair and Just Prosecution (FJP) *brings together recently elected district attorneys[1] as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" briefs provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

SUMMARY

This FJP "Issues at a Glance" brief discusses discovery practices that prosecutors can implement to promote fair and just outcomes, expedite resolution of cases, enhance accountability, and ensure compliance with constitutional mandates.

While most district attorney's offices have some form of a discovery policy, there have been significant innovations and new thinking in this area in recent years. This briefing paper highlights key principles and new approaches that can be adapted in some form in every office to improve accountability and transparency and enhance fairness.

BACKGROUND AND DISCUSSION

Perhaps no single area of prosecutorial practice has received more scrutiny and commentary than discovery. The courts are constantly refining prosecutors' disclosure obligations under seminal cases like *Brady* and *Giglio*[2] and subsequent case law. Reforms to discovery practices have long

[1] The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, prosecuting attorneys, etc.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972).

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been the subject of discussion among prosecutors, criminal defense lawyers, judges, academics, and advocates. In the last decade, the movement toward reform has become even more urgent given the number of wrongful convictions attributable in part to discovery errors.[3]

Some state legislatures, as well as both state and federal courts, have moved to rectify these issues through legislation or rules aimed at improving discovery practices. These reforms have sought to address two distinct and equally important challenges posed by traditional discovery practices — the scope and the timing — by (1) expanding the breadth of disclosure and (2) ensuring disclosure occurs as early as possible.

Six states now have some version of "open file" discovery.[4] For example, North Carolina enacted open file discovery that includes a provision criminalizing the failure of law enforcement agencies to turn over evidence to the prosecutor.[5] In response to the high-profile wrongful conviction and subsequent exoneration of Michael Morton,[6] Texas enacted open file discovery legislation that requires prosecutors to give defense attorneys any evidence that is relevant to the defendant's guilt or punishment.[7] Louisiana[8] and Ohio[9] also have implemented systemic discovery reforms. Most recently, California criminalized certain willful discovery violations by prosecutors.[10]

In addition to expanding disclosure obligations, many states[11] and several federal district courts[12] have taken steps to ensure that the disclosure occurs early in prosecution, generally within 14 days or less of arraignment. Two states explicitly require that disclosures must occur before any plea,[13] an issue that is also the subject of litigation in the Fifth Circuit Court of Appeals.[14]

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[3] *See, e.g., Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* at 36 (2010), available at http://digitalcommons.law.scu.edu/ncippubs/2/.

[4] Darryl Brown, *Discovery in State Criminal Justice, Academy for Justice: A Report on Scholarship and Criminal Justice Reform,* Virginia Public Law and Legal Theory Research Paper No. 2017-15 (2017).

[5] North Carolina G.S. § 15A-903 (2004) (accessible at: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-903.html); North Carolina House Bill 408 (2011) (accessible at: https://www.ncleg.net/Sessions/2011/Bills/House/PDF/H408v2.pdf).

[6] Morton spent nearly 25 years in prison for the murder of his wife before he was exonerated by DNA evidence.

[7] Texas Rule of Criminal Procedure 39.14 (accessible at: http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.39.htm).

[8] Louisiana H.B. 371 (2013) (accessible at: http://www.legis.la.gov/Legis/ViewDocument.aspx?d=851402).

[9] Ohio Criminal Rule 16 (Amended 2010) (accessible at: https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=23763&libID=23732).

[10] California A.B. 1328 (2015) (accessible at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1328).

[11] State rules requiring early disclosure: Arizona R. Crim. Pro. 15; Colorado Cr. R. 16; Minnesota Crim. R. 9.01 and 11.01; and New Mexico R. Crim. Pro. 5-501.

[12] Federal courts requiring early disclosure: S.D. Ga. Local R. Crim. P. 16.1; D. Haw. Local R. Crim. P. 16.1(a); Neb. Local R. Crim. P. 16.1(a)(3); M.D. Tenn. Local R. Crim. P. 16.01(a)(2); W.D. Tex. Local R. Crim. P. 16(b)(1)(C).

[13] N.J. Ct. R. 3:13-3(a); Texas Code Crim. Pro. Art. 39.14(j)) (one reading of this rule would allow defendants to waive the right to pre-plea discovery).

[14] See A*lvarez v. City of Brownsville,* No. 16-40772 (5th Cir. 2017).[15] For example, information that might put a person at risk of harm if made public can be disclosed under a protective order with an "attorney's eyes only" designation.

These changes and new thinking have started to prompt a fundamental shift in the perspectives of many district attorneys, and a corresponding realignment in policy. Historically, the approach in many offices was to disclose information only if and when it was required by law. Under an open file approach, the starting point, instead, is to *presume* disclosure and ask whether there is a reason *not* to turn it over. District attorneys following this approach now discuss discovery reform as an essential part of transforming culture in the office, orienting practices and incentives toward achieving a just outcome — not simply a conviction — and acknowledging that systems are fallible and subject to human error.

The Benefits of Broad and Early Discovery

Recent innovations in discovery practices have been propelled by several overarching lessons. Specifically, there is evidence that more expansive discovery produces better overall outcomes, including enhanced integrity of final case dispositions, more efficient decision-making with regard to plea offers, and improved law enforcement accountability, while still preserving prosecutors' ability to withhold information that would put victims or witnesses at risk.[15] Each of these is discussed in turn, below.

Enhanced Case Integrity: Policies that ensure maximum disclosure to defense counsel can help prevent wrongful convictions and protect a successful prosecution from future legal challenges. As wrongful convictions have been dissected by Conviction Review Units, "sentinel event review"[16] processes, and other post-conviction investigations, two frequent sources of error have been identified: (1) prosecutors improperly withholding evidence or information that might have prevented a wrongful conviction based on their erroneous determination that it was "immaterial" or "not exculpatory"; and (2) law enforcement agencies failing to provide information in their possession to prosecutors.[17] In addition, as one district attorney said, "[i]t's very unjust to put defendants in a position where their lawyer can't protect them because they don't know what the

[15] For example, information that might put a person at risk of harm if made public can be disclosed under a protective order with an "attorney's eyes only" designation.

[16] The concept of "sentinel event" review is common to fields like medicine and aviation that, similar to criminal justice, are complex systems with numerous different decision-points that may have compounding effects that lead to bad outcomes. A sentinel event review dissects a bad outcome (or a "near miss") and studies it through a non-punitive lens that seeks to determine where system failures occurred and to address them prospectively. The focus is not assessing "blameworthiness" or disciplining bad actors, but rather determining systemic failures and joint accountability. This starting point avoids driving errors underground.

[17] *See, e.g.*, Kevin C. McMunigal, *Guilty Pleas*, Brady *Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007).

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— MILWAUKEE COUNTY (WI) DISTRICT ATTORNEY JOHN CHISHOLM

state has."[18] The enhanced discovery policies and protocols discussed below address these issues, and reduce the overall risk of a wrongful conviction. Furthermore, broad and early disclosure before plea negotiations can substantially further the goal of arriving at a just and proportionate sentencing outcome.[19]

Increased Efficiency: Broad discovery policies have proven to be more efficient than traditional discovery approaches. Empirical evidence shows that broad discovery, if provided early in the prosecution process, reduces disputes, accelerates case dispositions, and can result in higher rates of guilty pleas.[20] As one district attorney with an open file policy has said, "I want the defense to have everything I have."[21] Broad discovery policies also allow prosecutors to focus on other aspects of their cases, since they no longer need to spend time assessing whether certain evidence is material or exculpatory.[22] In North Carolina, for example, where 91% of prosecutors and 70% of defense attorneys had a favorable view of the state's recently enacted open file law,[23] one district attorney noted that, "[p]rosecutors can have blind spots…[w]e get so convinced that the defendant is guilty. We really can't be the architects of deciding what's helpful to the defense and what's not. Now they [defense attorneys] decide. In the end, that's liberating."[24] When relieved of the task of examining information for materiality, prosecutors are empowered to prioritize their time evaluating disclosure obligations in light of critical questions related to safety, such as whether disclosing information would endanger a confidential informant, victim, or witness.

Improved Police Accountability: Finally, creating better disclosure protocols with law enforcement agencies and building robust internal "*Brady* Lists" can greatly enhance a prosecutor's ability to ensure cases do not fall apart because of an undetected issue with a witness or law enforcement officer, and can also help the prosecutor monitor local policing. Policies that lead to better policing and more consistent documentation from law enforcement agencies can contribute to better case outcomes. Importantly, these innovations also allow district attorneys to play a more effective role in improving local policing practices, a goal that many DAs have prioritized in direct response to profound community concerns. A robust *Brady* List enables DAs to identify patterns of concern with particular officers or departments, and can inform them about whether further policy changes are needed, such as additional training or enhanced oversight. Prosecuting police officers who violate the law is a critical component of ensuring constitutional policing, but identifying and remedying law enforcement misconduct early is equally important and arguably more effective overall.

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[18] Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her,* NY Times Magazine (Aug. 1, 2017) (quoting Wyandotte County (Kansas City, KS) District Attorney Mark Dupree).

[19] Jenia I. Turner, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison,* Washington and Lee Law Review, Vol. 73 (2016).

[20] *Id.*

[21] *See* Bazelon, *supra* note 18 (quoting Milwaukee County (WI) District Attorney John Chisholm).

[22] District attorneys also note that implementing "open file"-type discovery processes relieves some of the responsibility of being immediately reactive to every court decision imposing new minimum discovery obligations — because they are likely already exceeding those minimum obligations. In addition, adopting more open discovery policies puts them ahead of changes to state law or criminal procedure that may be coming down the line.

[23] *See* Turner, *supra* note 19 at p. 354-55.

[24] *See* Bazelon, *supra* note 18 (quoting 5th Prosecutorial District (Wilmington, NC) District Attorney Benjamin David).

Technology, Checklists and Other Tools

In the past, discovery "policies" in many DAs' offices may have consisted primarily of a memorandum reiterating the minimum legal requirements for disclosure, relying on the individual line prosecutor to interpret those requirements in individual cases. Increasingly, however, DAs have recognized that creating a more robust policy framework and standardized protocols is necessary to ensure that critical information is not uncollected or undisclosed. It is also increasingly needed in modern-day criminal prosecutions where voluminous information may be gathered from a variety of sources. Below are common tools that many district attorneys are using to improve discovery practices with these starting points in mind.

***Brady* List database:** A "*Brady* List database" refers to a centralized, intra-office database where all *Brady*-related information regarding law enforcement officers and other government witnesses is kept in a uniform and centralized fashion. While most DAs' offices have kept a "*Brady* List" of some kind for years, the innovation to note here is creating an easy-to-use electronic database that is quickly accessible to all line prosecutors so that they can easily input and track concerns related to the veracity and integrity of law enforcement officers or other government witnesses, and that allows supervisors to monitor broader trends and patterns.

Supporting Protocols and a *Brady* Committee: Since a database is only as good as the information collected, the most effective *Brady* List databases are those that identify a broad range of findings for inclusion and require disclosures from law enforcement agencies, crime labs, and other government entities to be made in a timely manner. In addition, many offices have formed "*Brady* Committees" composed of senior staff who are tasked with creating *Brady*-related policies and resolving more complex questions about inclusion on, or removal from, a *Brady* List. The overarching purpose of both efforts — a clear policy framework and high-level decision-making body — is to gather as much *Brady* information as possible and to ensure centralized and consistent decision-making about the use of that material.

Checklists, Form Letters and MOUs: Many complex industries, such as medicine and aviation, have been able to reduce systemic errors through checklists and form letters. DAs have also had success reducing error when integrating checklists into different aspects of the discovery process.[25] For example, district attorneys have implemented policies ensuring that line prosecutors use a checklist to ensure they have received all discoverable information from law enforcement agencies. Comprehensive checklists can also ensure a file is totally complete before disclosure to the defense, a tool that is especially useful in "open file" offices where the list of documents to potentially be disclosed may be extensive. Many district attorneys have combined these checklists with "form letters" sent at the outset of the discovery process to all other entities that

[25] Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 Cardozo L. Rev. 2215, 2242 (2010) ("[A] well-designed post-indictment checklist and discovery conference can ameliorate *Brady* disclosure problems and improve the quality of practice"); *see also* Jeff Adachi (San Francisco Public Defender), *Using Checklists to Improve Case Outcomes*, The Champion (Jan.-Feb. 2015).

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— WYANDOTTE COUNTY (KANSAS CITY, KS) DISTRICT ATTORNEY MARK DUPREE

may have discoverable information. In addition, some DAs have also negotiated "Memorandums of Understanding" with local law enforcement agencies that memorialize the agency's disclosure obligations and create a mechanism to resolve disclosure or policing issues detected by the DA.[26]

Audits, Training and Internal Accountability: Without periodic quality control, it is possible for poor disclosure practices to persist unnoticed for long stretches of time, until they cause a major failure. For this reason, periodic audits of case files are critical to monitor compliance with discovery policies, and to identify and remedy issues on an ongoing basis before they lead to a serious error. These audits should be complemented with other accountability mechanisms, like training to support new policy changes, and positive reinforcement for staff who comply with new discovery policies and who catch and remedy discovery errors. These retrospective audits should also be supplemented by routine supervisory review that can catch and correct potential errors before they occur. Where a significant "near miss" is caught and corrected, it is valuable to highlight it in a positive light and consider using the "near miss" in future trainings or to inform policy changes.

RECOMMENDATIONS

The recommendations below suggest some concrete steps DAs can take to promote open and early discovery practices within the office. In addition to specific policy recommendations, prosecutors should consider how to weave principles of broad discovery into the daily decision-making of the office and reinforce those principles through audits, training and supervision, transparency, and communication to the public about the importance of these efforts.

1. **Implement open and early discovery practices** that aim to provide the most information possible to the defense at the earliest possible point in the prosecution, while including appropriate safeguards for the disclosure of information that might put safety at risk.
2. **Form a discovery practices review committee** with high-level staff tasked with examining existing discovery practices and determining the changes needed to implement open file and early discovery. This committee can also solicit input from other stakeholders, such as judges, criminal defense attorneys, law enforcement agencies, and crime victims.
3. **Create a *Brady* List database** that is continuously updated in a timely manner and that can be easily accessed by all prosecutors in the office.
4. **Form a *Brady* Committee** (including, ideally, many members of the "discovery practices review committee") to ensure high-level and consistent decisions about an individual's placement on, or removal from, the office's *Brady* List.
5. **Create comprehensive internal *Brady* policies** that clearly explain obligations for prosecutors, supported by checklists and other forms.

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[26] The San Francisco District Attorney's office, for example, has an agreement with the San Francisco Police Department whereby the police department provides to the DA's office the names of employees who have information in their personnel files that may require disclosure under *Brady*. The Prosecuting Attorney's office in King County (Seattle), WA established a written *Brady* policy and *Brady* committee to collect and review certain information regarding officer misconduct including any involving dishonesty or bias. And the DA in Harris County (Houston), Texas is working with law enforcement partners to develop MOUs and protocols regarding disclosure to the DA of potential *Brady* material and tracking of that information in a secure electronic database.

6. **Create comprehensive external *Brady* policies** that clearly spell out disclosure obligations for law enforcement agencies and other government agencies (like crime labs) supported by MOUs, checklists, and form letters.
7. **Ensure ongoing supervision and conduct random audits** to ensure consistent compliance with discovery policies.
8. **Provide adequate ongoing training and reward staff who comply with policies** and who catch and remedy disclosure errors or near misses.
9. **Be transparent about new policies and communicate to the public** that discovery reforms represent a substantial commitment to culture change and proactively address community concerns about constitutional policing.

RESOURCES

■ Center on the Administration of Criminal Law, New York University School of Law, *Establishing Conviction Integrity Programs in Prosecutor's Offices*, including the following sample policies and checklists from the Manhattan District Attorney's office:

- Cooperation Agreement Checklist
- Questions for Police Officers
- *Brady/Giglio* Questionnaire
- Identification Case Checklist

■ *Conviction Integrity and Internal Accountability Mechanisms,* Fair and Just Prosecution (2017), available at: https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf.