

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**

**August 9-10, 2004**

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Provide adequate funding to prosecutors' offices;
2. Establish standards to ensure that workloads of prosecutors are maintained at levels that allow them to provide competent legal representation;
3. Ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence;
4. Establish procedures for evaluating cases that rely upon eyewitness identification, confessions or testimony from witnesses that receive a benefit; and
5. Draft legislation to provide that material evidence be preserved for a reasonable period of time after criminal appeals are exhausted to permit post-conviction review.

# **REPORT**

## **Introduction**

This report is an attempt to set forth best practices by prosecutors in order to reduce the possibility of innocent people being convicted in a criminal trial. Technology and modern science has advanced to the point that it has become painstakingly clear that innocent people have been convicted of crimes that they did not commit. The objective of these recommendations is to acknowledge the integral role prosecutors play to ensure that a fair process is followed, and to set forth practical best practices that should be employed by prosecutors to reduce the risk of wrongly convicting the innocent.

It is apparent that even where there is a scrupulous adherence to ethics by the prosecution, zealous and competent advocacy by the defense and a diligent and effective judge controlling the courtroom, that innocent defendants can wrongly be convicted.

The question of “whether it is better [that] 100 guilty persons should escape than that one innocent person should suffer,” has been imposed on the American legal system since our nation’s founding.<sup>1</sup> It is a valid question that remains with us today 228 years later and is no less vexing to our system of justice. Regardless of our best efforts mistakes have occurred and innocent defendants have suffered as a consequence. The recommendations that follow are an attempt to set forth procedures that will reduce the risk that innocent defendants are convicted.

### **1. Provide adequate funding to prosecutor’s offices.**

Funding for prosecutors’ offices has not kept pace with the increased resources that have been allocated to other law enforcement agencies. It is axiomatic that additional resources given to law enforcement agencies will inevitably result in increased arrests which will lead to an increased workload for prosecutors. This recognition of the importance of adequate prosecutorial resources is echoed by the *ABA Criminal Justice Standards on the Prosecution Function*, including Standard 3-2.2(d) re laboratories, investigators, accountants, special counsel and other experts; Standard 3-2.4 re special assistants, investigative resources, and experts; and Standard 3-2.3(e) re compensating prosecutors comparable to their peers in the private sector.

### **2. Establish standards to ensure that workloads of prosecutors are maintained at levels that allow them to provide competent legal representation.**

The issue of manageable or reasonable workload is a continuing problem for prosecutors nationally. As staffing levels decrease and assistant prosecutor’s responsibilities and caseloads increase, their ability to be fair and just can be compromised. No prosecutor should be forced to surrender justice due to an overwhelming caseload. Funding allocated to prosecutors’ offices must be maintained at levels sufficient to insure that caseloads remain manageable. The Ad Hoc Innocence Committee to Insure the Integrity of the Criminal Process has made several

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1. Benjamin Franklin, letter to Benjamin Vaughan, March 14, 1785 – “The Writings of Benjamin Franklin,” ed. Albert H. Smith, vol. 9, p. 293 (1906).

recommendations that call upon prosecutor's to establish additional safeguards to insure that the innocent are not wrongly convicted. To ask the prosecutor's of our nation to undertake these additional tasks without providing for adequate resources is ill advised.

**3. Ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence.**

What obligation does a prosecutor have to discover exculpatory or mitigating evidence from police departments and laboratories (both private and law enforcement)?

Prosecutors have a duty to disclose information possessed by government personnel who assist the prosecutor, including police officers and other investigators. *Kyles v. Whitley*, 514 US 419 (1995). This obligation extends to testing and evidence produced or examined by police laboratories. While the courts have not extended that obligation to disclose to private entities, it is the prosecutor's duty to disclose evidence favorable to the accused which is a requirement of due process. Therefore, it can be argued that if the entity is a paid agent of the prosecutor, such as a private laboratory hired to perform DNA testing on evidence, the prosecutor may be held liable for the failure by this third party to disclose.

In light of the prosecutor's ongoing obligation to disclose *Brady* evidence to a defendant, and the desire to provide all defendants with fair trials, prosecutors should establish guidelines and procedures for turning *Brady* evidence over to the defense and for receiving that information from its partners and agents including police departments and laboratories.

The government is required under *Brady v. Maryland*, 373 US 83 (1963), and its progeny, to fully disclose to the accused all exculpatory and impeachment evidence in its possession. In *Giglio v. United States*, 405 US 150 (1972) and *United States v. Bagley*, 473 US 667 (1985), the Supreme Court expanded *Brady* to include materials that could impeach a witness' credibility and motivation to testify, such as leniency agreements. In *Bagley*, the Court also set forth the materiality standard that has become central to any *Brady* analysis; namely that the evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different.

In *Bagley* Justice Blackmun defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome of the case." 473 US at 682. In *Kyles v. Whitley*, 514 US 419 (1995), the Court further divided its *Brady* assessment into four parts. First the Court formally adopted Blackmun's standard of materiality. Second, it held that the prosecution's failure to disclose the favorable material undermines the case as a whole and not just one particular aspect of it. Third, once a *Brady* violation is discovered, the court does not have to examine the case to determine if it was a harmless error as the failure to disclose requires a reversal. Fourth, a prosecutor must weigh all suppressed *Brady* material collectively and when the standard of "reasonable probability" is met, the evidence must be disclosed. *Id* at 437.

The question of whether a prosecutor has an obligation to disclose *Brady* evidence in the possession of the police, and by extension police laboratories, has been answered in the affirmative. The People's duty to disclose *Brady* material extends beyond the actual knowledge

of any particular prosecutor. As an example, if one prosecutor has made a promise to a witness, the knowledge of that promise is imputed to the trial prosecutor. *Giglio*, 405 US at 154. See *People v. Wright*, 86 N.Y.2d at 598 (police knowledge that complainant was a police informant imputed to trial prosecutor). Thus the individual prosecutor has a duty to learn of any *Brady* material known to either the police or another prosecutor within the same agency, *Kyles v. Whitley*, 514 U.S. 419 (1995). See, *People v. Simmons*, 36 N.Y.2d at 132, ([n]egligent, as well as deliberate, nondisclosure may deny due process”). Knowledge of other non-police agencies will not be imputed to prosecutors. See, *Pina v. Henderson*, 752 F.2d 47, (2d Cir. 1985) (parole officer’s knowledge of *Brady* material could not be imputed to the prosecutor). Moreover, knowledge of a federal law enforcement agency is not imputed to the prosecutor if we cannot obtain the materials from “law enforcement answerable to another sovereign.” See, *People v. Santorelli*, 95 N.Y.2d 412, 420-22 (2000) (where prosecutor has requested and then has attempted to subpoena sealed document from FBI conducting parallel investigation with state, but was unsuccessful, there was no *Brady* violation).

While *Brady* evidence in the possession of the police or other agency prosecutor has been deemed to be in the “possession” or “control” of the trial prosecutor, the question arises when can possession of *Brady* material by private third parties, such as private laboratories be attributed to the government. There is no case directly on point for private laboratories that have been paid by the government to test physical evidence. However, under the law these laboratories are acting as agents of the government during those tests. Their possession of *Brady* material arising from the performance of those tests clearly must be attributable to the government.

A case closely analogous to the question, but not on all fours as to the facts, is *United States v. Joselyn*, 206 F3d 144 (1<sup>st</sup> Cir. 2000). In that case the court was confronted by an appeal by criminal defendants convicted of conspiracy to defraud their employer, among other charges. The defendants, executives with American Honda Motor Company, were accused of accepting kickbacks from car dealerships in exchange for preferential treatment. Their defense was that Honda knew of their activities and had sanctioned and condoned it. Honda, arguably a potential criminal racketeering defendant, ostensibly fully cooperated with the prosecution. After the convictions it became public that Honda had had knowledge of the defendant’s activities for several years prior to the criminal prosecution. The Circuit Court refused to attribute Honda’s knowledge of potential exculpatory and/or mitigating evidence to the People. It clearly found that the government did not have access to the evidence, and did not suppress it willfully or otherwise. The interests of a private third party, Honda, were not identical or even congruent to that of the prosecution and therefore, knowledge of the material cannot be attributed to the government.

It is in the interests of justice and due process that it is recommended that prosecutors develop and implement guidelines that will create procedures for turning over *Brady* evidence over to the People and for receiving that information from its partners and agents including police departments and laboratories. This recommendation is consistent with *ABA Criminal Justice Prosecution Function Standard 3-2.7* which calls on the prosecutor to provide legal advice and training to the police concerning police duties and functions, *Prosecution Function Standard 3-3.4* which calls on the prosecutor to take reasonable care to ensure that investigators

working at their direction or under their authority are adequately trained in the issue of arrest and search warrants, and *Discovery Standard* 11-4.3(b) which calls on the prosecutor to make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office. This recommendation also furthers the goals stated in the accompanying recommendation regarding forensic science.

**4. Establish procedures for evaluating cases that rely upon eyewitness identification, confessions or testimony from witnesses that receive a benefit.**

Studies have conclusively shown that a growing number of defendant's nation-wide have been convicted of crimes that they did not commit.<sup>2</sup> Through the use of new scientific technology not previously available, such as DNA, convicted defendants have been exonerated of crimes for which they had been convicted. In recognition that the prosecutor's duty is not merely to obtain convictions but to ensure justice, *Prosecution Function Standard* 3-3.4(c) calls on the prosecutor to establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

It has been established that among the many factors that lead to the wrongful conviction of the innocent, eyewitness testimony and confessions were the most problematic. In order to reduce the risk of wrongly convicting the innocent it is urged that police and prosecutors implement detailed guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy.

Law enforcement should receive periodic training on how to implement such procedures and on non-suggestive techniques for interviewing witnesses. Internal mechanisms should be created within police departments and prosecutors' offices periodically to update such procedures to incorporate advances in social scientific research and in the continuing lessons of practical experience. This is consistent with the accompanying recommendation concerning training of law enforcement. Every set of guidelines should address at least the following subjects, and should incorporate at least the following social scientific teachings and best practices:

**Lineups and Photospreads<sup>3</sup>**

1. Whenever practicable, the person who conducts a lineup or photospread and all others present should be unaware of which of the participants is the suspect.

2. Eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make or the lack thereof.

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<sup>2</sup> Walter F. Rowe, "Commentary," in Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996).

<sup>3</sup> These principles are covered more extensively in the Criminal Justice Section's recommendation on Eyewitness Testimony, August 2004 House of Delegates agenda book.

3. Lineups and photospreads should use a sufficient number of foils reasonably to reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.

4. Foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.

5. The police should photograph the lineup and a record made describing how the entire procedure was administered, also noting the appearance of the foils and the suspect and the identities of all persons present.

### **Confessions**

1. Whenever practicable, the police should videotape complete custodial interrogations of defendants.

The reliability of defendants' confessions, even after Miranda rights have been explained, have come under attack based on the results of social science research.<sup>4</sup> The research concludes that some individuals are susceptible to falsely confessing to criminal activity when common police questioning techniques are employed. Clearly, a prosecutor has a duty to examine the evidentiary trustworthiness of any evidence, including that of a defendant's confession. It is recommended that prosecutors consider the defendant's background, IQ, and state of mind at the time of the interrogation in assessing the defendant's confession.

Currently very few jurisdictions require that police interviews be recorded from beginning to end. Additional study and research in those jurisdictions should be encouraged and supported. ABA House of Delegates 2004 Midyear Meeting, Report No. 8A urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations.

In addition, police departments and prosecutors, in conjunction with academic institutions of higher learning should engage in properly designed field experiments in which police precincts in a county or city can determine the feasibility of conducting such interrogations at minimal cost to the police.

### **Witnesses That Receive A Benefit**

1. Prosecutors are urged to carefully weigh the credibility and reliability of witnesses who receive a benefit in exchange for their testimony.

While this type of testimony is often useful it should be critically examined to ensure that it is reliable in order to minimize the possibility of wrongfully convicting the innocent.

### **5. Draft legislation to provide that material evidence be preserved for a reasonable period of time after criminal appeals are exhausted to permit post-conviction review.**

Currently, thirty-five jurisdictions have laws mandating post conviction DNA testing for convicted individuals asserting their innocence. Unfortunately, laws or regulations addressing

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<sup>4</sup> See Welsh White, *False Confession in Criminal Cases*, (ABA) **Criminal Justice** (Winter 2003).

preservation of evidence vary significantly leading to disparate and unjust results. Additionally, many of these statutes fall short of thoroughly addressing preservation requirements.

On September 5, 2000, the ABA adopted the following policy addressing the collection of biological evidence in criminal trials:

- All biological evidence should be preserved;
- All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law;
- All necessary funding to accomplish these principles should be provided;
- Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.<sup>5</sup>

A uniform statute mandating preservation requirements amongst governmental agencies of all material forensic evidence, as well as guidelines for requesting testing, and eventual destruction of the evidence in question, is necessary to promote the search for the truth, public safety and confidence in the fair administration of justice.

The goals of this legislation should be to ensure access to forensic testing in criminal cases so that wrongfully convicted persons have the opportunity to prove their innocence. In addition to promoting the exoneration of the innocent for which there should be no time bar, such testing could lead to the capture of the guilty, which will in turn promote public safety and confidence in our system of jurisprudence. Without the preservation of material evidence none of these goals can be adequately promoted and met.

The governmental agencies charged with the responsibility of preservation would be applicable to all state crime laboratories and law enforcement agencies in actual possession of the evidence. The scope of cases for which preservation would be required would encompass all categories of crimes since there is never an interest in incarcerating the innocent. However, the time limitation placed upon the government for preservation would be clearly defined to provide for destruction in an orderly fashion following clearly defined notice requirements.

The apprehension and successful prosecution of the guilty, and the exoneration of the innocent, overrides all concerns regardless of when the evidence is tested in the incarcerated individual's post-conviction journey through the judicial process. Therefore, states should be required to preserve for testing all evidence that may exculpate the inmate, and support his or her allegation of innocence, until the inmate is discharged from custody. Although the timing may be well beyond the exhaustion of the defendant's appellate remedies, the possibility that an innocent person remains incarcerated prevails over all other considerations. Therefore, all

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<sup>5</sup> See, ABA House of Delegates 2000 Annual Meeting, Report No. 115. The preservation of evidence during the pretrial stage is addressed by *ABA Criminal Justice Discovery Standard* 11-3.2.

material evidence that may exculpate the inmate should be preserved until discharge from custody.

In the event the crime is minor, the state should have the ability to destroy the evidence in a timely fashion and thereby not be unduly burdened. In all other cases, any potentially exculpatory evidence should be preserved for as long as the convicted individual remains deprived of his or her liberty. Removing a time constraint also furthers the goal of ensuring that incarcerated persons have the ability to test evidence solely conditioned upon its potentially exculpatory nature.

Following the inmate's release from confinement, the government would be relieved of their safe keeping responsibility. Moreover, the state should be afforded the opportunity to request destruction during the inmate's confinement. The legislation should provide a notification requirement imposed upon the government that precludes destruction while the inmate is in custody unless the defendant and his or her counsel are notified. If the defense requests preservation, the state will be required to comply with the request until the inmate is discharged, or a court orders the destruction, following a full and fair opportunity for the parties to be heard.

The incarcerated individuals that would have protection under this legislation would include all those persons claiming innocence, so that even those individuals who pled guilty and possibly offered admissions would nevertheless enjoy the privileges and rights conferred by this law. However, the defense would bear the burden of demonstrating that testing the evidence in question would provide non-cumulative, exculpatory evidence relevant to the prisoner's claim of innocence. In drafting legislation concerning retention, attention should be given to retention of property of third parties. On occasion, material evidence will belong to a victim or other individual not involved in the criminal activity. In some instances, photographs and/or partial sampling of evidence may be sufficient. Depending on the type of evidence involved, considerations of fairness as well as practicability of retention may be implicated. Generally, practicability and cost are implicated whenever material evidence is retained, since storage in the aggregate is both costly and cumbersome. However, a number of the recent exonerations have been the result of scientific advances that were not available when the evidence was originally gathered. In some of these cases, as well as in other cases in which no suspect was ever tried, retained evidence now provides the means long after the crime to identify the actual perpetrator. However, the appropriation of funding will be key to ensuring the viability of legislative retention policies.

Additionally, a uniform statute requiring preservation should provide for testing of evidence even if it had already been conducted, or could have been conducted but had not been. Due to the ever-evolving state of technology, re-testing a particular piece of forensic evidence years after it had been tested could very well yield evidence that had not been obtainable in the past.

Finally, the uniform legislation should require a chain of custody so that the integrity of the preserved evidence is beyond reproach. Mandating preservation would obviate the current state of evidence retention that is inconsistent throughout the nation.

Respectfully submitted,

Norman Maleng  
Chair, Criminal Justice Section  
August 2004

## GENERAL INFORMATION FORM

**1. Summary of Recommendation.**

Establishes principles and standards to be followed by prosecutors to reduce the risk of wrongly convicting the innocent. Calls upon government to fund prosecutors' offices adequately in order to perform these procedures while also urging that workload standards for prosecutors be established.

**2. Approved by Submitting Entity.**

This recommendation was approved by the Criminal Justice Section Council at its April 17-18, 2004 meeting.

**3. Similar Recommendations Submitted Previously.**

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

**4. Relevant Existing ABA Policies and Affect on These Policies.**

None.

**5. Urgency Requiring Action at this Meeting.**

High.

**6. Status of Congressional Legislation (If applicable).**

No legislation is currently pending.

**7. Cost to the Association.**

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

**8. Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

**9. Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2004 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

**10. Contact Person (Prior to 2004 Annual Meeting).**

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**11. Contact Persons (Who will present the report to the House).**

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