Testimony of

The Legal Aid Society

at a public hearing on

Wrongful Convictions

Presented to:

New York State Bar Association's Task Force on Wrongful Convictions

Presented by:

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The Legal Aid Society welcomes the opportunity to testify before the New York State Bar Association's Task Force on Wrongful Convictions and to share the views of its experienced staff of criminal defense practitioners.

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles more than 295,000 cases for low income families and individuals. The legal services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers.

By contract with New York City, The Legal Aid Society serves as the primary trial-level defender of persons accused of crimes and other offenses. It also serves as the largest appellate defender for persons in need of post-conviction services. This year the Society projects that its 489 criminal practice staff attorneys will represent clients in some 236,000 trial level, post-conviction, and parole revocation proceedings.

Each day, Legal Aid's criminal practice attorneys grapple with the frightening prospects and consequences of wrongful convictions. At the trial level,

lawyers struggle mightily to avoid wrongful convictions by vindicating the rights of clients who are wrongfully accused and face charges predicated on the most dubious evidence. The Society's appellate attorneys strive to identify wrongful convictions that are already in place by conducting comprehensive factual re-investigations and then navigating the legal labyrinth necessary to obtain relief. The specter of a wrongful conviction is a criminal defense attorney's worst nightmare. Every experienced practitioner at The Legal Aid Society has encountered such cases.

The Task Force has correctly identified the systemic frailties that contribute to wrongful convictions: (1) the practices of government, including police and prosecutors; (2) practices of defense attorneys; (3) false confessions; (4) jailhouse informants; (5) witness identification; and (6) collection and maintenance of evidence.[1] Legal Aid trial and post-conviction attorneys have seen deficiencies in all of these areas operate to the detriment of their clients. Each area warrants careful and comprehensive study. No single factor – let alone the combinations of factors often present in a wrongful conviction case – can be addressed fully in the brief time allotted.

In today's testimony, the Society will focus on the first area identified by the

[1] The Task Force also rightly flags as a critical issue the compensation of those shown to have been wrongfully convicted.

Task Force. Specifically, we examine the prosecutor's obligation under *Brady v. Maryland*.[2] When the prosecution fails to discharge its duties under *Brady*, either by eliciting or failing to correct the false testimony of its own witnesses, by failing to disclose material[3] exculpatory evidence to the defense, or by disclosing such evidence in a dilatory manner, the entire system can derail and terrible miscarriages of justice ensue.

The case of our client, Shih Wei Su, serves as a useful point of departure. Mr. Su's conviction of attempted murder resulted from a prosecutor's knowing elicitation of false testimony from her star witness. By the time this wrong was righted by the United States Court of Appeals for the Second Circuit, Mr. Su had served almost 13 years in prison. His civil suit charging prosecutorial misconduct recently resulted in a multimillion dollar settlement with the City, one of New York's largest payments ever to a wrongfully convicted person.[4] The case demonstrates how badly things can go awry.

The State's charges against Mr. Su arose from a 1991 shooting of a rival

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[2] 373 U.S. 83 (1963).

[3] Neither the United States nor New York Constitutions oblige the prosecution to disclose all exculpatory evidence to the defense, only *material* exculpatory evidence. In New York, when the defense specifically requests such information, exculpatory evidence is material when it creates a reasonable possibility of a defendant's acquittal. *People v. Vilardi*, 76 N.Y.2d 67 (1990). In the absence of a specific defense request, materiality is assessed under the less searching "reasonable probability" standard.

[4] Dwyer, "Prosecutor Misconduct at a Cost of $3.5 Million," New York Times, October 22, 2008.

gang member in a Queens pool hall. Serious questions of guilt or innocence emerged from the start. The manager of the pool hall, the closest thing to a disinterested witness, did not see Mr. Su at all that night.[5] Although about 30 people were present when the shooting occurred, the prosecutor relied solely on members of the rival gang to make her case. Even one of these witnesses failed to identify Mr. Su.

The chief prosecution witness was Jeffrey Tom, a gang member with legal problems of his own. At the time of the trial, the Queens District Attorney's office, the same office prosecuting Mr. Su, was prosecuting Tom on unrelated felony charges. When he testified, Tom emphatically stated that no one in the DA's office had promised him anything in connection with his pending case. During her summation, the prosecutor, who elicited this testimony, touted Tom as a truthful witness. The jury convicted Mr. Su and the court sentenced him to a maximum of 50 years in prison. The Appellate Division unanimously affirmed the conviction in a brief opinion.[6]

The Legal Aid Society entered the case years later on Mr. Su's appeal from the denial of a *pro se* motion contending that Tom had testified falsely about the

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[5] The factual account of the incident derives from the Second Circuit's decision. *Su v. Filion*, 335 F.3d 119 (2d Cir. 2003).

[6] *People v. Su*, 213 A.D.2d 502 (2d Dept. 1995).

absence of a deal with the prosecution. Armed initially only with a seasoned attorney's suspicion that something was amiss, Mr. Su's Legal Aid lawyer commenced an investigation. Her suspicions sharpened when she learned that Tom's sentence had been adjourned several times over a four month period and that it was imposed finally on the very day that he testified against Mr. Su. In addition, the resulting minutes had been sealed by court order. The Legal Aid Society obtained an order unsealing these minutes, which revealed that Tom had indeed entered into a cooperation agreement with the Queens District Attorney's Office. That agreement provided that he would receive youthful offender treatment and a probationary sentence in exchange for his cooperation in the case against Mr. Su – cooperation which expressly included testimony at trial. On the date of sentence, the prosecutor informed the court that Tom had upheld his end of the deal and the court imposed the promised sentence. Tom's sworn trial testimony that he had received no deal was thus false and the prosecutor's elicitation of it constituted a *Brady* violation.

Even then, it took years to free Mr. Su. The prosecution vigorously opposed our efforts. The state courts, citing numerous procedural bars, declined to reach the merits of the issue.[7] The federal district court, reviewing the habeas corpus petition

[7] *People v. Su*, 267 A.D.2d 260 (2d Dept. 1999).

that Legal Aid filed in Mr. Su's behalf, agreed that a *Brady* violation had occurred, but concluded that Mr. Su had failed to satisfy the rigorous prejudice hurdles erected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which sharply limited the availability of habeas corpus relief to State inmates. When the case finally reached the Second Circuit, that court reaffirmed that "a conviction obtained through testimony that the prosecutor knows to be false is repugnant to the Constitution."[8] Finding that Mr. Su had indeed shown the requisite prejudice, the court ordered the State to release him unless it retried him within 60 days.

Forgoing a re-trial that would have been spearheaded by a demonstrably perjurious witness, the State released Mr. Su on the 60th day, dismissing all charges against him. Mr. Su subsequently commenced a federal civil rights action alleging a "pattern and practice" of misconduct by the District Attorney's office. Rather than risk a trial, the City settled the case for $3.5 million dollars.[9]

The lessons of Mr. Su's case and others like it are many. A system that

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[8] *Su v. Filion*, 335 F.3d at 126 (citations omitted).

[9] Dwyer, "Prosecutor Misconduct, at a Cost of $3.5 Million, *New York Times*, October 22, 2008. Under the recent United States Supreme Court decision in *Van de Kamp v. Goldstein*, __ U.S. __, 2009 WL 160430 (January 26, 2009) it may well be that a federal civil rights suit of this nature would now be barred by prosecutorial immunity. Accordingly, meaningful compensation under New York's Court of Claims Act must be made available to any claimant who can show that he or she was exonerated on all charges that had been submitted to the trier of fact.

leaves an individual incarcerated for nearly 13 years and then pays out millions of taxpayer dollars in purported compensation is obviously deeply flawed. The legal error in Mr. Su's case – a prosecutor's knowing elicitation of false testimony from a pivotal witness – is the most severe variety of *Brady* violation, striking at the heart of the justice system. Nonetheless, the New York state courts erected a series of procedural barriers to avoid even reaching the merits of the claim and the federal district court engaged in fine calculations of prejudice to avoid according relief. When an asserted *Brady* violation involves State-sponsored false testimony or the total non-disclosure of material exculpatory evidence, a state court should be obliged to address the merits of a defendant's claim and Article 440 of the Criminal Procedure Law should be amended accordingly. In addition, the "harmless error" doctrine should not be invoked to salvage a conviction in such cases unless the State can clearly establish that there is no conceivable possibility that the *Brady* violation affected the outcome. Once again, the Criminal Procedure Law should be amended to reflect this highly rigorous, but entirely appropriate, standard.

Not all *Brady* violations arise when prosecutors act maliciously or fail entirely to discharge their obligations. Often, through accident, inattention or oversight, material evidence of a defendant's innocence remains in prosecution or police files for too long, disclosed to the defense only when, as a practical matter, it

is far too late. It is, after all, human nature. Left to their own devices, lawyers often delay fully mastering the information in their own files until it appears that a matter is moving towards trial. When prosecutors fall to such carelessness, they may simply overlook material exculpatory evidence that they possess themselves or fail to obtain such evidence from the police. When they finally perceive what they have missed, they disclose it, but by then irrevocable damage has often already been done.

At present, New York law does not provide an adequate remedy to defendants thus aggrieved. Late disclosure of *Brady* material in New York does not require a mistrial (or a new trial on appeal) so long as the defendant "is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case."[10] But this standard misses the point because it fails to recognize the essential role that timely disclosed *Brady* material ought to play outside the court room: in guiding defense pre-trial investigations, in helping to unearth new leads and in yielding further evidence or additional witnesses. As the Second Circuit has held in granting a New York State defendant habeas corpus relief: "the closer to trial the disclosure is made, the less opportunity there is for use . . . . The defense may be unable to divert resources

[10] *People v. Cortijo*, 70 N.Y.2d 868 (1987).

from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case."[11]

Nonetheless, under New York's case law, even when significant evidence of innocence is first revealed on the eve of trial or after trial has begun, the defense is out of luck so long as it finds some way, however imperfect and incomplete, to employ the material before a verdict is rendered. This standard blinks at the reality of a criminal trial and it ought to change in a manner that encourages prosecutors to locate and disclose *Brady* material, not as a trial looms, but at the earliest possible opportunity.

There are practical ways to facilitate such changes. Through training and supervision, prosecutors' offices should ensure that assistants are aware of, and alert to, their obligations to disclose *Brady* material in a timely fashion. The need for training extends to police officers, who must record, preserve and promptly disclose exculpatory evidence to prosecutors, if the *Brady* regime is to function at all. Although *Brady* is, indeed, a prosecutorial obligation, trial judges, who are obliged to oversee the fairness of the process, should play a more active role in ensuring that timely and complete disclosure occurs. As a trial date approaches, a judicially supervised *Brady* conference could serve to promote full compliance. Where late

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[11] *Leka v. Portuondo*, 257 F.3d 89, 100-01 (2d Cir. 2001).

disclosure does occur, liberal adjournments must be available to the defense as a matter of right so that a thorough investigation can be completed. Where disclosure occurs at a stage of the trial that makes a meaningful adjournment impossible, then a mistrial must be available to the defense at its request. Finally, appellate and other post-conviction courts examining late *Brady* disclosure cases must squarely place on the State the burden of establishing that its untimeliness did not impede the defense.

One additional point should be made about the present state of *Brady* disclosure rules. Under existing New York law, the prosecution need not disclose all evidence in its possession that tends to negate the defendant's guilt. Instead, a prosecutor must disclose only the constitutional minimum -- "materially" exculpatory information that the prosecutor believes creates a reasonable possibility[12] that the defendant would be acquitted.[13] Among other deficiencies, this standard falls short because prosecutors frequently do not know the content or context of the likely defense theory of the case at the time disclosure decisions are made. Hence, they may have little basis for making accurate materiality determinations. Instead, New York's discovery rules should follow other states to

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[12] In the absence of a specific defense request for the information, the less searching "reasonable-probability" standard applies.

[13] *See* C.P.L. §240.20(1)(h).

require automatic disclosure of *all* information known to the prosecution that tends to mitigate or negate the defendant's guilt.[14] Not only would this substantially improve the defense's ability to investigate exculpatory leads and to incorporate exculpatory information into its case – and thus assure more accurate verdicts – but it would have the added benefit of simplifying prosecutors' jobs by eliminating the need to continually make discretionary judgment calls about the cumulative weight of the known exculpatory information.

Last, troubling questions about the defense's access to information in criminal cases extend far beyond *Brady* to the generally restrictive discovery provisions of Article 240 of New York's Criminal Procedure Law. This is not the place to proffer specific proposals in favor of discovery reform. Nonetheless, there is little doubt that wide-ranging and thorough pre-trial investigations by the defense can serve as powerful seawalls against wrongful convictions. Unfortunately, current New York discovery rules do not require prosecutors to make relevant disclosures in a manner that allows for adequate and complete defense preparation.

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[14] *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); Mass. R. Crim. P. 14(a)(1)(A)(iii); Mich. CR 6.201(B)(1); *see also* "ABA Criminal Justice Section Standards – Discovery," Standard 11-2.1(a)(viii); DR 7-103(B). Notably, the Advisory Committee on Criminal Rules of the Judicial Conference of the United States forwarded for publication in 2007 a proposal to require federal prosecutors to automatically disclose all known exculpatory and impeachment evidence. *See* Federal Judicial Center, "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies" (2007), pp. 23-24, available at www.uscourts.gov/rules/BradyFinal2007. Several United States District Courts also have rules requiring the disclosure of such information "without regard to materiality."

In many other jurisdictions, prosecutors routinely disclose police reports as well as witnesses's names, addresses, and written and recorded statements early in the case.[15] Under New York law, however, most such disclosures may be delayed until the start of trial.[16] For this reason, no doubt, the 2008 Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge has recommended "that Article 240 and other sections of the Criminal Procedure Law be amended to effect broad reform of discovery in criminal proceedings."[17] Such comprehensive discovery reform, should it be forthcoming, would serve to place the defense on an equal investigatory footing with the State. It would thus represent a significant step forward in the fight against wrongful convictions.

Thank you for the opportunity to share our thoughts and experiences with the Task Force. We welcome any questions that you may have at this time.

Respectfully Submitted,

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[15] *See* New York County Lawyers' Association, "Discovery in New York Criminal Courts: Survey Report and Recommendations" (2006) p. 15.

[16] C.P.L. §240.45

[17] *See* "Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge" (January 2008), p. 3.