M V, Assistant District Attorney
Monroe County District Attorney's Office
Ebenezer Watts Office Building
Rochester, NY 14614

[redacted]

Re: *People v.* [redacted]

Ms. V:

Demand for Information under *Brady/Kyles/Vilardi* and Rule 3.8(b)

I request immediate disclosure of the following:

The United States Supreme Court holding in Brady v. MD, 373 US 83, (*see also* Miller v. Pate, 386 US 1; and Giles v. MD, 386 U.S. 66) requires the District Attorney to immediately deliver all potentially favorable evidence to your affiant. People v. Harrison, 81 Misc2d 144; People v. Bottom, 76 Misc2d 525. This rule applies to evidence favorable both in regards to guilt or innocence as well as to potential mitigation. The Prosecution is required not only to immediately deliver all potentially favorable information in its possession, it is also required to seek to obtain that information of which it should know and could obtain as part of its investigation into this matter.

In order to equitably implement this rule, the Defendant requests the Prosecution's file be produced in Court and examined *in camera*, so a fair determination can be made. US v. Gleason, 265 F.Supp. 880 (S.D.N.Y. 1967); US v. Cobb, 271 F.Supp. 159 (S.D.N.Y. 1967).

This information should include, but not be limited to:

1. Any evidence, information, testimony, transcript, statement, or other record indicating the defendant did not commit the offense(s) charged in the Indictment;

2. Any and all information in whatever form available, supporting the position that the defendant did not commit the offenses as alleged in the Indictment, or in a manner which would support the Indictment;

3. Any information to the effect that all or some of the evidence which may be utilized by the Prosecution at trial was illegally or improperly obtained or was obtained, even partially, as the result of improper acquisition of

some other evidence or information. People v. Geaslen, 54 NY2d 510;

4. Any evidence, information, testimony, transcript, statement, or other record indicating any prospective prosecution witness on any occasion gave false, misleading, or contradictory information regarding the charge at bar or any related matter, to persons involved in law enforcement or their agents, informers, or others and the names and addresses of both those who gave and those who received that inconsistent, false, and/ or misleading information;

5. Any evidence, information, testimony, transcript, statement, or other record indicating any prospective prosecution witnesses gave statements contradictory to one another, as well the date, time, and location at which each statement was made and the name and address of the person to whom each statement was made. US v. Bagley, 374 U.S. 667 (1985); this request is to include Grand Jury testimony which if it is Brady material, should be disclosed to the Defendant prior to the time required by CPL §240.45 and People v. Rosario, NY2d 286.

6. Any evidence, information, testimony, transcript, statement, or other record indicating that any prospective prosecution witness has been subjected to hypnosis in order to attempt to restore and/or refresh that witness' memory concerning this matter and the name and address of that witness. People v. Tunstall, 63 NY2d 1; People v. Hughes, 59 NY2d 523; Rock v. AR, 107 SCt. 2704;

7. Any evidence, information, testimony, transcript, statement, or other record which indicates or reveals any potential prosecution witness has a psychiatric history or any other condition, affliction, disease, injury, chemical dependence, medicinal dependence, behavioral disorder, learning disorder or limitation which could conceivably render their testimony less than perfectly trustworthy. People v. Maynard, 80 Misc.2d 279 (S.Ct., NY, 1974).

8. Any evidence, information, testimony, transcript, statement, or other record indicating that any prospective prosecution witness has been subjected to polygraph testing; the results of the test; and the name and address of any witness involved in the test. People v. Mondon, 129 Misc2d 13; Carter v. Rafferty, 826 F2d 1299 (1987).

9. Any evidence, information, testimony, transcript, statement, or other record indicating that any prospective prosecution witness has consulted a lawyer prior to trial with the intent or purpose of suing the defendant in the event of a conviction. People v. Wallert, 98 AD2d 47 (1st Dept., 1983);

10. Any evidence, information, testimony, transcript, statement, record, or document indicating that any police department employee or officer involved in this matter has been, is now, or soon will be a subject of an investigation into police corruption or other illegal activity or is currently subject to departmental discipline. People v. Curry, 627 NYS2d 214 (SCt., NY Cnty, 1988).

11. Any evidence, information, testimony, transcript, statement, record, or documents from the disciplinary files of any police officer or employee involved in the investigation of this crime, which indicate or refer to prior misconduct either as a part of his or her employment or in their civilian life. People v. Puglisi, 44 NY2d 748 (1978).

12. Any evidence, information, testimony, transcript, statement, or other record indicating that any prospective prosecution witness has been offered, promised, or given any type or form of immunity or prosecutorial lenience and/or any other consideration with reference to any and all pending or past charges or any other matter based upon their testifying for the Prosecution. US v. Bagley, 87 LEd2d 481; US v. Pfingst, 477 F2d 177 (2d Cir., 1973); People v. Andre W., 44 NY2d 179 (1978); Giles v. MD, 386 US 66 (1967); Giglio v. U.S., 405 US 150; DeMarco v. U.S., 415 US 449 (1974); Ring v. U.S., 419 US 18 (1974); People v. Graziano, 38 AD2d 127 (2d Dept., 1974);

13. Any evidence, information, testimony, transcript, statement, report, or other record indicating that there ever existed any suspect in this crime, other than the defendant. Bowan v. Maynard, 799 F2d 593 (8th Cir. 1986), or that any other person was stopped, searched, detained, or arrested as a part of the investigation of this matter. Banks v. Reynolds, 54 F3d 1508 (10th Cir. 1995).

14. Any evidence, information, testimony, transcript, statement, or other record indicating that any psychiatric, psychological, or mental health records existed or have existed on any prospective prosecution witness in the past ten (10) years; People v. Acklin, 102 Misc.2d 596 (1980), rev'd on

other grounds, sub nom; People v. Freshly, 87 AD2d 104 (1st Dept., 1982); People v. Lowe, 96 Misc2d 33 (1978). Counsel herein will accede to a Protective Order per CPL §240.50(2) of this material if requested by the Prosecution;

15. Any evidence or information indicating any prospective prosecution witness is or has any form of relationship, whether by blood, marriage, affinity, or otherwise, to any member of the Office of the District Attorney or any police or law enforcement agency involved with the instant case;

16. Copies of any written advice, rights, or information provided to any alleged victim or prospective witness herein, whether provided by a Police agency or the Office of the District Attorney;

17. The names and addresses of any witnesses who participated in any identification procedure but failed to identify the defendant as a perpetrator or participant in the offenses charged; People v. Anderwkavich, 117 Misc2d 218 (lineup); People v. Ahmed, 20 NY2d 958 (photographs); or who misidentified the defendant or any alleged accomplice(s). People v. Jenkins, 68 NY2d 896;

18. The name and address of any witness or other persons who has or might have information favorable to the defendant

19. Record of all arrests and convictions (both State and Federal) of any witness who the Prosecution will call to testify. Too often the prosecution intentionally does not search for any prior convictions obtained by the prosecutor's office as well as charges currently being prosecuted against a trial witness by the prosecutor's office under the belief that the requirements of CPL §240.45 (1)(b)[c] only requires the prosecutor to provide this information if the information is known to the prosecutor. In fact the requirements of *Brady* and its progeny make it clear that the prosecutor must educate himself as to the criminal record known in his office of each witness the prosecutor intends to call at trial as well as any current pending charges known to the prosecutor's office. In light of the foregoing, the defendant demands the criminal record of any witness which the prosecution intends to call at trial where such criminal convictions were obtained in the county in which the prosecution is located. People v. Pressley, 234 AD2d 954 (4th Dept.), *affd* 91 NY2d 825 (1997); People v. Arac, 297 AD2d 560, *lv. denied* 96 NY2d 580, including

but not limited to "rap sheets", military records, police personnel records and other memoranda. US v. Bagley, 473 US 667; People v. Valentin, 1 AD3d 982 (4th Dept. 2003) and a list of any other convictions that the prosecution is aware of; Any information related to prior convictions and bad acts have a direct bearing on a witness' credibility and constitutes evidence favorable to the Defendant. Brady v. MD, 373 US 83 requires the District Attorney deliver all potentially favorable evidence to the Defendant. People v. Valentin, 1 AD3d 982 (4th Dept., 2003).

20. Any and all records relating to any arrest and/ or conviction stemming from charges filed in either in State or Federal Court pertaining to any witness who the Prosecution potentially will call to testify. Any information related to these facts have a direct bearing on a witness' credibility and constitutes evidence favorable to the Defendant which must be provided to the defendant pursuant to Brady v. MD, 373 US 83. The Defendant requests the District Attorney deliver all potentially favorable evidence to the Defendant. People v. Valentin, 1 AD3d 982 (4th Dept. 2003).

21. Any and all reports, papers, and forms of any state, county, local, or federal law enforcement agency relating to any witness who the Prosecution potentially will call to testify; including but not limited to, arrest reports, supplemental reports, investigative action reports, crime investigation reports, surveillance reports or notes, property custody reports, Field Information Form (FIF) documents, technician reports, laboratory reports, narcotic incident reports, SCIS investigative reports, custody log/interview forms, prisoner data reports, reports of out–of–court identification procedures, search warrants and the papers on which they are based, and any other reports or documents, whether stored on computer or hard copy prepared by a public servant engaged in law enforcement activity in connection with the investigation and/ or arrest of any witness who the Prosecution potentially will call to testify.

22. Records of prior convictions or pending criminal actions against any witness who the Prosecution will potentially call to testify and any information indicating he has perpetrated immoral, vicious, or criminal acts;

23. Copies of all accusatory instruments, supporting depositions, indictments, and certificates of conviction pertaining to any case in which the Monroe County District Attorney's office prosecuted and obtained a conviction for

any potential witness. People v. Valentin, 1 AD3d 982 (4th Dept. 2003).

24. Any threats, express, implied, direct or indirect, made to any prosecution witness, including criminal prosecution or investigation, any change in the probationary, parole, or custodial status of the witness, or any other pending or potential legal disputes between the witness and the prosecution or over which the prosecution has a real, apparent or perceived influence;

25. Complete information of each occasion when each witness who was or is an informer, accomplice, or coconspirator has testified before any court or grand jury, including the date, caption and CR# or indictment number of the case;

26. Any repetition of any scientific test and any differing results obtained;

27. Any lack of qualification by any person performing any scientific test in connection with this matter;

28. Grand jury testimony of a police officer or other witness that the prosecutor knows or should know to be mistaken or false. People v. Pelchat, 62 NY2d 97(1984);

29. The existence or prior existence of any surveillance tapes or photographs turned over to the police whether still in existence or subsequently discarded. People v. Springer, 122 AD2d 87 (2d Dept. 1986);

30. Statistical data underlying an estimate of probability of DNA matching samples. People v. Davis, 196 AD2d 597 (2d Dept. 1993);

31. Any prospective witness' juvenile record. Matter of Evan U, 244 AD2d 691 (3d Dept. 1997);

32. Any statement, verbal or written or any admission or confession by any third party to involvement in or commission of the crime(s) charged in the indictment. People v. Ausserau, 77 AD2d 152 (4th Dept. 1980).

34. Any evidence, information, testimony, transcripts, statements, records or documents indicating that any police department employee or officer involved in this matter has been, is now or soon will be a subject of an investigation into police corruption or other illegal activity or is currently subject to departmental discipline. People v. Curry, 627 NYS2d 214 (S.Ct., NY, 1988).

35. All impeachment material or material that could be used to demonstrate that any prosecution witness is not entirely credible. This is to include all instances of prior bad acts, pending criminal charges, criminal convictions and inconsistent statements of the witnesses.

36. With respect to all witnesses, the defense specifically demands:

    i. a copy of any criminal record,

    ii. all documents, reports, and depositions in the possession of the Rochester Police Department or any other law enforcement agency. This is to include all Field Information Forms.

    iii. all information regarding probation or parole violations.

    iv. all information regarding prison misconduct, infractions, or disciplinary actions. Kyles v. Whitley, 514 U.S. 419 (1995) (Prosecutor remains responsible for duty under *Brady* to disclose favorable evidence to defendant, regardless of whether police investigators failed to inform prosecutor of evidence); US v Bagley, 473 US 667 (1985) (impeachment evidence falls within the Brady rule); People v. Baxley, 84 NY2d 208; People v Vilardi, 76 NY2d 67 (1990); People v Wright, 86 NY2d 591(1995) (The mandate of Brady extends beyond any particular prosecutor's actual knowledge – an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police); People v. Valentin, 1 AD3d 982 (4th Dept. 2003); People v Pelchat, 62 NY2d 97 (1984) (Failure to disclose witness's perjury before grand jury); People v Marzed, 161 Misc 2d 309 (Crim. Ct NY 1993) (Failure to disclose that police officer witness had committed perjury in other case). People v. Simmons, 36 NY2d 126 (Brady material in the possession of any assistant district attorney is deemed to be in the possession of all

district attorneys). People v Steadman, 82 NY2d 1 (1993) (Prosecutor's duty to disclose favorable defense evidence extends to correcting mistakes or falsehoods by witness whose testimony is inaccurate.). People v Russo, 109 AD2d 855 (2d Dept. 1985) (evidence in police control is deemed to be in prosecution's control for Brady purposes). People v. Pressley, 234 AD2d 954, *affd* 91 NY2d 825.

kk. All impeachment material or material that could be used to demonstrate any prosecution witness is not entirely credible. This is to include all instances of prior bad acts and criminal convictions of the witnesses. Kyles v. Whitley, 514 US 419 (1995); US v Bagley, 374 US 667 (1985); People v Vilardi, 76 NY2d 67(1990); People v Wright, 86 NY2d 591 (1995); People v. Valentin, 1 AD3d 982 (4th Dept. 2003); People v Pelchat, 62 NY2d 97 (1984) (Failure to disclose witness's perjury before grand jury); People v Marzed, 161 Misc 2d 309 (Crim Ct NY 1993) (Failure to disclose police officer witness committed perjury in another case). Information possessed by any assistant District Attorney is deemed to be possessed by all assistant District Attorneys. People v. Simmons, 36 NY2d 126; People v Steadman, 82 NY2d 1 (1993). People v Russo, 109 AD2d 855 (2nd Dept. 1985) (evidence in police control is deemed to be in prosecution's control for Brady purposes).

ll. Any and all agreements or understanding written or verbal with the drug dealer or any other witness in which the Prosecution agreed not to prosecute the witness for acts which serve as the basis for being charged with a crime.

These records contain evidence potentially favorable to Mr. T and are therefore discoverable under

1. the constitutional and statutory disclosure standards of *Brady/Kyles/Vilardi* and CPL §240.20(1)(h), and/or

2. the ethical obligation of New York State Rule of Professional Conduct 3.8(b), which addresses "Special Responsibilities of Prosecutors."

The Prosecution may argue that the Defendant has not made an adequate showing that the requested materials include *Brady* information. They claim the Defendant needs to make a detailed showing of the exact information included in the requested records. This argument has no merit under the law. See, Matter of Andre W., 44 NY2d 179, 184 (1978)

(A Defendant is not required to demonstrate, in advance of the holding of the inquiry he seeks, that the inquiry will in fact necessary result in the finding of materiality); People v. Jackson, 237 AD2d 179, 180 (1st Dept., 1997) (To require defense counsel to know the precise contents of the very file it is seeking is putting the cart before the horse); People v. Kozlowski, 11 NY3d 223 (2008) (rejecting the *Gissendanner* test for the review of records finding it an "impossible" standard). The Prosecution's argument is an improper application of *Brady*. Further it runs counter to common sense, given that the requested records are confidential and the defense is unable to access them without them being ordered produced by the Court. Therefore, the defense does not have to make a more specific showing before these records must be produced.

These demands are made pursuant to the New York State and federal constitutional rights to receive impeachment and exculpatory materials possessed, controlled by, or known to any law enforcement personnel acting in the case. Additionally, the ethical duty of Rule 3.8(b) directs that, regardless of its "materiality" to the case, *all favorable* information and evidence known to the prosecutor should be disclosed. See People v. Garcia, 46 AD3d 461, 464 (1st Dept. 2007) ("The prosecution's constitutional and ethical obligations are *independent obligations….* This was a flagrant violation by the prosecutor of his *constitutional and ethical* obligations").

I. NEW YORK STATE AND UNITED STATES CONSTITUTIONAL DISCLOSURE STANDARDS

Disclosure of information and evidence favorable to the accused is necessary under the *federal constitutional* "materiality" standard when non-disclosure would create a reasonable probability of an acquittal of any charged offense, which is a showing lower than a "preponderance of the evidence" standard and is defined as being enough to "undermine confidence" in a conviction. See Youngblood v. WV, 547 US 867, 869-70 (2006); People v. Hunter, 11 NY3d 1, 5 (2008); see also Boyette v. Lefevre, 246 F3d 76, 90 (2nd Cir. 2001) ("Evidence is favorable to the accused if it either tends to show the accused is not guilty or impeaches a prosecution witness").

By contrast, when the defendant has specifically requested the favorable information or evidence, disclosure is necessary under the *state constitutional* "materiality" standard when there is merely a "reasonable *possibility*" that it would affect the verdict on any charged offense. See People v. Vilardi, 76 NY2d 67, 77-78 (1990); see also id. at 77 ("The 'reasonable possibility' standard … [is] essentially a reformulation of the 'seldom if ever [is non-disclosure] excusable' rule"); see, e.g., People v. Ennis, 11 NY3d 403, 414 (2008) (a request was sufficiently "specific" to trigger the "reasonable possibility" test for materiality where defense counsel "sought disclosure of all statements made by participants in the crime that were exculpatory"); People v. Scott, 88 NY2d 888, 891 (1996) ("That the defense did not know the precise form of the document does not alter the fact that the request provided particularized notice"); People v. Mickel, 274 AD2d 325 (1st Dept. 2000) (a request for materials "bearing on the credibility of [the prosecution] witnesses" was sufficiently "specific"); People v.Sibadan, 240 AD2d 30, 34 (1st Dept.

1998)(a "broadly worded request" was sufficiently specific).[1]

II. RULES REGARDING *BRADY/KYLES/VILARDI* OBLIGATIONS

The foundational rules concerning the *constitutional and statutory* disclosure obligations are as follows.

A. MATERIALITY:

In Kyles v. Whitley, 514 US 419 (1995), the Supreme Court explained how to assess "materiality" under the federal constitutional test by making three key points. First, materiality is assessed "in terms of suppressed evidence *considered collectively*, not item by item … [and its] cumulative effect." Second, the materiality assessment is *not a sufficiency of the evidence test* – "a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Third, "a showing of materiality *does not require demonstration by preponderance* that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." Instead, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." See Kyles, 514 U.S. at 434-38; see also Banks v. Dretke, 540

---

[1] Although the Court of Appeals has not yet considered the issue, we also hereby contend that ***all*** *favorable* information and evidence must be turned over (not merely *materially favorable* items) because the "materiality" requirement is simply an appellate standard that does not apply in the pretrial context. The main reason is that gauging the hypothetical cumulative effect of disclosures on a trial that has not yet occurred – and in the context of defense evidence and a defense theory that are not yet evident or certain – involves impossible speculation and unreliable guesswork. While a lack of prejudice (*i.e.*, non-materiality) is a defense post-conviction to a claimed due process violation based on the suppression of favorable evidence, it does not *condone* that suppression *ex ante*. Thus, as now in the pretrial context, a prosecutor must disclose ***all*** favorable information or evidence.

Several notable decisions discuss the legal issue we raise here. See U.S. v. Olsen, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013); U.S. v. Price, 566 F.3d 900, 913 n.14 (9th Cir. 2009); U.S. v. Acosta, 357 F.Supp.2d 1228, 1233- 40 (D.Nev. 2005); U.S. v. Sudikoff, 36 F.Supp.2d 1196, 1198-99 (C.D.Cal. 1999); U.S. v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005); U.S. v. Carter, 313 F.Supp.2d 921, 925 (E.D.Wis. 2004); see also People v. Vilardi, 76 N.Y.2d 67, 77-78 (1990)(criticizing "a backward-looking, outcome-oriented standard of review" in the pretrial context when the prosecutor is "first responding to discovery requests," and stressing that the federal constitutional materiality test "remits the impact of the exculpatory evidence to appellate hindsight, thus significantly diminishing the vital interest this court has long recognized in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence"); id. at 76 ("We have long emphasized that our view of due process in this area is, in large measure, predicated both upon 'elemental fairness' to the defendant, and upon concern that the prosecutor's office *discharge its ethical and professional obligations*")(emphasis added); People v. Ennis, 11 N.Y.3d 403, 414 (2008)(remarking that failure to disclose *non-material* favorable evidence "cannot be condoned").

U.S. 668, 698 (2004) ("Our touchstone on materiality is *Kyles*").

Furthermore, the facts at issue in *Kyles* itself are highly instructive. The Supreme Court ruled that the items of suppressed favorable information were "material," even though: (1.) *four* separate eyewitnesses had made identifications of Kyles as the shooter while the informant "Beanie" (whom the defense claimed was the real shooter) was standing next to him; (2.) the police had found the murder weapon behind Kyles's stove in his apartment; (3.) the police had found the victim's purse in Kyles's garbage; and (4.) the police had found cans of pet food of a brand bought by the victim (who had just been grocery shopping) in Kyles's apartment and a receipt from the grocery store with Kyles's fingerprint on it in the victim's stolen car. See Kyles, 514 U.S. at 427-31, 464, 473-74. In short, the federal constitutional materiality standard (which simply asks whether the non-disclosure "undermines confidence" in a conviction) should not be deemed too demanding. See, e.g., People v. Colon, 13 N.Y.3d 343, 346-50 (2009); People v. Hunter, 11 N.Y.3d 1, 3-7 (2008). And, of course, for the categories of information we request below, the state constitutional materiality threshold is *much lower* than "undermining confidence" – it is merely a "reasonable possibility" of another outcome. See People v. Vilardi, 76 N.Y.2d 67, 77 (1990) ("The 'reasonable possibility' standard … [is] essentially a reformulation of the 'seldom if ever [is non-disclosure] excusable' rule").

B. NO DISTINCTION BETWEEN "IMPEACHMENT" AND "EXCULPATORY" INFORMATION:

The prosecutor's duty is not lessened because *Brady* material may affect only the credibility of a government witness." See People v. Steadman, 82 N.Y.2d 1, 7 (1993); accord Smith v. Cain, 132 S.Ct. 627, 630 (2012); U.S. v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. U.S., 405 U.S. 150, 154 (1972); People v. Fuentes, 12 N.Y.3d 259, 263 (2009) ("Impeachment evidence falls within the ambit of a prosecutor's *Brady* obligation"); People v. Waters, 35 Misc.3d 855, 856-61 (Sup. Ct., Bronx Co. 2012); see, e.g., People v. Janota, 181 A.D.2d 932, 934 (3rd Dept. 1992) ("There is no doubt that where, as here, the outcome of a case turns on the credibility of the complaining witness, evidence impacting adversely on her credibility constitutes Brady material").

C. PROSECUTOR MUST LOOK FOR FAVORABLE INFORMATION

Prosecutors have an affirmative duty to learn about all *Brady/Kyles/Vilardi* information known to law enforcement personnel acting in the case. Their "good faith" in failing to disclose materials, and/or a lack of cooperation from police officers or other prosecutors who have neglected to alert them to the existence of materials, are irrelevant. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995)("the individual prosecutor has a duty to learn of any favorable

evidence known to the others acting on the government's behalf in the case, including the police"); People v. Wright, 86 N.Y.2d 591, 598 (1995)("The mandate of *Brady* extends beyond any particular prosecutor's actual knowledge"); People v. Simmons, 36 N.Y.2d 126, 132 (1975)("Negligent, as well as deliberate, nondisclosure may deny due process"); see also People v. Springer, 122 A.D.2d 87, 90 (2d Dept. 1986)("It is not for the prosecution, or the police, to select which materials should be preserved, and which should be destroyed. Were law enforcement officials empowered to pick and choose the materials deemed worthy of preservation, then the due process rights guaranteed by Brady would be shallow indeed").

D. *DUTY APPLIES EVEN WHEN INFORMATION PARTIALLY INCULPATORY:*

That the information or evidence simultaneously has both an inculpatory and an exculpatory effect does not exempt it from disclosure. See U.S. v. Mahaffy, 693 F.3d 113, 130-33 (2nd Cir. 2012)("Where suppressed evidence is inculpatory as well as exculpatory, and its exculpatory character harmonizes with the theory of the defense case, a *Brady* violation has occurred"); DiSimone v. Phillips, 461 F.3d 181, 195 (2nd Cir. 2006)("to the extent that the information was also inculpatory … this Court has already made it unmistakably clear that evidence having both an inculpatory and exculpatory effect must be turned over to the defense counsel as *Brady* material"); U.S. v. Rivas, 377 F.3d 195, 198- 200 (2nd Cir. 2004); see, e.g., U.S. v. Triumph Capital Group, Inc., 544 F.3d 149, 165 (2nd Cir. 2008); U.S. v. Howell, 231 F.3d 615, 625 (9th Cir. 2000); People v. Colon, 13 N.Y.3d 343, 348-50 & n.3 (2009)(notes from interviews with two women who had named various persons as participants in the shooting should have been disclosed, although the second note contained the name "Danny" and the defendant's name was "Danny Colon"); People v. Hopper, 87 A.D.2d 193, 196 (2d Dept. 1982)(grand jury testimony of a non-testifying witness that implicated not only the defendant, but also a prosecution witness as an accomplice, in the stabbing); People v. Waters, 35 Misc.3d 855, 856-61 (Sup. Ct., Bronx Co. 2012) (failure to disclose a change in the witness's account – even though his new account was *more* inculpatory than his original account – violated *Brady*).

E. ONLY ISSUE IS HOW INFORMATION COULD BE VIEWED BY THE JURY AND USED BY THE DEFENSE:

The proper *Brady/Kyles/Vilardi* analysis focuses on how the favorable item potentially could be viewed by *the jury* and/or *used* by the defense, and not on whether the prosecutor or the judge believes that it can somehow be "reconciled" with the inculpatory evidence or otherwise "explained away." For example, the Supreme Court in Kyles rejected the prosecution's rationales for not disclosing an officer's list of the vehicles parked near the scene of the murder shortly after it occurred which did not include the

defendant's car. The state had urged that, of course, the defendant *could have* moved his car before the police created the list, and it stressed that the list did not even purport to be a comprehensive listing. But the Supreme Court rejected those rationales for non-disclosure, ruling that such analysis "*confuses the weight of the evidence with its favorable tendency*." The list had to be turned over to the accused because it had "some value as exculpation and impeachment," and it "would obviously have helped" the defense. See Kyles v. Whitley, 514 U.S. 419, 450-51 (1995); see, e.g., Smith v. Cain, 132 S.Ct. 627, 630 (2012)("the State's argument offers a reason that the jury could have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so"); Cone v. Bell, 129 S.Ct. 1769, 1783 n.16 (2009)(pointing out that the prosecution used an incorrect analysis when concluding that disclosure was unnecessary on the ground that the defendant's unusual post-crime behavior *could be attributed* to his criminal acts, since it also could have been attributable to his claimed drug psychosis).

• Example of Prosecutors' Incorrect Analysis: As in *Kyles*, many decisions by New York's state and federal courts have criticized the incorrect analysis of prosecutors and judges who considered favorable information or evidence to be non-material *based upon the rationale that it could somehow be "reconciled" with the inculpatory evidence* or otherwise "explained away." Instead, when making disclosure decisions, prosecutors and judges should ask (1.) whether *the jury* could deem the favorable information to be significant, and/or (2.) whether the *defense lawyer* could employ it to undermine a notable part of the People's case, or to help counter likely prosecution arguments, or to develop a theory of defense to some or all of the charges. See, e.g., People v. Garcia, 46 A.D.3d 461, 462-64 (1 st Dept. 2007)(the prosecutor used an incorrect analysis in concluding that disclosure was unnecessary on the ground that the flight attendant witnesses' statements that they did not remember the child complainant's asking for help *could be attributed* to their likely being busy and distracted at the time, since the defense could have argued that the statements suggested that no such requests for help were made); People v. Gantt, 13 A.D.3d 204, 204-05 (1st Dept. 2004), ***aff'g, N.Y.L.J.*** 1/29/2004, p. 19, col. 3 (Sup. Ct., N.Y. Co. 2004)(the prosecutor used an incorrect analysis in concluding that disclosure of prior testimony was unnecessary on the ground that the witness's differing testimony at unrelated trials that he was working for different drug sellers on different blocks during overlapping time frames *could be reconciled* on the assumption that he worked for one drug-selling operation before working for the other, since the defense could have argued that the accounts suggested the witness may not actually have been present); People v. Poventud, 10 Misc.3d 337, 340-41 (Sup. Ct.,

Bronx Co. 2005)(the prosecutor used an incorrect analysis in concluding that disclosure was unnecessary on the ground that the witness's tentative misidentification of the defendant's brother *could be attributed* to his not wearing glasses and being medicated during the identification procedure, since the defense could have argued that his ability to identify the perpetrator was dubious); People v. Hopper, 87 A.D.2d 193, 196 (2d Dept. 1982); see also People v. Davis, 81 N.Y.2d 281, 283-87 (1993); People v. Baxley, 84 N.Y.2d 208, 213 (1994)("nondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved Youmans' recantation").

Likewise, many Second Circuit decisions have criticized this common error in some prosecutors' and judges' *Brady/Kyles* analysis. See, e.g., U.S. v. Gil, 297 F.3d 93, 101-03 (2nd Cir. 2002)(the judge used an incorrect analysis in concluding that disclosure was unnecessary on the ground that the internal corporate memo *did not explicitly authorize* extra-contractual payments to the defendant, since the defense could have argued that the memo reflected awareness of extra-contractual work); U.S. v. Rivas, 377 F.3d 195, 198-200 (2nd Cir. 2004)(the prosecutor and judge used an incorrect analysis in concluding that disclosure of the witness's pretrial statement that he had held a package of contraband was unnecessary on the ground *that the witness had asserted* that he did not know the contents of the package and that it belonged to the defendant, since the defense could have argued that the witness may have been the actual perpetrator); DiSimone v. Phillips, 461 F.3d 181, 194-95 (2nd Cir. 2006)(the prosecutor used an incorrect analysis in concluding that disclosure was unnecessary on the ground that the witness's statement *inculpated the defendant* by describing that the defendant stabbed the victim even though it acknowledged that the witness had also stabbed the victim, since the defense could have argued that the witness's blow might have been the cause of death); U.S. v. Rodriguez, 496 F.3d 221, 228 (2nd Cir. 2007)(the prosecutor used an incorrect analysis in concluding that disclosure of a detailed account of the witness's initial statements during a proffer meeting was unnecessary on the ground that *she had ultimately agreed* with the prosecution that her initial statements were "lies," since the defense could have argued that the initial statements could have been the truthful ones); U.S. v. Mahaffy, 693 F.3d 113, 130 (2nd Cir. 2012)("The fact that the government is able to argue that portions of the transcripts were consistent with the prosecution's theory fails to lessen the exculpatory force of sworn S.E.C. testimony"); U.S. v. Triumph Capital Group, 544 F.3d 149, 162- 63 (2nd Cir. 2008).

F. ABSENCE OF INCRIMINATING EVIDENCE IS "FAVORABLE" UNDER *BRADY*:

The *lack* of a particular kind of incriminating evidence can qualify, in itself, as information "favorable" to the accused. For example, the police may dust the crime scene or an item for fingerprints, but the ***defendant's fingerprints are absent***. Or law enforcement personnel may test the defendant's hands for traces of gunpowder residue, but *find none*. Or an eyewitness may *fail to make an identification* despite the defendant's presence in an identification procedure. Or an eyewitness may express the belief that *he or she could not identify the perpetrator.*

Although such information is consistent with the defendant's being guilty, it is still is "favorable" to the defendant – because it is a factor that the jury could consider as an indication of the lack of enough convincing proof of guilt to satisfy the prosecution's burden of proof. See, e.g., Kyles v. Whitley, 514 U.S. 419, 450-51 (1995)(rejecting the prosecution's position that a police officer's list of vehicles parked near the crime scene shortly after the murder that *did not include* the potential incriminating evidence that the defendant's car was parked there "was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does not purport to be a comprehensive listing," on the ground that such analysis "confuses the weight of the evidence with its *favorable tendency*"); Simmons v. Beard, 590 F.3d 223, 236-37 (3rd Cir. 2009)("'negative' or 'inconclusive' [scientific testing] results … may be exculpatory even where they do not provide definitive evidence on a particular issue…. [N]eutral forensic evidence may, because of its neutrality, tend to be favorable to the accused. While it does not by any means establish his absence from the scene of the crime, it does demonstrate that a number of factors which could link the defendant to the crime do not"); People v. Baba-Ali, 179 A.D.2d 725, 729-30 (2d Dept. 1992)("we find the People's withholding of the … medical records [that stated 'No external signs of abuse'] until the eve of trial inexcusable"); State v. DelReal, 593 N.W.2d 461, 464-66 (Wis.App. 1999)(finding of no gunshot residue in a swab of the defendant's hands was favorable information); see also U.S. v. Ash, 413 U.S. 300, 318-19 (1973)("the inability of a witness to make any selection [in a photographic identification procedure] will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution").

G. DUTY APPLIES TO INADMISSIBLE INFORMATION:

Most federal appellate courts (including the Second Circuit) have ruled that favorable information can be discoverable *even if it is inadmissible in its present form*, when it could either provide investigative leads that may result in locating admissible evidence or witnesses, or be a valuable tool in disciplining witnesses during cross-examination. See U.S. v. Gil, 297 F.3d 93, 104 (2nd Cir. 2002) ("we need only satisfy ourselves that: [1.] either all

or part of the Bradford memo is admissible; [2.] the memo could lead to admissible evidence; or [3.] the memo would be an effective tool in disciplining witnesses during cross examination by refreshment of recollection or otherwise"); U.S. v. Rodriguez, 496 F.3d 221, 226 n.4 (2nd Cir. 2007)("it is no answer that the specifics of the lies told by Lopez would not necessarily be admissible evidence"); U.S. v. Mahaffy, 693 F.3d 113, 131 (2nd Cir. 2012)("That testimony could have led the defendants to interview and possibly subpoena [witnesses]"); U.S. v. Triumph Capital Group, Inc., 544 F.3d 149, 162 (2nd Cir. 2008); Ellsworth v. Warden, 333 F.3d 1, 5 & n.4 (1st Cir.2003)(collecting cases); see, e.g., People v. Colon, 13 N.Y.3d 343, 348-50 (2009)(interview notes); People v. Baxley, 84 N.Y.2d 208, 213 (1994). Otherwise inadmissible information also can be discoverable when it could be used for a *non-hearsay purpose*, such as to challenge the thoroughness or reliability of the police investigation. *See* Kyles v. Whitley, 514 U.S. 419, 446-47 & n.15 (1995); Mendez v. Artuz, 303 F.3d 411, 414-16 (2nd Cir. 2002).

H. INFORMATION RELEVANT TO A WITNESS' ABILITY TO PERCEIVE, PSYCHIATRIC OR PHYSICAL CONDITION ARE BRADY INFORMATION.

People v. Rensing, 14 NY2d 210, 214 (1964) (paranoid schizophrenia, visual and auditory hallucinations, discharge from sanitarium against advice); People v. Lackey, 48 AD3d 982, 983 (3rd Dept. 2008) (statements that witness sometimes blacks out, hears voices, and does not know what is real, history of depression, anxiety disorder, and substance abuse, and false complaint of crime), People v. Collins, 250 AD2d 379, 379-80 (1st Dept. 1998) (long-standing history of mental illness and violent assaultive behavior, including psychiatric hospitalization); People v. Rivera, 138 AD2d 169, 175 (1st Dept. 1988) (records of paranoid schizophrenia, methadone dependence, anti-social personality, long psychological history, impaired judgment, violent behavior, brought to hospital in handcuffs); see also US v. Kohring, 637 F.3d 895, 904 (9th Cir. 2011) (police investigation of witness's possible sexual misconduct with a minor, which would have shed light on the magnitude of [his] incentive to cooperate); People v. Hunter, 11 NY3d 1, 6-7 (2008) (complainant later accused another man of similar crime); People v. Sanabria, 72 AD3d 552 (1st Dept. 2010) (complainant's prior claims of molestation by her doctors); People v. Jaikaran, 95 AD3d 903, 904 (2d Dept. 2012) (a defendant's Sixth Amendment right of confrontation can overcome a statutory privilege); People v. Bridgeland, 19 AD3d 1122, 1125 (4th Dept. 2005); see generally People v. Parks, 41 NY2d 36, 48 (1976); People v. Freeland, 36 NY2d 518, 524-26 (1975) (evidence of narcotic addiction is admissible to impeach a witness' credibility if tending to show that she was under the influence of drugs while testifying, or at the time of the events to which she testified, or that her powers of perception or recollection, were actually impaired by the habit); People v. Baranek, 287 AD2d 74, 78-80 (2nd Dept. 2001) (Where a primary prosecution witness is

shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition).

I. TIMING OF DISCLOSURE:

The prosecutor must disclose *Brady/Kyles/Vilardi* materials in sufficient time for the defense to perform a reasonable investigation and to meaningful use the information. See Leka v. Portuondo, 257 F.3d 89, 99-103 (2nd Cir. 2001) ("the prosecution did not identify Garcia by name until three business days before trial…. [T]he disclosure was too little, too late…. [O]nce trial comes, the prosecution may not assume that the defense is still in the investigatory mode…. [T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use"); DiSimone v. Phillips, 461 F.3d 181, 197 (2nd Cir. 2006)("The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use'"); People v. Santorelli, 95 N.Y.2d 412, 421 (2000)("A prosecutor must … promptly disclose any such material evidence to the defendant"); People v. Cortijo, 70 N.Y.2d 868, 870 (1987)(the defense must be "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine … or as evidence"); People v. Sinha, 84 A.D.3d 35, 43 (1st Dept. 2011)("tardy disclosure" was "inexcusable"), *aff'd,* 19 N.Y.3d 932 (2012); People v. Roberts, 203 A.D.2d 600, 601-02 (2d Dept. 1994)("it must be turned over to the defendant in time for it to be used effectively"); People v. Waters, 35 Misc.3d 855, 859-60 (Sup. Ct., Bronx Co. 2012) ("as soon as possible"); People v. Robinson, 34 Misc.3d 1217(A) (Crim Ct., Queens Co. 2011) ("at the earliest feasible opportunity"); see, e.g., People v. Steadman, 82 N.Y.2d 1, 6-8 (1993); People v. Williams, 50 A.D.3d 1177, 1180 (3rd Dept. 2008); People v. Baba-Ali, 179 A.D.2d 725, 729-30 (2d Dept. 1992). Moreover, constitutionally required discovery also must be provided pursuant to C.P.L. §240.20(1)(h), and thus *Brady/Kyles/Vilardi* materials must be disclosed, under C.P.L. §240.80(3), "within fifteen days of the service of the [defense's discovery] demand or as soon thereafter as practicable."

J. PROSECUTOR SHOULD NOT REFRAIN LEARNING ABOUT OR OBTAINING FAVORABLE INFORMATION:

A prosecutor should not intentionally refrain from learning about, locating, and obtaining readily available potential *Brady/Kyles/Vilardi* materials. See, e.g., People v. Novoa, 70 N.Y.2d 490, 498 (1987) ("it was not any 'separateness of offices' that stood in the way of transmission of the information but rather a disinclination to ask…. To excuse the failure to learn of the promise in circumstances such as presented here could only serve the undesirable objective of discouraging the obvious, appropriate inquiry");

U.S. v. Price, 566 F.3d 900, 909 (9th Cir. 2009) ("Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned"); Hollman v. Wilson, 158 F.3d 177, 181 (3rd Cir. 1998)("we, along with several other circuits have imposed upon the prosecution a duty to search accessible files to find requested exculpatory material…. [T]he duty rests on the notion that government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure. The duty to search discourages the government from intentionally keeping itself ignorant of information useful to the defense"); People v. Maldonado, 36 Misc.3d 1224(A) (Co. Ct., Sullivan Co. 2012) ("the People had an obligation of due diligence to request and disclose all of [caseworker's] notes and reports in connection with this matter"); see also ABA Standards For Criminal Justice, Prosecution Function, Standard 3-3.11(c) (3d ed. 1993).

K. THE ETHICAL OBLIGATION OF RULE 3.8(B)

Effective April 1, 2009, New York State Rule of Professional Conduct 3.8(b) imposed a broader disclosure duty on the prosecutor than the constitutional and statutory standards discussed above. Rule 3.8(b) states:

> A prosecutor or other government lawyer in criminal litigation shall make *timely disclosure* to counsel for the defendant … 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.

Courts have described ethical rules such as Rule 3.8(b) as imposing a disclosure "obligation." See Cone v. Bell, 556 U.S. 449, 470 n.15 (2009)("the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical … obligations"); Connick v. Thompson, 131 S.Ct. 1350, 1362 (2011); People v. Garcia, 46 A.D.3d 461, 464 (1st Dept. 2007)("The prosecution's constitutional and ethical obligations are *independent obligations*…. This was a flagrant violation by the prosecutor of his constitutional *and ethical obligations*"); People v. Waters, 35 Misc.3d 855, 859-60 (Sup. Ct., Bronx Co. 2012); see also Rule of Professional Conduct 8.4 ("Misconduct") ("A lawyer … shall not: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so … [or] state or imply an ability … to achieve results using means that violate these Rules").

Indeed, an official publication of the District Attorneys Association of the State of New York, entitled "*The Right Thing": Ethical Guidelines for Prosecutors* (2011), specifically instructs that: "As a prosecutor, you must also make timely disclosure to the defense of all evidence or information known to your office that 'tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence,' unless relieved of this obligation by protective order" (see p. 12). This manual also recognizes that the *Brady* disclosure duty "pertains to all exculpatory and impeachment 'information,' including oral information, and not merely to written materials or documents. It applies, moreover, not only at the trial stage, but also to pretrial suppression hearings" (see p. 14).

Notably, in July 2009, the ABA's Standing Committee On Ethics and Professional Responsibility issued its Formal Opinion 09-454, which interpreted Rule 3.8(d) of the Model Rules of Professional Conduct – a provision virtually identical to New York State's Rule 3.8(b). The ABA reached several significant conclusions that we contend apply equally under New York's Rule 3.8(b). In particular, Opinion 09-454 determined: (1.) that the ethical disclosure rule "*does not implicitly include [a] materiality limitation*" [p. 2]; (2.) that it "requires a prosecutor who knows of evidence and information favorable to the defense to disclose it *as soon as reasonably practicable*" [p. 1]; (3.) that "timely disclosure" includes disclosure "*prior to a guilty plea proceeding*, which may occur concurrently with the defendant's arraignment" [p. 6]; (4.) that the disclosure duty "*is not limited to admissible 'evidence'*" and that "evidence or information ordinarily will tend to negate the guilt of the accused if it would be *relevant or useful to establishing a defense or negating the prosecution's proof"* [pp. 5-6]; and (5.) that "[n]othing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence *is highly unreliable*" [p. 5; see also the ABA's hypothetical scenario illustrating the disclosure duty (at pp. 2, 5 & n.23)]. The ABA's House of Delegates passed a resolution advocating these

standards in August 2011 (Resolution #105D).

Based upon the ethical "obligation" of Rule 3.8(b) – as well as our contention described above in footnote 1 regarding the lack of a "materiality" requirement in the pretrial context – we respectfully request that you *timely* disclose ***all*** information and evidence that is favorable to the accused, without further consideration of whether you believe that it would ultimately be material to the verdict (unless the court grants a protective order pursuant to C.P.L. §240.50[1]).

1. Duty regarding Favorable Information under the above–described Rules

The prosecution's disclosure duty is not, of course, *limited* to requested materials. See People v. Vilardi, 76 N.Y.2d 67, 74-75 (1990); see also Rule of Professional Conduct 3.8(b). Nevertheless, "failure to turn over specifically requested evidence [is] 'seldom, if ever, excusable'" and it "verge[s] on prosecutorial misconduct." See Vilardi, 76 N.Y.2d at 74. We hereby request disclosure of all of the following types of information and evidence favorable to the accused, if they are within the possession, custody, control, or knowledge of any law enforcement personnel acting in the case:

a. Inconsistent statements by potential prosecution witnesses

Including during a proffer meeting or a trial-preparation interview, or made to responding or investigating officers or to any other person, or made during a polygraph examination, etc., whether or not memorialized). See, e.g., Smith v. Cain, 132 S.Ct. 627, 630 (2012)(detective's notes of witness interview); Strickler v. Greene, 527 U.S. 263, 266, 273 (1999)(detective's summary and notes of witness interviews); Kyles v. Whitley, 514 U.S. 419, 441-45 (1995)(statements by eyewitnesses and by police informant); U.S. v. Triumph Capital Group, Inc., 544 F.3d 149, 162-63 (2nd Cir. 2008)(agent's notes of proffer meeting with witness's attorney); U.S. v. Rodriguez, 496 F.3d 221, 228 (2nd Cir. 2007)(oral statements during proffer interview); Jamison v. Collins, 291 F.3d 380, 389 (6th Cir. 2002)(statements to police that omitted dramatic details in later testimony); Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 555-58 (4th Cir. 1999)(witness's statements to his attorney that were known to prosecutor); U.S. v. Service Deli Inc., 151 F.3d 938, 942-44 (9th Cir. 1998)(handwritten notes from witness interview); Boyette v. Lefevre, 246 F.3d 76, 91 (2nd 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. Vilardi, 76 N.Y.2d 67, 78 (1990)(initial views of expert); 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. Ramos, 201 A.D.2d 78, 88-89 (1st Dept. 1994)(statements by child sex abuse complainant); People v. White, 200 A.D.2d 351, 352-53 (1st Dept. 1994)(initial remark that shooter was unknown); see also U.S. v. Kohring, 637 F.3d 895, 906 (9th Cir. 2011)(prosecutor's notes and witness's attorney's notes stating witness had "bad recall" and "vague memory" of certain events); see generally People v. Wise, 46 N.Y.2d 321, 326-327 (1978)(to impeach with a prior statement, "[i]t is enough that the testimony and the statements … *tend* to prove differing facts"); People v. Savage, 50 N.Y.2d 673, 679 (1980)("when given circumstances make it most unnatural to omit certain information from a statement, the fact of *the omission is* itself admissible for purposes of impeachment").

b. Prior conduct, misconduct, and criminal acts by a witness

This information undercuts the credibility of any potential prosecution witness or informant. See, e.g., Carriger v. Stewart, 132 F.3d 463, 479 80 (9th Cir. 1997)(*en banc*)(criminal record); Milke v. Ryan, 711 F.3d 998, 1006-12 (9th Cir. 2013) (that state judges had made findings and taken actions against the prosecution in unrelated cases because of officer's false statements and constitutional violations, and officer's five-day suspension when supervisors caught him in lie); 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)(information concerning prior uncharged misconduct), *aff'd*, 19 N.Y.3d 932 (2012); People v. Monroe, 17 A.D.3d 863, 864 (3rd Dept. 2005)(complainant's prior arguments with attendant at another gas station); People v. Pressley, 234 A.D.2d 954, 955 (4th Dept. 1996)("the prosecutor failed to fulfill his obligation to turn over *Brady* material by failing to provide defendant with complete and accurate information concerning the criminal background of a prosecution witness"), *aff'd*, 91 N.Y.2d 825,

827 (1997); People v. Valentin, 1 A.D.3d 982, 983 (4th Dept. 2003)("It is not determinative that the prosecutor denied any contemporaneous actual knowledge of the eyewitness's criminal convictions"); People v. Santos, 306 A.D.2d 197, 198-99 (1st Dept.)("the complainant's history of assaultive behavior went to the very heart of this defendant's trial defense"), *aff'd*, 1 N.Y.3d 548 (2003); People v. Garrett, 106 A.D.3d 929, 931 (2d Dept. 2013)(records of pending federal civil lawsuit alleging interrogating officer's misconduct in another case), *lv. granted*; People v. Marzed, 161 Misc.2d 309, 317 (Crim. Ct., N.Y. Co. 1993)(officer previously lied under oath); People v. Rodriguez, 152 Misc.2d 328, 239-31 (Sup. Ct., Monroe Co. 1991) (prior conviction for a violation that was sealed but was known to prosecutor from District Attorney's Office's files); People v. Ramos, 132 Misc.2d 609, 613 (Sup. Ct., Kings Co. 1985)(prior chain snatching that "might well have altered the entire texture and focus of the case"); see also People v. Gissendanner, 48 N.Y.2d 543, 549 (1979)(citing cases involving various types of police misconduct, and deeming personnel file materials discoverable); see generally People v. Walker, 83 N.Y.2d 455, 461-63 (1994)("even where the proof falls outside the conventional category of immoral, vicious or criminal acts, it may be a proper subject for impeachment"); People v. Sorge, 301 N.Y. 198, 201 (1950) ("a witness may be examined properly with respect to criminal acts that have escaped prosecution").

i. Such prior conduct, misconduct, and criminal acts include, but are not limited to: (a.) acts of dishonesty, deception, fraud, aggression, violence, or any other immoral, vicious or unlawful acts, even if they occurred subsequent to the incident for which the defendant is charged, and regardless of whether they were the subject of state or federal proceedings or they escaped prosecution; (b.) any use of false identifying information in prior cases, including aliases, false dates of birth, etc.; (c.) any self-serving or unbelievable statements to law enforcement personnel in prior cases, including statements denying guilt in cases that later resulted in a conviction; (d.) disobedience of judges in prior cases, such as bench warrants or failure to honor agreements to perform court conditions like community service, etc.; (e.) information regarding any prison disciplinary rule infractions and misconduct; (f.) any misconduct relating to reporting of income or non-

payment of taxes; (g.) unlawful immigration status and any misconduct related thereto [see People v. Gonzalez, 193 Misc.2d 17, 19 (Sup. Ct., Bronx Co. 2002)]; (h.) participation in any unlawful gambling activities [see People v. Batista, 113 A.D.2d 890, 891-92 (2d Dept. 1985)]; (i.) filing of false police reports, or making of false statements in connection with administrative or other proceedings, etc. [see People v. Griffin, 242 A.D.2d 70, 74 (1st Dept. 1998)]; (j.) any civil lawsuit filed alleging the person's improper conduct [see People v. Daley, 9 A.D.3d 601, 602-03 (3rd Dept. 2004); People v. Jones, 193 A.D.2d 696, 697-98 (2d Dept. 1993)]; (k.) any prior or pending criminal charge against the person and the underlying facts [see C.P.L. §240.45(1)(c); People v. Daniels, 225 A.D.2d 632 (2d Dept. 1996)]; (l.) any prior criminal conviction and the underlying facts [see C.P.L. §60.40(1)]; (m.) any prior conviction of a non-criminal violation and the underlying facts [see People v. Suh, 27 Misc.3d 143(A)(App. Term, 9th & 10th Jud. Dists. 2010); People v. Rodriguez, 152 Misc.2d 328, 329 (Sup. Ct., Monroe Co. 1991)]; (n.) any prior Juvenile Delinquency or Youthful Offender adjudication and the underlying facts [see Davis v. Alaska, 415 U.S. 308, 319-20 (1974); People v. Gray, 84 N.Y.2d 709, 712 (1995)]; (o.) any proceeding resulting in an Adjournment in Contemplation of Dismissal, or other dismissal of a charge not on the merits, and the underlying facts [see People v. Wallace, 60 A.D.3d 1268, 1269 (4th Dept. 2009)] (p.) any probationary or other sentence imposed; (q.) any other information that tends to show an untruthful bent, or a tendency to place advancement of self-interest ahead of principle or of the interests of society; (r.) etc.

c. Information that tends to suggest a prosecution witness has a bias or motive to lie.

See, Banks v. Dretke, 540 U.S. 668, 691, 701 (2004)(paid informant status); U.S. v. Bagley, 473 U.S. 667, 683 (1985)(contingent possibility of a reward); U.S. v. Kohring, 637 F.3d 895, 904 (9th Cir. 2011)(police investigation of witness's possible sexual misconduct with a minor, which "would have shed light on the magnitude of [his] incentive to cooperate"); Robinson v. Mills, 592 F.3d 730, 738 (6th Cir. 2010)("close working relationship with local law enforcement personnel"); Matter of Sealed Case No. 99-3096 (*Brady* Obligations), 185 F.3d 887, 893-94 (D.C. Cir. 1999)(agreement that gave witness motive to plant evidence); Schledwitz v. U.S., 169 F.3d 1003, 1015 (6th Cir. 1999)(expert's extensive involvement in investigation against defendant); 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. Stein, 10 A.D.3d 406, 406-07 (2d Dept. 2004)(that complainants sought damages based on defendant's conduct); 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); see generally People v. Hudy, 73 N.Y.2d 40, 56 57 (1988) ("extrinsic proof tending to establish a reason to fabricate is never collateral"); Badr v. Hogan, 75 N.Y.2d 629, 635 (1990)("material facts in dispute, or matters such as a witness's bias, hostility, or impaired ability to perceive … may be proved independently for impeachment").

i. Among many others, one type of requested information that bears on a potential "reason to fabricate" *is any express or implied threat/accusation made to any witness or informant by law enforcement personnel* – such as a threat to arrest, prosecute, bring greater charges, or take any other adverse action against the person or a third party. Jurors may determine that such a threat or intimidating remark (even when it was not itself unlawful or false) provided a motive for the person to curry favor with the authorities, by making (or continuing to adhere to) false or exaggerated

accusations against the defendant, or relating to the incident in question. See, e.g., Simmons v. Beard, 590 F.3d 223, 235 (3rd Cir. 2009)("The information about the [detective's] threats against Pletcher was essential to explain why she might testify against Simmons even if he was not in fact guilty"); U.S. v. Scheer, 168 F.3d 445, 447-49, 456-58 (11th Cir. 1999)("in withholding information regarding the prosecutor's threatening remarks to a key prosecution witness, the government failed to divulge material impeachment evidence"); U.S. v. Sutton, 542 F.2d 1239, 1241-43 (4th Cir. 1976)("We perceive no difference between concealment of a promise of leniency and concealment of a threat to prosecute…. [W]e attempt no distinction between false or unlawful threats made up out of whole cloth for the purpose of intimidation and true threats that simply arise under the evidence and the law. Both go to the veracity of a witness…. [F]ailure to disclose [F.B.I. Agent] Smith's effort to induce (or coerce) Cannon's testimony was fundamentally unfair"); U.S. v. Cody, 722 F.2d 1052, 1062 (2nd Cir. 1983).

d. Information that tends to undercut the believability of the factual account of any prosecution witness.

Leka v. Portuondo, 257 F.3d 89, 106-07 (2nd Cir. 2001)(witness's observations of incident that differed from other witnesses' versions); U.S. v. Rivas, 377 F.3d 195, 198-99 (2nd Cir. 2004)(witness's statement during trial preparation meeting that he had carried package of contraband without knowing its contents); People v. Hunter, 11 N.Y.3d 1, 2, 5-7 (2008)(that complainant later accused another man of similar crime); People v. Davis, 81 N.Y.2d 281, 283-87 (1993)(that one of three men identified by complainant was registered in emergency room during general time period of crime); People v. Geaslen, 54 N.Y.2d 510, 515-16 (1981)(grand jury testimony that police officer was involved in the search, where hearing evidence did not mention him and described a "parolee consent" search); People v. Gissendanner, 48 N.Y.2d 543, 549 (1979)(citing cases involving types of prior police misconduct bearing "peculiar relevance to the circumstances of the defendant's case"); People v. Garcia, 46 A.D.3d 461, 462-64 (1st Dept. 2007)(that flight attendants did not remember complainant seeking help as she claimed); People v. Gantt, 13 A.D.3d 204, 205 (1st Dept. 2004), *aff'g, N.Y.L.J.* 1/29/2004, p. 19, col. 3 (Sup. Ct., N.Y. Co. 2004)(that

witness said he worked for another drug-dealer on another block during general time period of crime); People v. Santos, 306 A.D.2d 197, 198-99 (1st Dept.), *aff'd*, 1 N.Y.3d 548 (2003)(complainant's history of assaulting inmates, where the defense asserted he was the aggressor); People v. Lantigua, 228 A.D.2d 213, 219-21 (1st Dept. 1996)(that eyewitness was not alone when she made observations and was moving from place to place during shooting); People v. Roberts, 203 A.D.2d 600, 601-02 (2d Dept. 1994)(existence of witness who contradicted eyewitness's account by saying shooter left in car with second individual); People v. Ramos, 201 A.D.2d 78, 87-88 (1st Dept. 1994)(documents indicating child complainant's prior knowledge of sexual matters); People v. Clausell, 182 A.D.2d 132, 135-37 (2d Dept. 1992)(police report pertaining to uncharged drug sale that originally drew police attention to defendant and contained description of seller at odds with that related by arresting officer); People v. Janota, 181 A.D.2d 932, 934-35 (3rd Dept. 1992)(that complainant's friend said he did not remember seeing bruises, where she said he saw them); People v. Baba-Ali, 179 A.D.2d 725, 726-30 (2d Dept. 1992)(medical record saying "No external signs of abuse").

e. Information that tends to support a complete or mitigating defense to any charged offense, or that buttresses a potential defense version of pertinent facts.

See, Cone v. Bell, 129 S.Ct. 1769, 1784 (2009)(information supporting defense position that defendant habitually used excessive amounts of drugs and addiction affected his behavior); 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"); Kyles v. Whitley, 514 U.S. 419, 429-41 (1995)(information supporting defense position that defendant had been framed by informant who had planted evidence); Mahler v. Kaylo, 537 F.3d 494, 503-04 (5th Cir. 2008)(information suggesting victim had not intentionally turned away, but remained engaged in continuing struggle, when he was shot in back); U.S. v. Jernigan, 492 F.3d 1050, 1051-57 (9th Cir. 2007)(*en banc*)(similar bank robberies after defendant's arrest); DiSimone v. Phillips, 461 F.3d 181, 195 (2nd Cir. 2006) (information that another person's blow may have been cause of death); U.S. v. Rivas, 377 F.3d 195, 199 (2nd Cir. 2004)(information that another person carried package containing contraband); U.S. v. Gil, 297 F.3d 93, 102

(2nd Cir. 2002)(information that challenged "a background assumption" of prosecution's case); Leka v. Portuondo, 257 F.3d 89, 106-07 (2nd Cir. 2001)(witness's observations of incident that differed from other witnesses' versions); People v. Lackey, 48 A.D.3d 982, 983 (3rd Dept. 2008)(information that may have "changed the defense theory to a claim that the victim harmed herself"); People v. Hopper, 87 A.D.2d 193, 196 (2d Dept. 1982)(grand jury testimony of nontestifying witness implicating not only defendant, but also prosecution witness as accomplice, in stabbing); see also U.S. v. Agurs, 427 U.S. 97, 100-01, 114 (1976)(deceased's prior weapon possession convictions were favorable to justification defense but not material on facts); see generally Chambers v. Mississippi, 410 U.S. 284, 294-302 (1973); People v. Carroll, 95 N.Y.2d 375, 385-87 (2000)("Just as the People are allowed to rebut key assertions of the defense, the defendant also is allowed to attempt to disprove the People's theory and rebut their key assertions").

Information that tends to supports a theory of defense, or a defense factual version, includes but is not limited to: (a.) the existence of a potential defense witness; (b.) statements by participants in, and witnesses to, the incident or any relevant occurrence; (c.) hearsay information known to a witness or to law enforcement personnel; (d.) evidence gathered by, provided to, or known to but not gathered by, law enforcement personnel; (e.) documents, results, or information concerning scientific tests, experiments or comparisons, or physical or mental examinations; (f.) opinions or conclusions of a potential expert witness; (g.) information or evidence that may indicate the possible involuntariness or unreliability of a statement by the defendant or any alleged accomplice; (h.) information or evidence that may indicate the possible unreliability of any corporeal, non-corporeal, or voice identification evidence, or that relates to the inability of a witness to make an identification (or a fully confident identification) of the defendant or a perpetrator or suspect; (i.) information or evidence that may indicate that the defendant did not have dominion or control over, or knowledge of, any potentially incriminating evidence; (j.) information or evidence that may indicate the unreliability of a potential prosecution witness or informant and/or his or her statements; (k.) information or evidence that may support a non-incriminating interpretation of potential prosecution evidence, or that may indicate its unreliability or ambiguity or equivocal character, or that supports a challenge to its admissibility under the rules of evidence or constitutional or

statutory law; (l.) etc.

f. Information that could provide a basis for an alternative defense strategy or tends to support a defense theory or factual version different from that which has been announced or is being pursued.

See, Graves v. Dretke, 442 F.3d 334, 344 (5th Cir. 2006)("If the two statements had been revealed, the defense's approach could have been much different"); People v. Lackey, 48 A.D.3d 982, 983 (3rd Dept. 2008)("might well have altered the focus of the entire case and changed the defense theory"); People v. Smith, 127 A.D.2d 864, 866 (2d Dept. 1987)("defendant was deprived of the opportunity to make an informed decision regarding the trial strategy that would have been in his best interests"); People v. Jackson, 168 Misc.2d 182, 185-86 (Sup. Ct., Bronx Co. 1995) ("Evidence that the defendant is entitled to … includes evidence which would bear on trial strategy"), ***aff'd***, 264 A.D.2d 683 (1st Dept. 1999); People v. Waters, 35 Misc.3d 855, 857-58 (Sup. Ct., Bronx Co. 2012); see also Leka v. Portuondo, 257 F.3d 89, 103 & n.6 (2nd Cir. 2001) ("The district court ruled that [the non-disclosed] information … was not material because … it would have weakened the defense by calling into doubt testimony on which the defense relied…. There is nothing in this that ordinary trial preparation could not have cured if the defense had had an opportunity to prepare its case with Garcia's account in mind"); People v. Vilardi, 76 N.Y.2d 67, 78 (1990)("It is the reasonable possibility that the undisclosed evidence might have led to a trial strategy that resulted in a different outcome … that requires reversal"); see, e.g., Kyles v. Whitley, 514 U.S. 419, 445-47 (1995) ("Beanie's various statements would have raised opportunities to attack … the thoroughness and even the good faith of the investigation"); DiSimone v. Phillips, 461 F.3d 181, 195-97 (2nd Cir. 2006); U.S. v. Gil, 297 F.3d 93, 104 (2nd Cir. 2002); People v. Wright, 86 N.Y.2d 591, 596-98 (1995); People v. Davis, 81 N.Y.2d 281, 283-87 (1993); People v. Robinson, 133 A.D.2d 859 (2d Dept. 1987); People v. Hopper, 87 A.D.2d 193, 196 (2d Dept. 1982).

Potential complete or mitigating theories of defense about which materials are requested include, but are not limited to: (a.) misidentification; (b.) alibi; (c.) justification [see P.L. Article 35]; (d.) mistake of fact [see P.L. §15.20(1); People v. Gudz, 18 A.D3d 11 (3rd Dept. 2005)]; (e.) the agency defense to a

drug charge [see People v. Andujas, 79 N.Y.2d 113 (1992); People v. Lam Lek Chong, 45 N.Y.2d 64 (1978)]; (f.) possibly deficient, or insufficient, proof of the required *mens rea* or of any other element of a charged offense [see In re Winship, 397 U.S. 358 (1970)]; (g.) intoxication [see P.L. §15.25; see People v. Rodriguez, 76 N.Y.2d 918 (1990)]; (h.) diminished capacity [see People v. Segal, 54 N.Y.2d 58 (1981)]; and (i.) affirmative defenses including duress [see P.L. §40.00], entrapment [see P.L. §40.05], renunciation [see P.L. §40.10], "not responsible by reason of mental disease or defect" [see P.L. §40.15], and any other potentially applicable statutory affirmative defense.

Where a charged offense involves any use of force, one type of requested materials – among others – is information or evidence that could help to support any justification defense theory. This request includes, but is not limited to, any materials that potentially buttress a view that the defendant's conduct may have been justified under these settled rules: (a.) there are multiple *distinct theories* of justification (*e.g.,* regular/deadly force; force against the possible commission of certain types of crimes, such as attempted burglary; etc.) and *more than one* such theory may apply [see P.L. §§35.15, 35.20, 35.25, etc.; People v. Deis, 97 N.Y.2d 717 (2002)]; (b.) the defense can apply to *any type* of crime involving a use of force, regardless of the *mens rea*, etc. [see People v. McManus, 67 N.Y.2d 541 (1986); People v. Padgett, 60 N.Y.2d 142 (1983)]; (c.) the defense can apply even where the defendant has denied using force or described a contrary scenario, including *accidental* use of force, etc. [see People v. Steele, 26 N.Y.2d 526 (1970); People v. Magliato, 68 N.Y.2d 24 (1986); People v. Smith, 62 A.D.3d 411 (1st Dept. 2009); People v. Collier, 303 A.D.2d 1008 (4th Dept. 2003)]; (d.) the subjective-objective "reasonable belief" standard is assessed from the perspective of a reasonable person *having defendant's own background and experiences* [see People v. Goetz, 68 N.Y.2d 96 (1986)]; (e.) evidence of the *victim's recent alcohol or drug use is* relevant when there is an indication of aberrant behavior consistent with its use, even when the defendant was unaware of its use [see People v. Chevalier, 89 N.Y.2d 1050 (1997)]; (f.) the victim's prior *threats against the defendant* are relevant, even when the defendant was unaware of them [see People v. Petty, 7 N.Y.3d 277 (2006)]; (g.) a defendant who obtains control of an assailant's weapon can be justified in using it even *after the other person has been disarmed* [e.g., People v. Huntley, 59

N.Y.2d 868 (1983); People v. Douglas, 29 A.D.3d 47 (1st Dept. 2006); People v. Badillo, 218 A.D.2d 811 (2d Dept. 1995)]; (h.) use of deadly force can be justified even against assailants who were *unarmed* [e.g., Matter of Y.K., 87 N.Y.2d 430 (1996); People v. White, 16 A.D.3d 440 (2d Dept. 2005); People v. Morgan, 99 A.D.3d 622 (1st Dept. 2012); People v. Feuer, 11 A.D.3d 633 (2d Dept. 2004); People v. Arzu, 7 A.D.3d 458 (1st Dept. 2004)]; (i.) mere use of abusive/insulting language does not suffice to make one an "initial aggressor" [see People v. Gordon, 223 A.D.2d 372 (1st Dept. 1996)]; (j.) the duty to retreat before using deadly force applies only where the defendant had *actual subjective knowledge* that retreat with "*complete* safety" was available [see People v. Soriano, 36 A.D.3d 527 (1st Dept. 2007)]; (k.) the duty to retreat arises only "at the point at which deadly physical force was *used or imminent*," not at the time the defendant first confronted the victim [see Matter of Y.K., 87 N.Y.2d 430 (1996); Davis v. Strack, 270 F.3d 111 (2nd Cir. 2001)]; (l.) whether the rules for regular or deadly force apply depends on the nature of the attack, and not its result [see People v. Bradley, 297 A.D.2d 640 (2d Dept. 2002)(only view of regular force, where punch fractured orbital bone)]; (m.) where there is evidence of both justified and unjustified/excessive force, the defendant is liable only for a crime the *unjustified* force establishes [see People v. Carrera, 282 A.D.2d 614 (2d Dept. 2001)]; (n.) etc.

g. Information that tends to undercut a potential theory of the defendant's motive for committing the crime or suggests an absence of any motive.

See, Mendez v. Artuz, 303 F.3d 411, 412-14 (2nd Cir. 2002) ("The suppressed information would have allowed Mendez to challenge the state's motive theory…. Suppressed information is exculpatory and thus 'favorable' to the defense for *Brady* purposes when it directly contradicts the motive theory testified to by prosecution witnesses"); Benn v. Lambert, 283 F.3d 1040, 1062 (9th Cir. 2002)("Evidence that the fire in Benn's trailer was *not* caused by arson and had been determined by fire officials to be accidental would have substantially undermined the state's principal theory of motive"); see generally People v. Lewis, 275 N.Y. 33, 42 (1937)(absence-of-motive evidence is "a powerful circumstance in the exculpation of the defendant"); People v. Sangamino, 258 N.Y. 85, 88 (1932)("The question of motive or lack of motive is always a question for the serious

consideration of a jury").

h. Information that could provide a basis for the defense to argue at trial – in a so-called "*Kyles* challenge" – that law enforcement personnel's investigation of known and potentially exculpatory physical evidence or witnesses, or a known possible alternative suspect, was not thorough, not probing, or not reliable.

It is settled that this category of information is favorable to the accused – and hence discoverable as *Brady/Kyles/Vilardi* and Rule 3.8(b) material –because, in Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court ruled that when law enforcement personnel have decided not to fully investigate potentially important evidence or witnesses, or leads regarding a possible alternative suspect, those decisions *in themselves* can affect the jury's assessment of the strength of the prosecution's case and contribute to a finding of a reasonable doubt about the defendant's guilt. Thus, the defendant has the right to learn about, and to inform the jury at trial of the existence of, the underlying information that the police/prosecution decided not to more thoroughly investigate. Specifically, the information may be employed on cross-examination of a police witness for the *non-hearsay purpose* of showing that the officer knew about it, and yet the authorities chose not to perform the available and potentially probative further investigative measure(s). The police witness may then, of course, respond to such questioning by explaining *why* the authorities chose not to investigate the matter further. See Kyles, 514 U.S. at 446-47 & n.15.

For example, information that may be favorable to the accused because it could *provide the basis for a so-called "Kyles challenge" to the adequacy and reliability of the authorities' investigation* into a key factual issue includes, but is not limited to: (a.) statements, or other investigative leads, that may suggest a possible alternative suspect; (b.) potentially significant physical evidence that was not submitted for available and possibly probative scientific testing; (c.) an available and potentially knowledgeable witness whom the police knew about but did not thoroughly interview; (d.) etc.

Many significant cases have applied these rules. See, e.g., Kyles, 514 U.S. at 446-47 & n.15 (1995) ("the defense could have examined the police to good effect on their knowledge

of [the nontestifying informant] Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt…. By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence"); Mendez v. Artuz, 303 F.3d 411, 416 (2nd Cir. 2002) ("Presented with detailed information about a contract murder plot and no indication that Mendez was involved or even associated with the participants, the police essentially did nothing…. The absence of any credible investigation could have allowed Mendez to present a strong challenge to the thoroughness and reliability of the police work"); U.S. v. Howell, 231 F.3d 615, 625 (9th Cir. 2000); People v. Lumpkins, 141 Misc.2d 581, 590 (Sup. Ct., Kings Co. 1988); Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 314-16 (Mass. 2009); Workman v. Commonwealth, 636 S.E.2d 368, 376 (Va. 2006); State v. DelReal, 593 N.W.2d 461, 465-66 (Wis.App. 1999); see generally People v. Hayes, 17 N.Y.3d 46, 52-53 (2011)("Challenging the adequacy of a police investigation may constitute a permissible nonhearsay purpose"); People v. Williams, 5 N.Y.3d 732, 734-35 (2005)(the defense may highlight gaps in the police investigation, such as the failure to photograph the perpetrator's distinctive hat); People v. Retamozzo, 25 A.D.3d 73, 76 (1st Dept. 2005)(same for the failure to employ a kel recording device).

It is irrelevant to a "*Kyles* challenge" – and, thus, to the discoverability of the underlying information that could support it – that the *results* of the non-performed investigation and/or scientific testing are unknown, and that perhaps they might have inculpated the defendant or been inconclusive. Likewise, it is irrelevant that the police/prosecution were not under an official *duty* to perform such an investigation. Those same things could be said about the non-investigated information that was at issue in *Kyles* itself. Such contentions miss the point of a "*Kyles* challenge" – that an arguably incomplete or unreliable police investigation of potentially important information or evidence is significant in *itself*, because it is a factor that bears on whether the prosecution has introduced enough convincing evidence to satisfy its burden of proving the defendant guilty. The defense may argue, and the jury is entitled to conclude, that reasonable doubt exists in part because the authorities did not perform certain investigations or tests, even where it is *uncertain* what those additional

> investigative inquiries would have shown and the police were not *duty-bound* to undertake them.

There is a strong presumption that all materials requested in this letter should be turned over. See People v. Vilardi, 76 NY2d 67, 74 (1990) ("the prosecution's failure to *turn over* specifically requested evidence … [is] seldom, if ever, excusable"); see also Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be"); U.S. v. Agurs, 427 U.S. 97, 108 (1976)("the prudent prosecutor will resolve doubtful questions in favor of disclosure"); People v. Contreras, 12 N.Y.3d 268, 272 (2009)("Prosecutors and trial judges invite trouble when they push the rules of disclosure to their limit"); People v. Ennis, 11 N.Y.3d 403, 414 (2008)(declaring that failure to disclose *non-material* favorable information "cannot be condoned"); Rule of Professional Conduct 3.8(b).

We strongly underscore the importance of your providing *early* disclosure of information that is favorable to the accused in this case, so that we can undertake the necessary reasonable investigation of those materials. See People v. Santorelli, 95 N.Y.2d 412, 421 (2000)("A prosecutor must … *promptly disclose* any such material evidence to the defendant")(emphasis added); People v. Sinha, 84 A.D.3d 35, 43 (1st Dept. 2011)("tardy disclosure" was "inexcusable"), ***aff'd***, 19 N.Y.3d 932 (2012); People v. Roberts, 203 A.D.2d 600, 602 (2d Dept. 1994)("it must be turned over to the defendant in time for it to be used effectively"); Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001)("The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought"); see also C.P.L. §240.80(3)(mandating disclosure "within fifteen days of the service of the [defendant's] demand or as soon thereafter as practicable" of all *Brady/Kyles/Vilardi* materials discoverable pursuant to C.P.L. §240.20[1][h]); Rule of Professional Conduct 3.8(b)("A prosecutor … shall make *timely disclosure* … of the existence of evidence or information known to the prosecutor … that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence….").

Submitted by,

[redacted]
Monroe County Public Defender's Office
10 N. Fitzhugh St
Rochester, New York 14614
Phone: (585) 753–4904
Email: [redacted]

[redacted] Honorable C C, Monroe County Court Judge