

DISCOVERY

WHAT YOU MUST PRESERVE
AND
TURN OVER TO ENSURE
FAIRNESS

What do D.A.s need
in order to make
the case stick?

QUESTION:

What should you (the cop) tell/ give me (the ADA)?

ANSWER:

EVERYTHING!!

REASON

- When you give it to the ADA, it **STOPS** being your headache.

SOLUTION

- Give the ADA everything.
- Let the ADA figure out what to do with information.
- Let the ADA decide when to turn over the information to the defense.
- That is what the ADA is trained to do.

WHAT HAS TO BE TURNED OVER?

- ◎ Brady Material
- ◎ Rosario Material
- ◎ Statutory Discovery

BRADY MATERIAL

- ⦿ Material that exculpates the suspect
 - He didn't do it.
 - Someone else did it.
- ⦿ Material that is favorable to the suspect, but **may not** exculpate.
 - Flaws in the case.

BRADY MATERIAL

- ⦿ Anything good for the suspect!
- ⦿ Anything that suggests the suspect did not commit the crime.
- ⦿ Anything that reduces the suspect's culpability.
- ⦿ Anything that reduces a prosecution witness's credibility.

EXAMPLES

◎ Direct Evidence

- Such as a witness statement exculpating the suspect.

◎ Impeachment Evidence

- Such as a witness's prior criminal record.

EXAMPLES

- ◉ Misidentifications
- ◉ Non-identifications
- ◉ Witness Statements
 - He didn't do it!
 - He wasn't there!
 - He wasn't the shooter!
 - I wasn't there!
 - I wasn't looking!
 - I didn't see anything!

EXAMPLES – Direct Evidence

- Pre-trial witness Statements
 - Truth-on-the-installment plan
 - Multiple versions of a story
 - Inconsistencies
 - Lies

RED FLAGS

- Good to stop and consider
- Don't get caught in one theory of the case



EXAMPLES

- ◉ Things you do to gain cooperation and trust from a witness.
- ◉ Payments to the witness
- ◉ Payments to the witness's family
- ◉ Consideration for a witness' pending case – lower bail, delay arrest.
- ◉ Promises made to the witness or the witness' family
- ◉ Relocation
- ◉ Jobs

EXAMPLES

- Impeachment Evidence for witness:
 - Prior Drug Use
 - Criminal Record
 - Prior Arrests
 - Uncharged Crimes – Stuff He Got Away With
 - ACS Complaints
 - Alcohol, Psychiatric Issues

EXAMPLES

Cross of People's Witness

- ◎ Stop and consider:
- ◎ Is the witness believable?
- ◎ Is there any corroboration?



EXAMPLES

- Impeachment Evidence for police officers:
- Civil Rights Law § 50-a generally protects disclosure of police personnel materials.
BUT,
- Where defendant can show relevance – disciplinary or complaint proceedings must be turned over.
- Ticket fixing scandal in NYC

WRITTEN OR ORAL

- No difference for oral or written impeachment material
- Both must be turned over

CONSEQUENCES

Question: Is a conviction safe, if you (the cop) don't tell me (the ADA) about the existence of this material and it is never made available to the defendant?

Answer: NO!

Question: What if it wasn't turned over because of an honest mistake?

Answer: It doesn't matter. The police and the ADA will be held responsible

US Supreme Court holds:



- If you know about something that is Brady material
- Then it must be turned over, even if the ADA doesn't know about it.

US Supreme Court holds:

- If you don't tell me, **and**
- I didn't know about it, **and**
- I didn't turn it over to the defendant, **then**
- The conviction gets REVERSED!
AND
- A dangerous guilty person could go free.

EXAMPLE

- ◉ **Facts:** Police never told prosecutor that a trial witness, who claimed to have seen the murder, initially said that she was not there.
- ◉ **Result:** Murder conviction reversed, defendant gets a new trial.

People v. Bond, 95 NY2d 840 (2000)

EXAMPLE

- **Facts:** Police never told prosecutor that assault victim was a police informant on other matters.
- **Result:** Reversed. Why? Police were more likely to support the victims' version because of the prior relationship and jury should have known.
- *People v. Wright, 86 NY2d 591 (1995)*

EXAMPLE

- **Facts:** Police Department's Internal Affairs reports were not turned over, although they "were significantly at variance with the prosecution's evidence at trial" and "favorable to the accused."
- **Result:** Conviction Reversed. Why? Knowledge by some is knowledge by all!

People v. Jackson, 237 AD2d 179 [1st Dept. 1997]

EXAMPLE

- ◉ **Facts:** Police fail to preserve surveillance photos or audiotapes of drug deal between undercover and perpetrator.
- ◉ **Result:** Conviction reversed because failure to preserve led to loss of “potentially” exculpatory evidence.

EXAMPLE

- **Facts:** Big case, many detectives. Reports from non-testifying detectives that contain favorable defense material was not turned over to the prosecutor or defense.
- **Result:** Big case is in big trouble.

LESSONS LEARNED

- ⊙ Failure to preserve things you should keep fuels defense speculation that exculpatory material exists when it doesn't.
- ⊙ The courts, defense and juries can speculate
 - That paperwork was harmful to your case
 - That you destroyed it on purpose.
- ⊙ Conviction reversed, defendant goes free!

LESSONS LEARNED

- ◉ If you are the case detective, don't just get your own paper work... get everyone else's who worked on that case.
- ◉ We are in this together.
- ◉ We are responsible for each others decisions.

CONSEQUENCES

- ⦿ Conviction reversed or reduced
- ⦿ New trial ordered
- ⦿ Indictment dismissed
- ⦿ Proceedings delayed
- ⦿ Civil liability to municipality, police department and/or police officer

CONSEQUENCES

- ◉ Guilty defendant may go free after reversal or new trial
- ◉ Innocent person may have been convicted
- ◉ The real perpetrator is still at large committing more crimes!
- ◉ Personal and professional issues.

ROSARIO MATERIAL

- Any written or recorded statement of a witness who is going to testify at trial where the statement:
 - relates to the subject matter of the testimony.
 - Is in the possession of the police or the prosecutor

ROSARIO EXAMPLES

- Video recordings
- Audio recordings
- 911 call
- Police report
- Memo book entry
- Scratch complaint report
- Detective notes
- Emails and texts by a witness

ROSARIO EXAMPLES

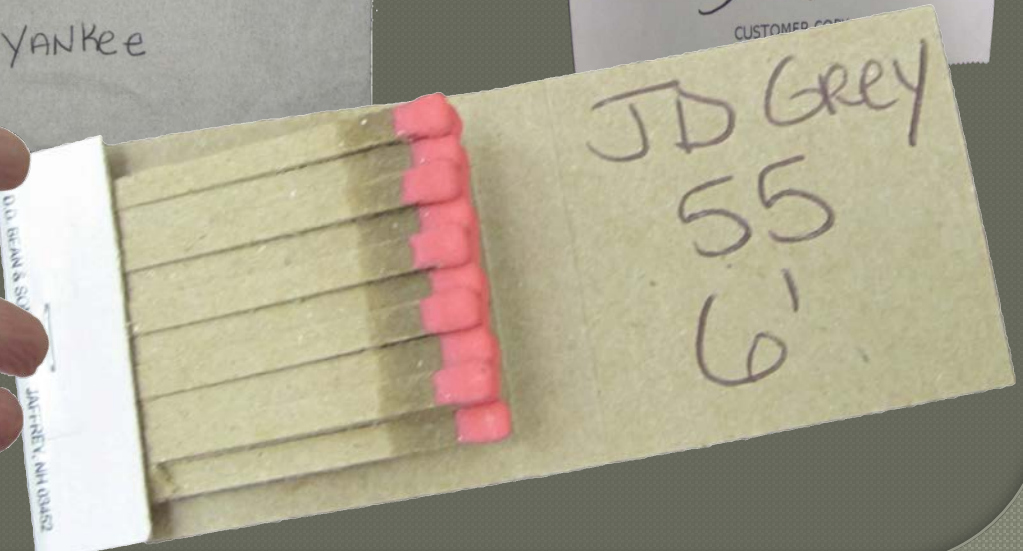
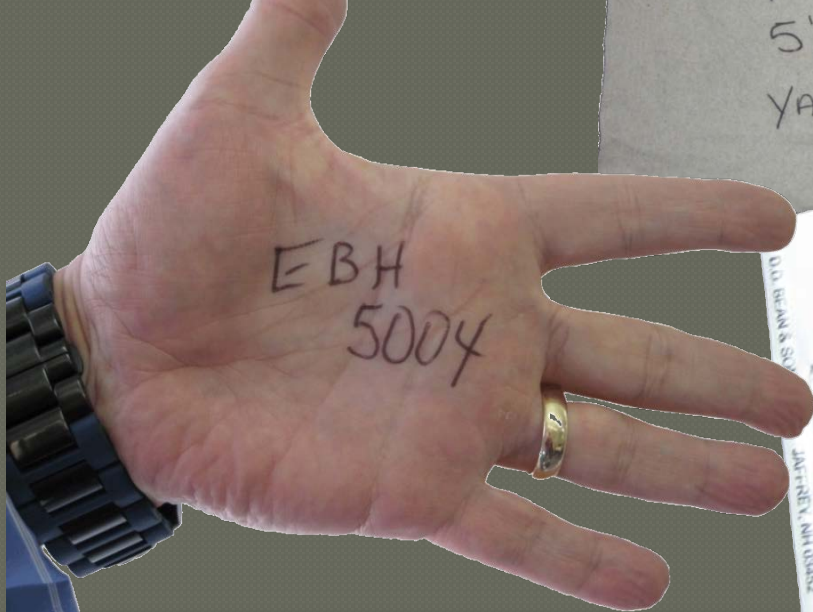
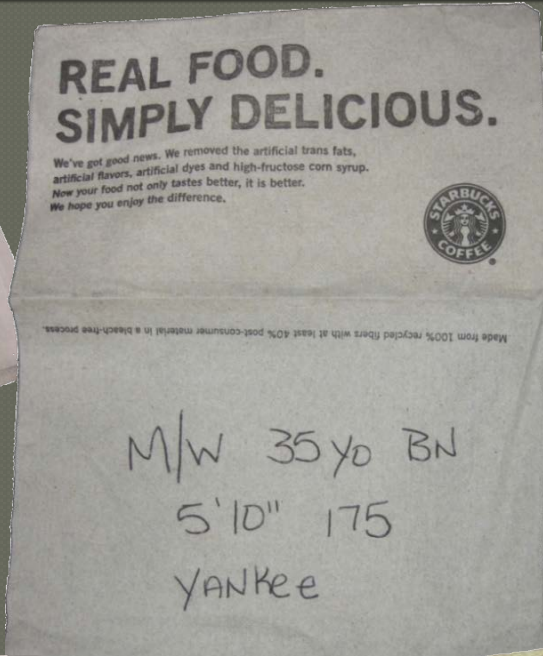
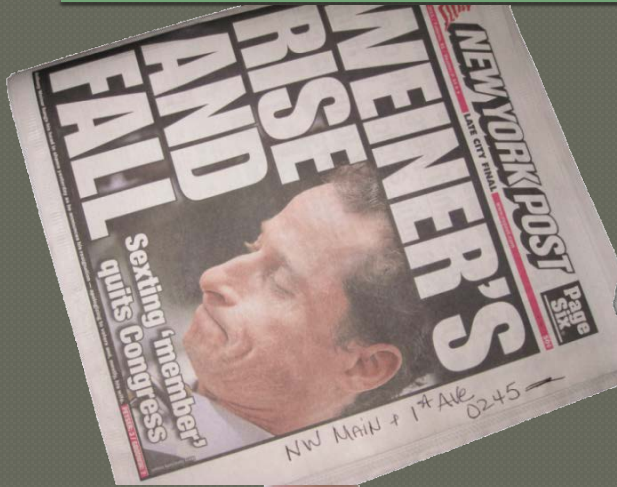
- Affidavit for search warrant
- SW return
- Affidavit for eavesdropping warrant
- Vouchers
- Transmittals
- Aided cards
- Every statement of every witness – police officers included

WRITTEN AND RECORDED

- Every pen stroke, key stroke or text message

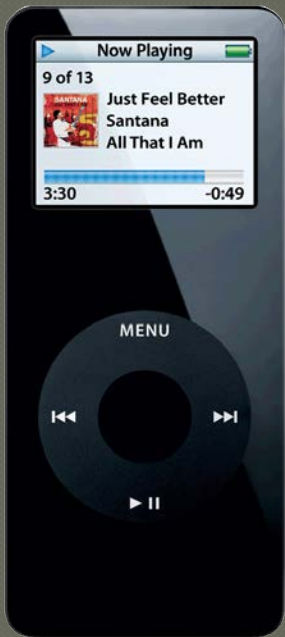


WRITTEN AND RECORDED



WRITTEN AND RECORDED

- Recorded statements: MP3 player, video recording, audio recording



STATUTORY DISCOVERY



STATUTORY DISCOVERY

- All the material that the defense must be provided before trial
 - Evidence
 - Defendant and co-defendant's statements
 - Photo spread
 - Lineup photo
 - Property recovered from perpetrator

STATUTORY DISCOVERY

- ◉ Defendant's statements - recorded, written or oral.
 - ◉ Miranda or no Miranda
- ◉ Give to prosecutor immediately
- ◉ CPL § 710.30 says we have to provide them to the defense within 15 days of arraignment or we can't use them

STATUTORY DISCOVERY

- ◉ Tapes and transcripts
- ◉ Surveillance recording of sale
- ◉ Audiotape recordings with U/C or CI
- ◉ Recordings on iPod, MP3 or personal phone
- ◉ Crime scene photos

HELPFUL DOCUMENTS

- Anything the defendant signed or filled out:
 - DMV applications,
 - Employment records,
 - Unemployment records,
 - School applications/records,
 - Loans, financial records,
 - Telephone contracts.

TEXTING

- Emails/Texting – probably saved



TEXTING

- ① Emails and texts to friends, family, prosecutors and witnesses
- ① May be discoverable

INTERNET

- ◉ Be careful of personal use of social media/blogs/YouTube
- ◉ Defense attorney will check



TIMING

- Obligations to turn over documents can start early
- Plan Ahead:
 - Save all e-mails and texts.
 - Prepare to have records copied.
 - Documents translated.

LESSONS LEARNED

- ⦿ Don't wait to give the ADA the evidence!
- ⦿ Let the prosecutor take care of it
- ⦿ The sooner you give it to the prosecutor, the sooner it can be evaluated and potentially hurt your case.

**Thank You
and
Good Luck**