Conviction Integrity Conference, NYU, 12/6/11

I am most grateful for this opportunity to discuss with you how all of us who play a role in the criminal justice system can work together to enhance the integrity of our convictions, and I applaud NYU's Center on the Administration of Criminal Justice for creating a forum in which we can have this dialogue. To me, conviction integrity has two key components: reducing the risk of convicting an innocent person in the first instance – an objective which has the additional advantage of strengthening the cases that we prosecute and bring to trial – and addressing claims of actual innocence that are raised years, even decades, after a conviction is secured. While I want to share with you my office's Conviction Integrity Program, I do not suggest that our approach will be exactly right for every prosecutor's office. Our Conviction Integrity Program evolved within the context of a unique office with long and proud traditions, in a city that faces a lot of violent crime, and in large part our efforts are grounded in our unique office ethic and the challenges of urban law enforcement. But I hope that in discussing our program, I can underscore some of the fundamental issues that must be addressed whenever an office seeks, in an institutional way, to address the challenges posed by the recent history of DNA exonerations and social science research which has led all of us to think twice about the evidence on which we build many of our cases.

Our story goes back a long way. When I joined the office as an assistant district attorney in 1982, part of the office legend was the famous Wyllie-Hoffert murder case, prosecuted by District Attorney Frank Hogan in 1963. That case, one of the most notorious of its time, involved the brutal murder of two young professional women. The crime went unsolved for months, until the police arrested a man who gave a detailed confession to the crime. But Frank Hogan and one of his chief assistants, Mel Glass, began to doubt the accuracy of that confession. They launched a far-reaching re-investigation of the case, an investigation that eventually led to the defendant's exoneration. When I began in the DA's Office, young attorneys were told that the Wyllie-Hoffert exoneration represented the highest traditions of the office; and, in fact, even before we joined the office, we were told in the office's recruiting materials and throughout the interview process that the job of an assistant district attorney was not simply to seek convictions, but to seek justice.

And so, when I returned to the office as District Attorney in January 2010 with a promise to build a new conviction integrity program, quite understandably the initial response by many of the most senior lawyers in my office was that I was trying to fix something that wasn't broke. And thus my first challenge was to build a Conviction Integrity Program that re-affirmed the traditions of my office, rather than seeming to question or undermine them.

Our goal was two-fold: first -- what we sometimes call the "front end" of the program -- to put into place procedures at every stage of the investigative and prosecutorial process which ensure that we are prosecuting the right person. Our second goal – what we sometimes call the "back end of the program" – was to institute a formal process to review all post-conviction claims of innocence that come into our Office.

We started to develop the "front end" of our program with the appointment of a senior assistant district attorney, Bonnie Sard, who is here today, as Chief of the Conviction Integrity Program. Bonnie assembled panels of our most seasoned and respected attorneys, who put together detailed procedures and protocols designed to bring to bear our most thoughtful practices in the investigation and prosecution of every case.

These front end measures have included the use of checklists, which assist ADAs in recognizing and confronting problematic issues early on, and ensure that our disclosure obligations are fully satisfied. Another goal is to improve communication between the Office and police witnesses.

These checklists help us to gather information that shapes our investigation and charging decision. For example, the "Identification Case checklist" forces Assistants to make sure as many investigative steps as possible have been taken to memorialize the initial description of the perpetrator, to investigate the circumstances of any out-of court identification, and to assemble any independent evidence which might tend to corroborate or contradict the eyewitness identification. Once those facts are assembled, we can recognize our problems sooner – for example, if we learn that the defendant's MetroCard was swiped in Brooklyn at the time of the crime in Manhattan, we have an issue. And by the same token, adherence to best practices contained in the checklist makes our cases stronger – if the defendant's cell phone was pinging off a tower next to the crime scene, that is powerful corroborative evidence of guilt.

A Cooperator Checklist is designed to provide detailed information about a prospective cooperator, including background, case-related knowledge, and likely motivation. This must be filled out for the trial division chief before any cooperator or informant is signed up. The checklist focuses the assistant on the possible motivations for the informant's cooperation, and encourages the assistant to think critically about whether the information provided is trustworthy. Again, our goal is to anticipate those issues that might lead to wrongful convictions, while strengthening those cases that we bring to trial.

We also have a case-write-up questionnaire which is designed to help Assistants to better communicate with police officers during the case screening process, and to improve the accuracy of datasheets, criminal court complaints, search warrants, and other arrest-related paperwork.

Finally, the Brady/Giglio list is designed to remind Assistants of the type of information that must be identified and disclosed to defense counsel. Most bureau supervisors review the checklist with ADAs at a fixed point in the life of the case, for example, when the case is adjourned for trial.

This front-end of our Conviction Integrity Program is not limited to checklists and paperwork. We have added a "conviction integrity" component to each of our major training sessions. So young assistants receiving training on grand jury practice , or the handling of domestic violence cases, for example, will be trained on ethical issues relating to those practice areas. We are also developing case studies for use in our

training programs. We have found that a close examination of cases in which a conviction was vacated is the most effective means of persuading our lawyers that we can – and do – make mistakes, despite the most diligent and professional work by our prosecutors. We also can learn critical lessons about how and why those mistakes occur. Another practice we have established is to hold "roundtables" for major cases. Prior to presenting these cases to the Grand Jury, homicides and other major cases are presented to a small group of senior ADAs, who thoroughly vet the facts and investigative steps in the case.

Yet another front-end aspect of our conviction integrity program relates to information from the police. As prosecutors, we have an obligation to make sure that when we write up new cases, and when we prepare officers for testimony, that we communicate with them in a way that ensures that their paperwork and testimony are accurate and do not present credibility issues. And so, as part of our Conviction Integrity Program, a specific group of senior ADAs reviews all circumstances in which the credibility of a police officer is called into question. The goal of this group is to ensure compliance with discovery obligations, and protect the integrity of the system. This group meets with the CIP Chief monthly to ensure uniform handling of such matters that relate to the credibility of police officers. Every judicial adverse credibility finding is investigated to determine whether disclosure is warranted when the officer testifies in the future.

Have these new procedures – the checklists and the panels and the training – have they worked? Frankly, one of the issues we have struggled with is how to find a metric to answer such questions. For now, let me say my answer is cautiously positive. To start, just the process of constructing the lists and the other new procedures led to some extraordinarily valuable internal policy discussions. And it's not hard to see why.

Sometimes, in addressing the conviction integrity issue, good government groups and commentators will say that the objective is to eliminate all false convictions. And indeed that is a central goal in our program -- but we are mindful that it is not our only goal. We have an equally solemn responsibility to apprehend and convict the guilty. That is not just a truism. In recent years, literally every form of evidence has been called into question by academics: not just eyewitness identifications and confessions and informant testimony, but forensics like fingerprints and toxicologies -- and even DNA technology itself -- have been subject to broadside challenges in some circles. I do not need to tell you that at some point, a conscientious prosecutor faces the critical challenge of deciding when, in a real case in an imperfect world, the evidence is sufficiently reliable to proceed with a prosecution. And the discussions that Bonnie Sard has led with our most senior attorneys has helped us to clarify our decision-making process in the context of specific kinds of cases, and, as we shall see, in the context of re-investigating individual cases after conviction.

And what, ultimately, is our yardstick? As many of you are aware from my statement in moving to dismiss the DSK indictment, ultimately we believe we should not proceed to trial unless we are convinced beyond a reasonable doubt of the defendant's guilt. Again, this is not a truism. It is a perfectly reasonable position, for example, for a prosecutor to

say, “I will not substitute my judgment for that of the jury; if there is sufficient evidence to bring a case to trial, I will do so, and let the jury decide.” And indeed, there may be classes of cases, such as obscenity prosecutions or police brutality allegations, where the law has placed so much emphasis on local community standards that, in an especially close case, there may be no alternative other than to present a particular case to a jury.

But in general, I do not believe we can ask a jury to convict if we would not do so ourselves.

A more complex issue arises when we examine a case in which a jury has already convicted – what we call the “back end” of our program. These are claims of actual innocence received from defendants who have already been convicted. Once again, in devising a process to address this issue, we considered several different possible approaches.

One option was simply to send the claim of innocence to the original trial assistant and ask him or her to investigate. At the other extreme, some suggested that prosecutors’ offices should have a specialized bureau that does nothing but investigate claims of innocence. We have chosen an intermediate approach, which I will first describe, and then I will tell you why I feel this approach is the right one for my office.

When we receive a post-conviction claim of actual innocence – whether in the form of a post-conviction motion to vacate, or in the form of a simple letter from a defendant or an attorney – it goes directly to our Conviction Integrity Unit. There, it is logged in and tracked, to make sure that it receives timely and thorough consideration.

In most instances, Bonnie Sard consults with the original attorney as part of the initial review of the case. If Bonnie is satisfied that there has been no miscarriage of justice, she will forward that conclusion to me, along with her recommendation that no further action be taken.

All cases which are reinvestigated are reassigned to another ADA. (This, of course, includes any claim which draws into question the actions of the original assistant.) This re-assignment carries with it absolutely no assumption that the original assistant committed any impropriety whatsoever. The new assistant will then re-investigate the case, and report back to the Chief of the Conviction Integrity Program -- and ultimately to me -- with his or her conclusions and recommendations.

When we first instituted our Conviction Integrity Program, it was this component that gave us the most concern. We worried, first, that some assistants might chafe at the prospect of their colleagues looking over their shoulders, to investigate claims of impropriety and innocence that, frankly, in most instances, prove to be simply frivolous. But we worried, too, about whether an assistant would feel inhibited in launching a full re-investigation of the work of someone who may be a longtime friend and trusted colleague.

In this regard, I can say our results have been unequivocal: the system we have devised works. I have been tremendously impressed by the thoroughness and objectivity of the reinvestigations my assistants have conducted, and by the professionalism of the trial assistants whose work has been scrutinized. In this sense, I believe we truly have tapped into the very best values and traditions of the office I inherited.

What I have outlined for you are the procedures we follow in reinvestigating a case. But how ultimately do we make the decision whether or not to vacate a conviction that has been challenged? First, let me offer this fact, which may come as a surprise to you, as it did to us: There has not to date been presented to our Conviction Integrity Program even a single case in which DNA evidence has exonerated or inculpated a defendant. And so, we face the task of reconstructing cases that took place years ago and then deciding – after sifting through all the evidence we have uncovered, no single piece of which is dispositive -- whether to set aside a jury verdict or guilty plea in a serious crime.

What is our yardstick in these cases? We consider several factors. First, after much internal debate, we have concluded that, while the existence of a guilty plea is an important factor to take into consideration in evaluating a claim of actual innocence, it will not foreclose re-investigation if there is a plausible explanation of why the defendant pled guilty.

That leads us to the question of what weight to accord to a jury verdict of guilty. I do not pretend that we have devised a simple formula in this regard. I will say this: if in reviewing a case, we are looking at the same evidence the jury saw, and if the trial seems to us to have been conducted in a fair and competent manner, we would be strongly disinclined to vacate a jury verdict of guilty -- even if we feel, in hindsight, that we might have reached a different verdict. But on the other hand, if we now have evidence the jury did not know, or if there was some procedural defect in the trial that prevented the jury from evaluating the evidence fairly, then we would be more inclined to substitute our view of the case for that of the trial jury. But in each instance, the question is the same, and remins central: do we believe, or at least strongly suspect, that the defendant is actually innocent?

In the year and a half that our program has been in operation, we have had a number of cases which seemed to us to merit especially careful re-investigation and reconsideration. Of those cases, after re-investigation, we decided to vacate one conviction, and that case now awaits re-trial. In two other instances, our investigations convinced us that the original convictions were sound, and in both instances we were successful in convincing a judge to deny a post-judgment motion by the defense. Other cases are still under review.

That is a brief snapshot of our Conviction Integrity Program. If it sounds like a work in progress, that's because it is. When we first conceived of the program, we put in place an outside panel of advisors that includes a former Court of Appeals judge, academics - including a leading figure in the DNA exoneration movement, and former prosecutors, to

meet with us periodically to review our program, to critique our performance, and to offer suggestions for how we might improve.

It sometimes seems like the age of DNA exonerations, which has forced us to re-evaluate the foundations of literally every form of evidence, has led us to a new and unfamiliar world. But I'm happy to say that in this new world, we have found a very useful compass to guide us: the very values and traditions that have graced my office ever since Thomas Dewey took the oath as District Attorney, over seventy years ago. My aim, as we go forward, is to continue in that great tradition.