APPENDIX B:

Response to United States Survey

60

JUL 5 1988

STATE BAR OF ARIZONA, 363 NORTH FIRST AVENUE, PHOENIX, ARIZONA 85003, (602) 252-4804

PLEASE REPLY TO: Thomas C. Kleinschmidt, Chairman
c/o Court of Appeals, 1700 W. Washington, Phoenix, AZ 85007

June 28, 1988

Mr. Gordon F. Proudfoot
The Canadian Bar Association
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to Mr. Thomas Zlaket, President of the State Bar of Arizona, has been referred to me, among others, for reply. I have recently had occasion to research this area of the law and I will tell you what I have learned.

The basic source, in the United States, of the requirement that the prosecution disclose exculpatory information to the defense, is found in the case of Brady v. Maryland, 373 U.S. 83 (1963). The Brady requirement is codified and expanded in Rule 15.1(a)(7) of the Arizona Rules of Criminal Procedure, a copy of which I enclose.

The Arizona Rules of Professional Conduct, E.R. 3.3(a)(2) and E.R. 3.4(a), if broadly read, arguably bear on the question. Copies of those rules are also enclosed.

In the absence of a rule, the Brady disclosure requirement is generally construed as not attaching until the trial stage. One case that I am aware of, Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y.), required disclosure before the defendant entered a plea of guilty. I also enclose copies of two law review articles which discuss the question of when disclosure is required. They are Ostrow, The Case for Preplea Disclosure, 90 Yale L.J. 158 (1980), and The Prosecutor's Duty to Disclose to Defendant's Pleading Guilty, 99 Harvard L. Rev. 1004 (1986).

Should the other attorneys to whom your letter was referred wish to supplement this information I am sure you will be hearing from them. If I can be of further assistance please let me know.

Very truly yours,

Thomas C. Kleinschmidt
Chairman, Committee on Rules
of Professional Conduct

TCK:s
enc.
cc: Mr. Thomas A. Zlaket, President
Ms. Harriet L. Turney, Chief Bar Counsel
Mr. Tom Karas
Mr. Alfred S. Donau III, Chairman, Criminal Justice Section

Financial Auditors' Requests for Information

When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Code Comparison

There was no counterpart to ER 2.3 in the Code.

ADVOCATE

ER 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Code Comparison

DR 7-102(A)(1) provided that a lawyer may not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." ER 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in ER 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, ER 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

ER 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Code Comparison

DR 7-102(A)(1) provided that "A lawyer shall not ..... file a suit, assert a position, conduct a defense (or) delay a trial ..... when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

ER 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) except as required by applicable law, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) except as required by applicable law, offer evidence that the lawyer knows to be false. If a

lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare ER 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in ER 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with ER 1.2(d), see the comment to that rule. See also the Comment to ER 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered, or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

The rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truthfinding process which the adversary system is designed to implement. See ER 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolu-

tion, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See ER 1.2(d).

Defense counsel's ethical options, as circumscribed by the criminal defendant's fundamental constitutional rights at trial, are still in the process of clarification. *See, e.g. Lowery v. Cardwell*, 575 F.2d 727 (9th Cir.1978); *State v. Jefferson*, 126 Ariz. 341, 615 P.2d 638 (1980). Therefore, under the Arizona version of ER 3.3, the provisions of subparagraphs (a)(2) and (a)(4) are prefaced by the phrase "except as required by applicable law."

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Code Comparison

ER 3.3(a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

ER 3.3(a)(2) is implicit in DR 7-102(A)(3), which provided that "a lawyer shall not ..... knowingly fail to disclose that which he is required by law to reveal."

ER 3.3(a)(3) is identical to DR 7-106(B)(1).

With regard to ER 3.3(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of ER 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, did not expressly deal with this situation, but the prohibition against "use" of false evidence could be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with ER 1.6, provided that "A lawyer who receives information clearly establishing that his client has ..... perpetrated a fraud upon ..... a tribunal shall ..... if the client [does not rectify the situation] ..... reveal the fraud to the ..... tribunal ....." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently required disclosure by the lawyer in such circumstances. However, some states, including Arizona, amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure did not apply when the "information is protected as a privileged communication." This qualification may have been empty, for the rule of attorney-client privilege had been construed to

exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer had a duty to disclose the perjury.

ER 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knew" was false. There was no counterpart in the Code to paragraph (d).

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also ER 4.2.

Code Comparison

With regard to ER 3.4(a), DR 7-109(A) provided that "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that "A lawyer shall not advise or cause a person to secrete himself ..... for the purpose of making him unavailable as a witness ....." DR 7-106(C)(7) provided that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence."

With regard to ER 3.4(b), DR 7-102(B)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(C) provided that "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying. (2) Reasonable compensation to a witness for his loss of time in attending or testifying. (3) A reasonable fee for the professional services of an expert witness." EC 7-28 stated that "Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

ER 3.4(c) is substantially similar to DR 7-106(A), which provided that "A lawyer shall not disregard ..... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

ER 3.4(d) has no counterpart in the Code.

ER 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) pro-

scribed asking a question "intended to degrade a witness or other person," a matter dealt with in ER 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to ER 3.4(f), DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

ER 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or an official of a tribunal by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Code Comparison

With regard to ER 3.5(a), DR 7-108(A) provided that "Before the trial of a case a lawyer ..... shall not communicate with ..... anyone he knows to be a member of the venire ....." DR 7-108(B)(2) provided that "During the trial of a case ..... a lawyer ..... shall not communicate with ..... a juror concerning the case." DR 7-110(B) provided that a lawyer shall not "communicate ..... as to the merits of the cause with a judge or an official before whom the proceeding is pending except ..... upon adequate notice to opposing counsel ..... [or] as otherwise authorized by law."

With regard to ER 3.5(b), DR 7-106(C)(6) provided that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal."

ER 3.6. Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1) through (b)(5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

ARIZ RULES OF CRIMINAL PROCEDURE

RULE 15. DISCOVERY

Rule 15.1. Disclosure by state

a. Matters Relating to Guilt, Innocence or Punishment. No later than 10 days after the arraignment in Superior Court, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;

(2) All statements of the defendant and of any person who will be tried with him;

(3) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the particular case;

(4) A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;

(5) A list of all prior felony convictions of the defendant which the prosecutor will use at trial;

(6) A list of all prior acts of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;

(7) All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his punishment therefor, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

b. Possible Collateral Issues. At the same time the prosecutor shall inform the defendant and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(1) Whether there has been any electronic surveillance of any conversations to which the accused was a party, or of his business or residence;

(2) Whether a search warrant has been executed in connection with the case;

(3) Whether or not the case has involved an informant, and, if so, his identity, if the defendant is entitled to know either or both of these facts under Rule 15.4(b)(2).

c. Additional Disclosure Upon Request and Specification. The prosecutor, upon written request, shall disclose to the defendant a list of the prior felony convictions of a specified defense witness which the prosecutor will use to impeach the witness at trial, and make available to the defendant for examination, testing and reproduction any specified items contained in the list submitted under Rule 15.1(a)(4). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

d. Extent of Prosecutor's Duty to Obtain Information. The prosecutor's obligation under this rule extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case and who are under the prosecutor's control.

e. Disclosure by Order of the Court. Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 15.1, and that he is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

f. Disclosure of Rebuttal Evidence. Upon receipt of the notice of defences required from the defendant under Rule 15.2(b) the state shall disclose the names and addresses of all persons whom the prosecutor will call as rebuttal witnesses together with their relevant written or recorded statements.

Amended May 7, 1975, effective Aug. 1, 1975.

Rule 15.2. Disclosure by defendant

a. Physical Evidence. At any time after the filing in Superior Court of an indictment or information, upon written request of the prosecutor, the defendant shall:

(1) Appear in a line-up;

(2) Speak for identification by witnesses;

(3) Be fingerprinted, palm-printed, foot-printed or voiceprinted;

(4) Pose for photographs not involving re-enactment of an event;

(5) Try on clothing;

(6) Permit the taking of samples of his hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his body;

(7) Provide specimens of his handwriting; or

(8) Submit to a reasonable physical or medical inspection of his body, provided such inspection

THE PROSECUTOR'S DUTY TO DISCLOSE TO DEFENDANTS PLEADING GUILTY

A criminal defendant's decision to plead guilty reflects his assessment of the strength of the state's case against him. The prosecution's failure to disclose evidence favorable to the defendant skews that calculation. Defendants who wish to withdraw guilty pleas tainted by such nondisclosure face two relevant lines of Supreme Court precedent. On one side stands *Brady v. Maryland*,[1] which fashions a prosecutorial duty to disclose evidence favorable to the defendant.[2] On the other side stands *Brady v. United States*,[3] which appears to hold that guilty pleas are valid unless made involuntarily or unintelligently. Caught in the middle is the defendant who has been deprived of favorable information in the prosecutor's hands, but whose guilty plea is voluntary and intelligent. This Note argues that the prosecutor's duty to disclose should apply in cases settled by guilty plea as well as in cases that go to trial. Defendants should be allowed to withdraw guilty pleas when prosecutors have withheld favorable information material to those pleas.

Part I of this Note describes the duty to disclose imposed on prosecutors by *Brady v. Maryland*. It explains the value of fairness underlying the duty, the elements comprising a violation, and the development of a standard of materiality of evidence that has prevented application of the duty in guilty plea cases. Part II analyzes the standards established in *Brady v. United States* for assessing the validity of guilty pleas. It shows that these standards allow courts to invalidate voluntary and intelligent guilty pleas tainted by certain kinds of prosecutorial misconduct. Part III argues that courts should extend the *Brady v. Maryland* duty of disclosure to guilty pleas by striking down pleas when the prosecution has failed to disclose material evidence favorable to the accused. This part then describes how the duty should be applied and suggests a new materiality standard for evidence withheld in guilty plea negotiations. It argues that a court should set aside a guilty plea when the revelation of suppressed favorable evidence creates a reasonable doubt as to the defendant's guilt of the charge to which he pleaded.

I. THE PROSECUTOR'S DUTY TO DISCLOSE

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon

---

[1] 373 U.S. 83 (1963).

[2] *See id.* at 87.

[3] 397 U.S. 742 (1970). *Brady v. United States* was decided with two other guilty plea cases, McMann v. Richardson, 397 U.S. 759 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970). These cases together are often called the *Brady* trilogy. In subsequent Terms the Supreme Court elaborated on the doctrine set out in the trilogy.

request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[4] Brady and a companion named Boblit had been convicted of first degree murder and sentenced to death in a Maryland court. Brady admitted participating in the crime, but claimed Boblit had done the actual killing. Before trial, Brady's lawyer had requested to examine Boblit's out-of-court statements. Some of these were disclosed, but one, in which Boblit admitted he had strangled the victim, was withheld. Brady learned of the withheld statement after sentencing and moved for a new trial on the basis of newly discovered evidence. On appeal from the denial of post-conviction relief, the Court of Appeals remanded the case for retrial on the issue of punishment.[5] The Supreme Court affirmed, holding that material nondisclosure violates due process.

Writing for the majority, Justice Douglas explained that the Court's holding rested on the principle of fairness to the accused.[6] He quoted an inscription on the walls of the Department of Justice stating that "'[t]he United States wins its point whenever justice is done its citizens in the courts.'"[7] Nondisclosure violates the right to due process because a prosecutor who "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."[8] The Court believed that Brady had been treated unfairly because the result of his trial was probably inaccurate and because the state helped bring about that result. Both elements of unfairness were essential to the holding. The Court's requirement that the suppressed evidence be material shows that prosecutorial nondisclosure alone is insufficient to make a trial "unfair."[9] Conversely, the Court's language demonstrates a concern with something more than the inaccuracy that could result when a defendant has no knowledge of favorable material evidence; the prosecutor's role in causing the inaccuracy is also important.[10]

---

[4] 373 U.S. at 87. Although the *Brady v. Maryland* ruling came in the heyday of the Warren Court, its foundations had been set down decades earlier. The groundbreaking case was Mooney v. Holohan, 294 U.S. 103 (1935), in which the Court held that a criminal conviction procured solely on the basis of testimony known by the prosecutors to have been perjured violates due process. *See id.* at 112. In Pyle v. Kansas, 317 U.S. 213 (1942), the Court expanded the *Mooney* holding to cover deliberate suppression by the prosecution of evidence favorable to the defendant. *See id.* at 216. In Napue v. Illinois, 360 U.S. 264 (1959), the Court extended the principle that the state may not use perjured testimony to include the use of testimony that went only to the credibility of a witness. *See id.* at 269–70.

[5] *See* Brady v. Maryland, 373 U.S. at 84–85.

[6] *See id.* at 87.

[7] *Id.*

[8] *Id.* at 87–88.

[9] The Court has written that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976).

[10] The significance of the prosecutor's role is reflected not only in the Court's language but

The unfairness perceived by the Court in *Brady v. Maryland* led it to a holding with three essential components. The first element of the Court's test requires that the court find that the prosecution actually suppressed evidence. The second element addresses whether that evidence is favorable to the defendant. The third element assesses whether the suppressed favorable evidence is material to guilt or punishment. A *Brady v. Maryland* challenge must meet all three of these criteria to establish a due process violation.

The Court's second requirement, that the evidence be "favorable" to the defendant, is meant to encompass any evidence that would make a neutral factfinder less likely to believe the defendant committed the crime with which he was charged or deserved the sentence he received.[11] The evidence suppressed in *Brady v. Maryland* met this definition of "favorable" because it would have tended to reduce Brady's penalty. Boblit's statement would have made the jury less likely to treat Brady as if he had strangled the victim and might well have convinced the jury to give Brady a less severe punishment. Prosecutorial nondisclosure of this kind of evidence is dangerous because it exacerbates the risk of inaccurate results.[12] In contrast, nondisclosure of evidence that is not favorable in this sense poses no risk that the judicial system will find an innocent defendant guilty or impose a penalty that is harsher than a guilty defendant deserves.

The third step of the inquiry is determining whether suppressed favorable evidence is "material." *Brady v. Maryland* left for subsequent cases the task of drawing the bounds of the materiality standard. Those cases, all arising within the context of trials, viewed materiality as hinging on the likelihood that disclosure would have changed the result at trial. In *Giglio v. United States*,[13] for example, the Court held that evidence is material if it is reasonably likely that the evidence would have affected "'the judgment of the jury.'"[14] Last

---

also in the scope of the *Brady v. Maryland* standard for the materiality of evidence, *see infra* pp. 1006–07. The *Brady v. Maryland* materiality standard is less difficult to meet than the materiality standard that governs challenges to convictions on the basis of newly discovered evidence. The Supreme Court has written that if the same standard operated in cases in which the prosecution withheld evidence and in cases in which it never possessed the information, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Agurs*, 427 U.S. at 111.

[11] *See supra* p. 1005.

[12] As used in this Note, "inaccurate results" means verdicts and punishments based on inaccurate versions of the events at issue. A verdict is inaccurate if new evidence makes it doubtful that the defendant committed the crime he is charged with. A punishment can also be inaccurate, even if it is statutorily appropriate, if it is predicated on a mistaken version of the facts of the case.

[13] 405 U.S. 150 (1972).

[14] *Id.* at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271 (1969)). The Court followed the same tack in Moore v. Illinois, 408 U.S. 786, 798 (1972), and Giles v. Maryland, 386 U.S. 66, 73–74 (1967).

Term, in *United States v. Bagley*,[15] five Justices used somewhat different language, stating that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[16] They found this single standard to be "'sufficiently flexible' to cover all instances of prosecutorial failure to disclose evidence favorable to the accused."[17] Despite using the word "proceeding," which could be taken to include proceedings other than trials, the Court appeared to retain the notion of the materiality standard as a retrospective judgment that the suppressed information would likely have made a difference at trial.[18]

II. *BRADY V. UNITED STATES* AND GUILTY PLEA CASES

In *Brady v. United States*[19] the Supreme Court assessed the validity of guilty pleas by considering whether such pleas are voluntary and intelligent.[20] Some of the language in the case suggests that the Court believed voluntary and intelligent guilty pleas are honest confessions of guilt and that factors such as prosecutorial suppression of evidence should not render such pleas invalid. This part of the opinion, however, ignored the realities of plea bargaining. Elsewhere in the opinion the Court demonstrated a more realistic understanding of plea bargaining and explicitly recognized that prosecutorial misconduct can serve as an independent ground for successfully attacking even a voluntary and intelligent plea. The case established the voluntary and intelligent standard as the central standard by which to assess the validity of bargained-for guilty pleas, but did not preclude

---

[15] 105 S. Ct. 3375 (1985).

[16] *Id.* at 3384 (opinion of Blackmun, J.); *id.* at 3385 (White, J., concurring in part and concurring in the judgment). Part III of Justice Blackmun's opinion, joined only by Justice O'Connor, set out this standard. Chief Justice Burger and Justice Rehnquist joined Justice White's separate opinion, which criticized Part III of Justice Blackmun's opinion, but nonetheless expressly endorsed this standard.

[17] *Id.* at 3385 (White, J., concurring in part and concurring in the judgment) (quoting the majority opinion at 3384). In finding a single materiality standard sufficient to cover all cases of prosecutorial nondisclosure, *Bagley* departed from the Court's decision in *United States v. Agurs*. In *Agurs*, a case involving suppression of the victim's criminal record, the Court divided the situations in which nondisclosure might require a new trial into three categories — cases in which the prosecution's case includes perjured testimony, cases in which the defense makes a pretrial request for specific information, and cases in which the defense makes no request or only a general request — and said that the same materiality standard does "not necessarily" apply in all these situations. *See Agurs*, 427 U.S. at 103–07.

[18] *See Bagley*, 105 S. Ct. at 3380 (stating that the prosecutor is required only to disclose evidence that "would deprive the defendant of a fair trial").

[19] 397 U.S. 742 (1970).

[20] *See id.* at 747.

the possibility that prosecutorial misconduct not affecting voluntariness or intelligence might nonetheless render a plea invalid.

The defendant in *Brady v. United States* was charged with violating the Federal Kidnaping Act,[21] which permitted imposition of the death penalty upon a jury verdict but not upon a bench verdict. Although Brady initially intended to plead not guilty, he decided to plead guilty when he learned that a codefendant was available to testify against him. After he was sentenced, the Supreme Court, in *United States v. Jackson*,[22] struck down the death penalty provision of the kidnaping statute as an impermissible burden on the defendant's fifth amendment right not to plead guilty and sixth amendment right to a jury trial. Brady sought federal habeas corpus relief[23] on the ground that the burden the statute placed on the exercise of his right to trial coerced him to plead guilty. The Supreme Court affirmed Brady's conviction, finding that its decision in *Jackson* did not render the plea invalid.[24]

The Court found that Brady's guilty plea had been voluntary and intelligent.[25] The plea was intelligent, the Court said, because it was not made in ignorance of the "relevant circumstances and likely consequences."[26] In this section of the opinion, the Court made clear that the intelligence standard presented a low hurdle: a plea would be deemed intelligent if the accused had the advice of counsel and understood the consequences of his plea in a fairly rudimentary way.[27] Furthermore, the Court wrote, Brady's plea was voluntary because it was not the result of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally.[28] The Court rejected Brady's

---

[21] Act of June 25, 1948, ch. 645, 62 Stat. 683, 760 (current version at 18 U.S.C. § 1201(a) (1982)).

[22] 390 U.S. 570 (1968).

[23] A guilty plea defendant may withdraw his plea before sentencing under rule 32(d) of the Federal Rules of Criminal Procedure. After sentencing, however, the defendant may only challenge his guilty plea by direct appeal or by a motion under 28 U.S.C. § 2255 (1982).

[24] *See* Brady v. United States, 397 U.S. at 743–45.

[25] *See id.* at 748. The Court had previously used the voluntary and intelligent standard to assess the validity of guilty pleas. *See* Machibroda v. United States, 368 U.S. 487, 493 (1962) (holding that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void"); Kercheval v. United States, 274 U.S. 220, 223 (1927) (stating that "[o]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences"). In *Brady v. United States*, however, the Court set out most clearly the ramifications of the standard.

[26] *See* Brady v. United States, 397 U.S. at 748.

[27] *See id.* at 748 n.6. The Court found Brady's plea to be intelligent because he "was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties." *Id.* at 756.

[28] *See id.* at 750.

claim that a guilty plea is involuntary if the defendant is influenced by the fear of a more severe penalty at trial[29] and thus also rejected the notion that plea bargaining itself vitiates the voluntariness of guilty pleas.[30] In effect, the Court crafted the voluntary and intelligent standard in such a way that almost all pleas would meet it. The Court then stated that in the case at bar — in which the voluntary and intelligent standard was satisfied — the Constitution did not require that the defendant "be permitted to disown his solemn admissions in open court that he committed the act with which he is charged."[31]

The Court's language in this section of the opinion seems to reflect a belief that all guilty pleas that meet the voluntary and intelligent standard are honest and truthful confessions and are not affected by factors independent of the defendant's guilt or innocence — in other words, that such pleas are accurate. The Court noted, for example, that it would have had "serious doubts" about the case if it suspected that offers of leniency magnified the risk that defendants would falsely condemn themselves.[32] The Court's equation of voluntariness and intelligence with accuracy suggests that prosecutorial misconduct that does not go so far as to render a plea involuntary or unintelligent should have no bearing on the validity of a plea.

But the view that all guilty pleas satisfying the voluntary and intelligent standard are accurate is unrealistic. Guilty pleas today are not necessarily honest gestures of contrition. The modern guilty plea is more like "intelligent capitulation."[33] The great bulk of guilty pleas, at least in busy urban jurisdictions, are negotiated pleas.[34] Defendants

---

[29] *See id.* at 751. In two companion cases to *Brady v. United States*, the Court held that a plea resulting from a prior coerced confession was voluntary, *see* McMann v. Richardson, 397 U.S. 759, 768–71 (1970), and that a plea induced by a desire to limit the possible maximum penalty was voluntary, *see* Parker v. North Carolina, 397 U.S. 790, 794–95 (1970).

[30] Prior decisions of the Court arguably called for a narrower definition of "voluntary" and cast doubt on the validity of the entire institution of plea bargaining. In *Jackson* and other cases, the Court had held that certain burdens on the exercise of constitutional rights are unconstitutional. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (invalidating a policeman's conviction because it was based on self-incriminating testimony induced by the threat of losing his job). The arrangements attacked in these cases resembled plea bargaining in offering preferential treatment to those willing to waive a constitutional right. *See* Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 178–80 (1968). The Court, however, denied the relevance of this line of cases. It specifically distinguished *Jackson*, claiming that the case did not hold that the death penalty provision of the kidnaping statute was inherently coercive of guilty pleas, but only that it needlessly encouraged them. *See* Brady v. United States, 397 U.S. at 746.

[31] *Brady v. United States*, 397 U.S. at 757.

[32] *See id.* at 758.

[33] *See* Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 119 (1977).

[34] The frequency of plea bargaining varies widely from place to place. It has been estimated that 99 percent of all guilty pleas in Detroit are bargained-for. *See* Newman, *Profile of Guilty*

agree to plead guilty in return for concessions in the charges against them and the punishment they are threatened with. The pressure on defendants to plea bargain is overwhelming, and many of the inducements to plead guilty bear no relation to the defendant's acts or to his actual guilt under the law.[35] Defense attorneys, who are often their clients' sole representatives, can have inordinate influence on the decision to plead guilty, especially when defendants are ignorant of the precise legal issues on which their cases depend. Some defense attorneys encourage guilty pleas to realize quick profits.[36] Even honest attorneys feel the pressure to bargain.[37] The heavy caseloads in many jurisdictions make plea bargaining an imperative for prosecutors. In addition, some prosecutors are so concerned with statistical measures of success that they aim to "'get something'" from every defendant[38] and offer their most attractive bargains in their weakest cases.[39] Faced with an offer whose generosity is measured to outweigh the chance of acquittal, the defense lawyer may have no choice but to advise even an innocent defendant to plead guilty.[40] For example, a defendant who is offered a deal that would enable him to go free by pleading guilty has little incentive to stay in jail long enough to see his case go to trial.[41] These considerations make clear that a defendant's decision to plead guilty often has little to do with the facts of his case.

Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas, 17 WAYNE L. REV. 1195, 1196 n.8 (1971). Observers in Philadelphia, Baltimore, and Pittsburgh, however, claim that only about 35 percent or less of guilty pleas in those cities result from plea bargaining. *See* Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1047 (1984). But in some cities where relatively few pleas are officially considered "bargained," many others are the product of informal negotiation. Many defendants are convicted by way of "slow pleas" — brief bench trials that are less than adversarial in nature. *See* White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 441–42 (1971).

[35] *See* D. MAYNARD, INSIDE PLEA BARGAINING 196–97 (1984) (arguing that a preference for plea bargaining is built into the structure of the criminal justice system).

[36] *See* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181–85 (1975) (quoting a Boston lawyer's statement that "[a] guilty plea is a quick buck").

[37] *See id.* at 1201.

[38] *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968).

[39] *See id.* The strength of the state's case is the crucial factor in the bargaining process. *See id.* at 58–59 (quoting a Chicago prosecutor as saying "when we have a weak case for any reason, we'll reduce to almost anything rather than lose"); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, app. at 901 (1964) (reporting that weakness in the government's case was the factor most likely to encourage the prosecutors surveyed to plea bargain).

[40] Professor Alschuler describes the case of an innocent defendant who pleaded guilty to simple battery rather than risk conviction for kidnaping and forcible rape; the defense attorney said that he would be "playing God" to stand in the defendant's way and that he could not tell his client that "professional ethics" required a course that might have ruined the defendant's life. *See* Alschuler, *supra* note 38, at 61.

[41] *See* White, *supra* note 34, at 444.

Most importantly, the Court itself has shown that a realistic approach to plea bargaining is necessary. Notwithstanding its several equations of guilty pleas with accurate confessions, the Court recognized elsewhere in *Brady v. United States* that many guilty pleas are calculated and that certain kinds of prosecutorial misconduct may therefore threaten their accuracy. For example, the Court spoke of the "mutuality of advantage" of plea bargaining[42] and recognized that the decision to plead guilty is often heavily influenced by the defendant's appraisal of the state's case.[43] These statements suggest that the Court intended judges to consider factors such as prosecutorial nondisclosure in evaluating the validity of guilty pleas. But the Court left more direct evidence of its recognition that prosecutorial misconduct may threaten the accuracy of bargained-for pleas. Justice White pointedly included the phrase "absent misrepresentation or other impermissible conduct by state agents" in his exposition of the voluntary and intelligent standard.[44] This language suggests that even voluntary and intelligent pleas can be invalidated when they are tainted by prosecutorial misconduct during plea bargaining.[45]

One year later, in *Santobello v. New York*,[46] the Court ratified the suggestions in *Brady v. United States* that courts should consider prosecutorial misconduct when assessing the validity of guilty pleas.[47] It explicitly stated that the considerations favoring plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor"[48] and that although heavy caseloads may explain prosecutorial misconduct, they do not excuse it.[49] This language shows beyond any doubt that unfair prosecutorial practices may themselves provide a reason to invalidate guilty pleas. Combined with the language of *Brady v. United States*, it makes clear that the Court's guilty plea jurisprudence does not preclude application of a rule, such as that of *Brady v. Maryland*, aimed at protecting defendants from prosecutorial misconduct.

---

[42] *See* Brady v. United States, 397 U.S. at 752.

[43] *See id.* at 756.

[44] *Id.* at 757.

[45] One contemporaneous commentator argued that *Brady v. United States* validated plea bargaining because of practical, administrative concerns. *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 153–54 (1970). This interpretation suggests that any guilty plea challenge that does not present a general attack on the plea bargaining system should be unaffected by the case.

[46] 404 U.S. 257 (1971).

[47] *See id.* at 260–61. In *Santobello*, a new prosecutor recommended a heavy sentence for a defendant who had pleaded guilty after a previous prosecutor promised to make no recommendation as to sentencing. The Supreme Court held that the defendant deserved relief but remanded the case for determination of whether that relief should be specific performance of the plea agreement or permission for the defendant to withdraw his plea. *See id.* at 263.

[48] *Id.* at 261.

[49] *See id.* at 260.

III. APPLYING *BRADY V. MARYLAND* TO GUILTY PLEA CASES

Part II of this Note argued that the realities of plea bargaining and much of the Supreme Court's language in *Brady v. United States* call for courts to consider prosecutorial misconduct when assessing the validity of guilty pleas. This Part argues that prosecutorial nondisclosure of material evidence favorable to the accused is the sort of misconduct that requires invalidation of a plea. It then details the way in which the *Brady v. Maryland* duty to disclose should operate in the context of guilty pleas.

A. The Unfairness of Failing to Apply Brady v. Maryland

Courts have reacted in different ways to the argument that the *Brady v. Maryland* duty to disclose should apply in guilty plea cases. In *Fambo v. Smith*,[50] a United States District Court found that the prosecution does have a duty to disclose in the guilty plea context. Fambo was originally charged with two counts of possession and intent to use an explosive substance (a class B felony), but pleaded guilty to one count of possession of an incendiary device (a class D felony). More than a year after his sentencing, Fambo learned that one of the two bombs he had originally been charged with possessing had been emptied of its explosive contents and filled with sawdust by police, making it impossible for him to have been guilty of at least one count of the original indictment. He petitioned for habeas corpus relief on *Brady v. Maryland* grounds. The district court, although denying the petition,[51] wrote that "[i]n order to maintain the integrity of the plea bargaining process . . . a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case."[52]

In *Campbell v. Marshall*,[53] however, the Sixth Circuit concluded that the prosecutor's duty to disclose is limited to cases that go to trial. In *Campbell*, the defendant shot his estranged wife and her companion, but claimed that the companion had reached for his pocket as if he were about to pull a gun. The prosecution, faced with the defense's request for all material information, failed to disclose that the police had found a .25 caliber semi-automatic pistol in the

---

[50] 433 F. Supp. 590 (W.D.N.Y.), *aff'd*, 565 F. 2d 233 (2d Cir. 1977) (per curiam).

[51] The district court concluded that the nondisclosure was harmless and that there was sufficient mutuality of advantage to make the bargain reasonable and fair. *See Fambo*, 433 F. Supp. at 600. The Second Circuit affirmed, agreeing that "Fambo was guilty of the offense for which he was sentenced, got what he bargained for, and that there was a factual basis for the plea." *See Fambo*, 565 F.2d at 235.

[52] *Fambo*, 433 F. Supp. at 598.

[53] 769 F.2d 314 (6th Cir. 1985).

male victim's pocket. The defendant pleaded guilty to two counts of aggravated murder.[54] After learning of the gun's existence, Campbell petitioned unsuccessfully for a writ of habeas corpus.[55]

On appeal, Campbell contended that he had pleaded guilty only because he had no believable claim of self-defense, and that he would have gone to the jury with such a claim had he known of the gun.[56] The appeals court assumed that the prosecution had committed a *Brady v. Maryland* violation sufficient to reverse a guilty verdict obtained at trial.[57] It nonetheless denied the petitioner relief. Although the court admitted that the withheld information could have affected the defendant's bargaining power in negotiating a plea, it stated that "there is no authority within our knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process."[58] Instead, the court limited its evaluation of the guilty plea to determining "whether under such circumstances petitioner's guilty plea was intelligently and voluntarily made with the advice of competent counsel."[59] Finding that the plea was voluntary and intelligent, the court denied Campbell relief.[60]

The *Fambo* court saw what the *Campbell* court missed — that prosecutorial nondisclosure of evidence is a hazard to accurate guilty plea convictions, and that application of the *Brady v. Maryland* duty combats this problem. During plea bargaining, suppression of evidence favorable to the accused poses two dangers: it could either induce innocent defendants to plead guilty or compel guilty defendants to plead guilty to charges more serious than the crimes they committed.[61] The first of these problems shocks our sensibilities, but is less

---

[54] *See id.* at 315–16. The two counts each carried maximum possible sentences of life imprisonment. In exchange for Campbell's guilty plea, the prosecution struck from the original indictment several specifications that could have resulted in the death penalty upon conviction. The specifications were that Campbell had committed each murder as part of the killing of two or more persons and that each murder was committed during the course of an aggravated burglary. The prosecution also dropped the aggravated burglary count. If Campbell had been convicted of aggravated murder subject to one of the specifications, he could have received the death penalty. *See id.* at 316.

[55] *See id.* at 316.

[56] *See id.* at 317. Campbell also argued unsuccessfully that the trial judge failed to warn him of the consequences of his guilty plea and that this failure violated his fourteenth amendment due process rights. *See id.* at 324.

[57] *See id.* at 318.

[58] *Id.* at 322.

[59] *Id.* at 315.

[60] *See id.* at 321. The same path was followed by the court in United States v. Wolczik, 480 F. Supp. 1205 (W.D. Pa. 1979). The defendant in that case argued that the government's failure to provide him with the statements of alleged coconspirators rendered his guilty plea invalid. Judge Snyder read the Supreme Court's words in *Brady v. United States* to mean that "a defendant cannot expect to obtain *Brady* [*v. Maryland*] material for use in a pretrial decision to plead guilty." *Id.* at 1210.

[61] *See* Wertheimer, *The Prosecutor and the Gunman*, 89 ETHICS 269, 269 (1979).

important than it seems: observers agree that the criminal justice system accuses very few truly innocent persons of crimes.[62] The second danger, however, does threaten great harm. Although plea bargaining allows many defendants to plead guilty to charges less serious than their crimes, it may, in the absence of a prosecutorial duty to disclose, cause others to plead guilty to unjustly severe charges.

Nondisclosure during plea bargaining creates a real threat of inaccurate results by eroding the defendant's bargaining position. Because a defendant's bargaining power depends on his knowledge of the evidence in the state's possession, suppression of exculpatory evidence reduces this power. The defendant's bargaining power, in turn, dictates his ability to win concessions from the prosecution. For example, the punishment for a guilty defendant in a typical barroom killing case might vary enormously — from the death penalty for first degree murder to a few years in prison for voluntary manslaughter — depending on the defendant's ability to bargain with the prosecutor.[63] Reduced bargaining power resulting from nondisclosure distorts the ability of the plea bargaining process to produce factually accurate results. As is true at trial, the relative strengths of the two sides' cases is crucial. But because there is no neutral factfinder, the two sides' perceptions of the strength of their cases become more important than the actual facts of the case. When the prosecutor charges a more serious crime than the defendant committed[64] and deprives the defendant of exculpatory information he would be entitled to at trial, the defendant's perception of the forces arrayed against him is skewed such that he cannot bargain down to an appropriate result.

Thus, when a prosecutor withholds information from a defendant who plea bargains, he unfairly compromises the defendant's rights in the same ways that nondisclosure prejudices a defendant who goes to trial. Just as in *Brady v. Maryland*, withholding of evidence may cause a defendant to receive harsher punishment than his crime requires, and, just as in *Brady v. Maryland*, the state itself causes this inaccuracy by abusing its prosecutorial discretion. Plea bargaining, no less than a trial, is aimed at determining guilt and punishment in a just way. Even though plea bargaining assumes the verdicts it

---

[62] *See* B. JACKSON, LAW AND DISORDER 81 (1984) (quoting a New York prosecutor as saying "Why should I go after somebody I thought wasn't guilty? I can't keep up with the ones I *know* are guilty."); M. MAYER, THE LAWYERS 156 (1967) (quoting Dean Edward Barrett, Jr., who argues that "[o]ur system of criminal courts is organized to deal with a situation in which police and prosecutor screen out all but the most clearly guilty").

[63] One prosecutor has used the barroom killing example to illustrate this problem of "variable guilt." *See* Specter, Book Review, 76 YALE L.J. 604, 606 (1967).

[64] *See* Alschuler, *supra* note 38, at 65 (stating that many prosecutors overcharge in this way).

produces will sometimes be inaccurate, it does not condone unduly harsh verdicts. Any inconsistency must be in the defendant's favor. A defendant who is misled into pleading guilty to a crime more serious than the one he committed receives no "bargain" — he receives no benefit in exchange for the benefit he grants to the government by not exercising his right to trial.

Application of the *Brady v. United States* standard without application of the *Brady v. Maryland* duty fails to remedy this unfairness. Bargained-for pleas will almost never prove involuntary under *Brady v. United States*, because they can rarely be characterized as physically or mentally coerced, or as irrationally reached. Nor does the requirement of *Brady v. United States* that a plea be made intelligently provide any aid, for the Supreme Court has effectively held that pleas are intelligent whenever the defendant has the benefit of counsel and understands the consequences of his actions in the most elementary sense.[65] The unfairness of reducing a defendant's bargaining power by withholding evidence favorable to his case mandates that courts apply the *Brady v. Maryland* duty to cases settled by guilty pleas.[66] Although *Brady v. Maryland* arose in the context of a trial, nothing in the opinion suggests that the rule should not apply to guilty pleas as well. The court stated that "our system of the administration of justice suffers when *any accused* is treated unfairly."[67]

---

[65] *See supra* p. 1008.

[66] It could be argued that application of the *Brady v. Maryland* duty is unnecessary because in a case in which there is danger of an inaccurate verdict the defendant may attack the plea on the ground that it lacks a factual basis. Although courts generally recognize the necessity that a plea have a factual basis, the doctrine remains murky and unpromising. It is, for example, unclear whether such a challenge rests on constitutional grounds or only on the Federal Rules of Criminal Procedure. Rule 11(f) directs a judge not to accept a guilty plea if he cannot satisfy himself that a factual basis exists by personally questioning the defendant. In McCarthy v. United States, 394 U.S. 459 (1969), the Court wrote that this rule is designed to protect defendants who plead guilty without knowing that their acts do not constitute the crimes with which they are charged, *see id.* at 467, and hinted that the inquiry might be of constitutional significance because of the link between the factual basis for a plea and its voluntariness, *see id.* at 465–66. The Court, however, paid little attention to this doctrine in *Brady v. United States*, and has never provided guidance as to the correct evidentiary standard, *see* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 515–17 (1980). In any case, a factual credibility test is too severe to combat or correct prosecutorial nondisclosure. Because defendants are often guilty of some participation in the crime, a plea of guilty to an unjustly severe offense will often seem factually credible, even in light of the suppressed evidence. This is the situation of Campbell, caught between the onerous factually credible standard and the more lenient *Brady v. Maryland* standard. The revelation of the victim's gun in *Campbell v. Marshall* did not rob Campbell's plea of its factual basis, because it did not give Campbell an alibi or prove that he did not fire the fatal shots. But the gun was favorable evidence under *Brady v. Maryland* because it made it more likely that Campbell acted in self-defense.

[67] Brady v. Maryland, 373 U.S. at 87 (emphasis added).

B. Fashioning the Standard

The *Brady v. Maryland* duty should be redefined to encompass guilty pleas. As at trial, three elements are necessary to make out a due process violation. The prosecution must fail to disclose evidence, that evidence must be favorable to the defendant, and it must be material. The traditional materiality standard, however, does not make sense in the guilty plea context, and a new standard, based on the standard for proving guilt at trial, should apply.

Whereas the determination of nondisclosure is a straightforward factual inquiry, deciding whether evidence is favorable to the defendant is more complicated. The correct definition of "favorable" is dictated by *Brady v. Maryland*'s focus on the accuracy of verdicts.[68] Evidence should be considered favorable if it bears on our beliefs about the crime itself — if it would make a factfinder less likely to believe that the defendant is guilty of the crime with which he has been charged or that he deserves the punishment he has received. Evidence that goes to the credibility of a prosecution witness, for example, should be considered favorable because it can convince a factfinder that the defendant did not do what he is charged with doing.[69] Any evidence that would tend to erode the factual underpinnings of the defendant's guilt or punishment should trigger the duty to disclose.

Suppressed information that would have changed a defendant's mind about pleading guilty but is not exculpatory of the charge to which he pleaded guilty should not be considered favorable. There is no constitutional violation if the record shows that the defendant's verdict and punishment are accurate in light of all the evidence. The information withheld in such cases would not tend to show that the accused was guilty of a less serious charge or was innocent, and it would thus not fall under the *Brady v. Maryland* umbrella.

In *United States v. Puma*,[70] for example, the defendant had agreed to plead guilty in exchange for the government's assurance that no other investigations of him were pending.[71] After the defendant served his sentence, the state indicted him on charges stemming from another investigation that had been pending at the time of the agreement. He sought to have the indictment dismissed. Although the court did not ultimately base its decision to dismiss the indictment on

---

[68] Justice Douglas's opinion described favorable evidence as evidence that "would tend to exculpate [the defendant] or reduce [his] penalty." *See* Brady v. Maryland, 373 U.S. at 88.

[69] *See* United States v. Bagley, 105 S. Ct. 3375, 3380 (1985) ("Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* [*v. Maryland*] rule" because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence'" (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))).

[70] 521 F. Supp. 258 (E.D.N.Y. 1981).

[71] *See id.* at 259–60.

the fact of nondisclosure,[72] it opined that suppression of the information about the pending investigation was amenable to *Brady v. Maryland* analysis.[73] The court, however, was wrong in this conclusion, because the information suppressed was not favorable to the defendant. Revelation of the pending investigation would not have made the factfinder less likely to believe the defendant was guilty of the crime with which he was charged. Suppression of such information does not endanger the factual accuracy of guilty pleas and thus does not cause the kind of unfairness necessary to activate the *Brady v. Maryland* duty.

The case of *People v. Jones*[74] provides another example of a situation in which the duty to disclose should not apply. In that case, the prosecution failed to inform the defense that the complaining witness had died. The court correctly declined to apply the *Brady v. Maryland* duty. Although the information about the witness's death would have revealed that the prosecution would have had difficulty in gaining a conviction, it was not exculpatory. It would not have made a third party more likely to believe the defendant was not guilty of the crime with which he was charged. There is no risk in such a case, as there was in *Brady v. Maryland*, that the accused will be punished for a crime he did not commit.[75]

The third prong of the *Brady v. Maryland* test is whether the suppressed and favorable evidence is material. A new materiality standard must be designed to apply to guilty pleas, because the standard that applies to trial verdicts makes little sense in the guilty plea context. The correct standard should require that a guilty plea be invalidated when the revelation of suppressed information creates a reasonable doubt, in light of all the evidence, that the defendant is not guilty of the crime to which he pleaded guilty. The reasonable doubt standard in the trial context expresses society's belief about when it is appropriate to impose criminal sanctions on a defendant. When a defendant chooses to plead guilty rather than to put the state to its proof at trial, we usually ascribe a "presumption of verity"[76] to the defendant's admission of guilt. But when a factor such as prosecutorial nondisclosure gives us reason to doubt the accuracy of that plea, we should discard this presumption[77] and resort to the standard for

---

[72] *See id.* at 262–63. The court based its holding on the prosecution's breach of the plea agreement, to which it applied contract law principles.

[73] *See id.* at 261–62.

[74] 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85 (1978).

[75] The court believed that the defendant's own testimony at the post-conviction hearing established that the plea was factually accurate. *See Jones*, 44 N.Y.2d at 82, 375 N.E.2d at 44–45, 404 N.Y.S.2d at 89.

[76] Blackledge v. Allison, 431 U.S. 63, 74 (1977).

[77] *Cf.* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (noting that the *Brady v. United States* line of cases means that guilty pleas should be treated as reliable admissions of factual

which the plea is a replacement. If the revelation of suppressed evidence creates a reasonable doubt that the defendant is guilty, it requires invalidation of his guilty plea.

Implementing this standard requires an evidentiary hearing.[78] At such a hearing, the judge should reexamine the evidence in the case in light of the suppressed information to determine whether there is a reasonable doubt that the defendant committed the crime with which he is charged. Although this proceeding is adversarial in nature, it is not a full-blown trial. In cases like *Campbell*, the relevant facts will appear in the records of the proceedings in which the defendant pleaded guilty and first attempted to withdraw his plea.[79] In other cases, relatively streamlined fact-finding will suffice to tell a judge whether the defendant's bargain produced an accurate result in light of the suppressed information. In cases in which the evidence of guilt is still available, the government has the option to forgo the hearing and once more allow the defendant the choice of pleading or going to trial. And in the occasional case in which a detailed record must be built, the sacrifice will be worth the gain in serving the values of fairness underlying *Brady v. Maryland*.

IV. Conclusion

Application to guilty plea cases of the *Brady v. Maryland* duty to disclose requires that a defendant challenging the validity of his guilty plea demonstrate that suppressed evidence creates a reasonable doubt as to his guilt of the crimes to which he pled. Defendants plead guilty on the basis of many factors unrelated to their culpability — the prospects of long delays before trial, their perceptions of their attorneys' competence, their sometimes imperfect understanding of the law, judges' reputations, and so on — and when the state suppresses exculpatory information that could offset such considerations, it creates the risk of factually inaccurate pleas. The frequency of overcharging and the fact that prosecutors make their most tempting offers in their weakest cases exacerbate that risk. Application of the *Brady v. Maryland* duty is necessary to combat the threat of inaccurate pleas created by nondisclosure.

---

guilt unless tainted by constitutional violations that make the process "logically inconsistent with the valid establishment of factual guilt").

[78] *Cf. Blackledge*, 431 U.S. at 76 (holding that a hearing is due a defendant seeking habeas corpus relief from a guilty plea when his specific factual allegations are not "palpably incredible"); Fontaine v. United States, 411 U.S. 213, 215 (1973) (holding that the defendant was entitled to a hearing when the record before the district court did not "conclusively show" that he was not entitled to relief).

[79] *See* Campbell v. Marshall, 769 F.2d 314, 315 (6th Cir. 1985).

Application of the duty to guilty plea cases would also have symbolic importance. It would alert prosecutors that courts expect fair dealing from them in plea negotiations as well as in trials. Because plea bargaining is the primary means by which our system reaches verdicts, it is imperative that the same standards of fair play apply to guilty pleas as apply at trial. Defendants who agree to sacrifice their right to a trial help keep the criminal justice system from collapsing under the weight of its caseload. That system owes such defendants the same duty of fairness it owes defendants who proceed to trial.

84

LAW OFFICES
PERRONI, RAULS & LOONEY
A PROFESSIONAL ASSOCIATION
THE KOGER CENTER, SUITE 215
10810 EXECUTIVE CENTER DR.
LITTLE ROCK, ARKANSAS 72211

SAMUEL A. PERRONI
STANLEY D. RAULS
RITA S. LOONEY

TELEPHONE
501/227-8999

SEP 15 1988

September 8, 1988

SEP 15 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Darmouth, Nova Scotia
B2Y 3Z5

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Mr. Phil Dixon, our Arkansas State Bar Association President, has provided me with copies of your letters to him of June 10, 1988, and August 5, 1988.

In response to your question, I am enclosing copies of pertinent portions of the Arkansas Rules of Criminal Procedure.

In addition, I am providing you with a decision of the Arkansas Supreme Court relating to the disclosure of exculpatory statements.

Of course, the United States Supreme Court has passed upon the subject in the United States. The landmark case is the case of Brady v. Maryland, 373 U.S. 83 (1963), I am sure you probably have been provided with a copy of that case for your examination. If not, I would be more than happy to obtain a copy for you.

If there is anything else that you need or if you need any explanation of the materials I am enclosing, please feel free to contact me.

Very truly yours,

Samuel A. Perroni/mr

SAMUEL A. PERRONI

SAP/jlw
Enclosures
cc: Mr. Phillip E. Dixon

RULE 17. DISCLOSURE TO DEFENDANT

RULE 17.1. Prosecuting Attorney's Obligations.

(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iii) those portions of grand jury minutes containing testimony of the defendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grand jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant's premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Commentary to Article V

The rules which follow trace the contours of a comprehensive discovery scheme characterized by broad reciprocal pretrial disclosure aimed at expediting the criminal justice process.

Broad pretrial disclosure would seem to be not only desirable but also necessary. By encouraging guilty pleas, reducing delays during trial, and in general lending more finality to the disposition of criminal cases, disclosure alleviates docket congestion and permits a more economical use of resources.

The need for expanded pretrial disclosure requirements has been accorded recognition recently by the Arkansas General Assembly which, in 1971, enacted Act 381. This legislation, now codified as Ark. Stat. Ann. § 43-2011.1 *et seq.* (Supp. 1973), represents a desirable first step toward reform of the law in this area. The Commission has sought to follow the lead of the legislature, while, at the same time, setting out specific guidelines and requirements, and relaxing the formalistic aspects of the discovery process by eliminating, where feasible, written motion practice.

Article V is divided into four rules. The initial rule, Rule 17, addresses itself to required and discretionary disclosures by the prosecution. The scope of disclosure and the manner in which it may be accomplished are set out with particularity.

Rule 17.1 spells out the prosecutor's obligations respecting disclosure. The provisions of 17.1 are innovative not only in scope and design, but also in that they require certain information to be made available to a defendant upon request. A written motion addressed to the trial court's discretion is no longer an essential prerequisite. This, of course, is not to say that the rule divests the trial court of authority to exercise an appropriate degree of control over the discovery process. Neither does Article V mandate unlimited discovery. Rule 17.5 imposes limitations on required prosecutorial disclosure to protect the prosecutor's work product, the identity of an informant where his identity is not relevant or material to the issues at hand, and material the disclosure of which would involve a substantial risk of grave prejudice to national security. Additionally, under Rule 19.4, the trial court is specifically vested with authority to order disclosures restricted or deferred.

The prosecuting attorney's obligations under this rule extend to material and information within the knowledge, possession, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and regularly report, or with reference to the particular case, have reported to his office.

Rule 17.1 (a) (i) is congruent with existing authority insofar as it requires disclosure of *names* of witnesses.

Rule 17.1 (a) (ii) is also consonant with present law to the extent that it provides for discovery of written or recorded statements of a defendant. *See,* § 43-2011.2 (Supp. 1973). Insofar as discovery extends to the substance of oral statements by the defendant and written, recorded, and oral statements of codefendants, this provision is innovative.

Prior to the enactment of Act 381, a defendant apparently could not, as a matter of right, compel production prior to trial of a copy of a written confession, at least where the confession would not itself furnish evidence that it was involuntarily given. *Howell v. State,* 220 Ark. 278, 247 S.W.2d 952 (1952). Neither could he force the disclosure of relevant statements made by witnesses against him, unless a "fair trial" was impossible without such disclosure. *Johnson v. State,* 250 Ark. 132, 464 S.W.2d 611 (1971). *See, also, Bates v.*

87

129

State, 210 Ark. 1014,
(1947). Subsequent to
Act 381, it has been he
a defendant to cross-e
without making avail
pretrial statement; ho
will not be found to re
sent a showing of re
Rush v. State, 252 Ar
696 (1972).

The rationale justi
statements of codefen
by the commentary t
covery § 2.1:

> The requirement
> be allowed to inspec
> by a codefendant re
> which make it . . .
> there be pretrial dis
> v. United States, 3
> Ct. 1620, 20 L. Ed.
> Supreme Court hel
> stitutional error to
> under conditions
> dant's statement in
> defendant was bef
> under careful inst
> statement was
> against the codefe
> quate motion for
> made or if the ques
> codefendant's stat
> tered to remove th
> decided at the app
> clear that defense
> able to examine it
> 61.

The effect of Rule
marily to confer as
latitude for discovery
the discretion of the t
guage of the propose
somewhat greater di
that of its counterpa
(Supp. 1973); discove
results and reports o
tal examinations" b
reports or statements
connection with th
[emphasis supplied].

Adoption of this ru
Commission's agreen
dards Reporters tha
greater need for pr
less risk of misuse
this area. Unless ad
to examine this typ

the day of the trial, the prosecutor failed to comply with the rule, and the five minutes period granted to the defendant in order to interview the witness was insufficient to cure the prosecutor's noncompliance. Lewis v. State, 286 Ark. 372, 691 S.W.2d 864 (1985).

Untimely Request for Disclosure.

Where the record clearly reflected that the defendant was aware from his pretrial discovery that a certain informant would be called as a witness and that his credibility would be in issue, but he waited until the end of his case to call the prosecutor and the informant's attorney in an effort to impeach the informant's story by showing that the informant had been promised leniency relating to his part in the crime, the defendant simply failed to make his proof request in a timely manner. Garcia v. State, 18 Ark. App. 110, 711 S.W.2d 176 (1986).

Where defendant made the appropriate request under this rule and sought the basis of the results of a missing fingerprint report, pursuant to subdivision (a)(iv), and the information testified to by the expert was neutral and nonprejudicial, the defendant was entitled to challenge the state's conclusion by having his own tests performed, but he had to timely object. The defendant could not wait to see the full strength of the state's case before bringing his mistrial request to the attention of the trial court. Dumond v. State, 290 Ark. 595, 721 S.W.2d 663 (1986).

Waiver.

Discovery rights can be waived if the defense does not utilize them. Malone v. State, 292 Ark. 243, 729 S.W.2d 167 (1987).

Cited: Brown v. State, 261 Ark. 683, 550 S.W.2d 776 (1977); Russell v. State, 262 Ark. 447, 559 S.W.2d 7 (1977); Selph v. State, 264 Ark. 197, 570 S.W.2d 256 (1978); Brenneman v. State, 264 Ark. 460, 573 S.W.2d 47 (1978); Hughes v. State, 264 Ark. 723, 574 S.W.2d 888 (1978); Price v. State, 267 Ark. 1172, 599 S.W.2d 394 (1980); Robinson v. State, 7 Ark. App. 209, 646 S.W.2d 714 (1983); Walls v. State, 8 Ark. App. 315, 652 S.W.2d 37 (1983); Orsini v. State, 281 Ark. 348, 665 S.W.2d 245 (1984); Horne v. State, 12 Ark. App. 301, 677 S.W.2d 856 (1984); Woods v. State, 287 Ark. 212, 697 S.W.2d 890 (1985); Snell v. State, 290 Ark. 503, 721 S.W.2d 628 (1986).

RULE 17.2. Prosecuting Attorney's Performance of Obligations.

(a) The prosecuting attorney shall perform his obligations under Rule 17.1 as soon as practicable.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, recorded or photographed, during specified reasonable times; or

(ii) making available to defense counsel at a time specified such material and information, and suitable facilities and arrangements for inspection, testing, copying, recording or photographing of such material and information.

(c) The prosecuting attorney may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this Article.

RULE 19. REGULATION OF DISCOVERY

RULE 19.1. Investigation Not to Be Impeded.

Subject to the provisions of Rules 17.5 and 19.4, neither the prosecuting attorney, the defense counsel, nor members of their staffs shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant material.

RULE 19.2. Continuing Duty to Disclose.

If before trial, but subsequent to compliance with these rules, or an order entered pursuant thereto, a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel or the other party of the existence of such material or information. If additional material or information is discovered during trial, the party shall notify the court and opposing counsel of the existence of the material or information.

1987 Unofficial Supplementary Commentary to Rule 19.2

Disclosure of Theory of Case.

In *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983) the Arkansas Court of Appeals reviewed the conviction of an appellant prosecuted for tampering with physical evidence. Appellant filed a discovery motion under Rule 17.1 prior to trial. At trial a prosecution witness implicated both appellant and a city councilman in the offense. Appellant had no reason to believe that the state's witness would implicate another person in the crime. Appellant attempted to call the councilman as a defense witness, but the court sustained the prosecution's objection on grounds that appellant had not disclosed to the prosecution the name of this witness before trial. The Court did not attempt to fashion a remedy permitting such testimony by an undisclosed defense witness where defendant is clearly surprised by testimony of a prosecution witness. Neither did it characterize it as rebuttal testimony. Instead, the court reversed, finding that,

> Under Rule 19.2 . . ., the prosecutor had a continuing duty to notify appellant of any additional material or information comprehended by appellant's prior discovery motion. . . . [T]he prosecutor . . . improperly withheld details of the alleged crime which should have been set out in the State's Bill of Particulars.

7 Ark. App. at 93, 644 S.W.2d at 615

The court also found that the state failed to comply properly with a discovery motion, apparently because it failed to identify its main witness by name. Counsel for appellant knew the witness' identity, however, and attempted to interview her prior to trial, so it appears that reversal stemmed mainly from failure to disclose that there was an uncharged accomplice. The case seems to stand for the proposition that in response to a Rule 17.1 motion the state should disclose the identity of any other participant in the crime if it intends to produce evidence that there was another participant. Failure to do so places the defendant in the position of being unable to present testimony from a witness who would in some cases be both available and eager to dispute the state's evidence. See *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986), where the court of appeals observed that the *Masingill* decision was required because "withholding of details of the crime . . . clearly served to frustrate the appel-

lant's defense preparat
App. at 6, 708 S.W.2d at

ANALYSIS

Failure to disclose.
Timely request.

Failure to Disclose.

Where the attorney fo
mother in a child abuse
motion for discovery pr
had requested all statem
at any time have been r
fendant to police officer
the State had responde
without disclosing that
had made a statement t
treated her child, that
was going to call the p
not have taken the ch
trial court should have
statement or granted t
continuance since the St
obligation to timely inf
dant of all information i
erly requested to furni
State, 267 Ark. 527,
(1980).

There was no reversib
from the state's failure t
dant with the photogra
identified by witness a
state witnesses, where
cated that the state did
tograph after defense co
it at the omnibus hear
and where, although th
disclose in advance of
names of the two witnes
was listed by defendant
ness and the other was
defense counsel in adva
mony after the court re
for that purpose. Martin
Ark. 231, 601 S.W.2d

Knowledge of a code

RULE 19.3. Cust

Any materials fu
remain in his custo
tion and trial of the
furnished subject t

90

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

3580 WILSHIRE BOULEVARD, ROOM 800
LOS ANGELES 90010
(213) 736-2304

(213) 736-2235

JUN 2 1 1988

June 15, 1988

Gordon F. Proudfoot
Boyne Clark
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5

Dear Mr. Proudfoot:

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

The Attorney General of California, John K. Van de Kamp, requested that I respond to your inquiry regarding timely mandatory disclosure of exculpatory evidence to the defense in a criminal prosecution. We do have procedures for such disclosure.

Under the Constitution of the United States, all government prosecutors, state and federal, must disclose to criminal defendants, even in the absence of a specific request, all exculpatory evidence which raises a reasonable doubt about the defendant's guilt. Additionally, a defendant has the constitutionally protected privilege of requesting and obtaining all material evidence on the question of guilt and punishment. I have enclosed copies of three United States Supreme Court cases which discuss the prosecutor's duties of disclosing and preserving evidence.

In California, we call the procedure for disclosing information to the defense, "discovery". The State of California is geographically divided into 58 counties. The courts in each county are free to develop their own rules regarding discovery. Some counties, for example, specifically declare that the prosecution must provide discovery to the defense prior to trial, while others may remain silent as to when discovery must be provided. However, all of the trial courts in California are vested with broad discretion to impose sanctions, including dismissal or retrial of a case, if they conclude that the prosecutor did not provide timely discovery. The trial courts must determine what prejudice a defendant suffered because of

late discovery, and fashion an appropriate sanction to remedy that prejudice. I have enclosed the California Supreme Court case of People v. Wright (1985) 39 Cal.3d 576, which discusses those concepts, at pages 589-591.

Please feel free to contact me if I can provide further assistance to you.

Very truly yours,

Edward T. Fogel Jr.

EDWARD T. FOGEL, JR.
Assistant Attorney General

ETF:rfr

BRADY *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 490. Argued March 18–19, 1963.—Decided May 13, 1963.

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held:* Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84–91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86–88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88–91.

226 Md. 422, 174 A. 2d 167, affirmed.

E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was *John Martin Jones, Jr.*

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Thomas B. Finan,* Attorney General, and *Robert C. Murphy,* Deputy Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A. 2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland

Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A. 2d 167. The case is here on certiorari, 371 U. S. 812.[1]

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

---

[1] Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman* v. *United States*, 302 U. S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent* v. *Texas*, 318 U. S. 418, 421–422. Cf. *Local No. 438* v. *Curry*, 371 U. S. 542, 549.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—*United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815, and *United States ex rel. Thompson* v. *Dye*, 221 F. 2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney* v. *Holohan*, 294 U. S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle* v. *Kansas*, 317 U. S. 213, 215–216, we phrased the rule in broader terms:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan*, 294 U. S. 103."

The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F. 2d, at 820. In *Napue* v. *Illinois*, 360 U. S. 264, 269, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta* v. *Texas*, 355 U. S. 28; *Wilde* v. *Wyoming*, 362 U. S. 607. Cf. *Durley* v. *Mayo*, 351 U. S. 277, 285 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made avail-

[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

able, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady.*
>
> "Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .
>
> "The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree.* We, therefore, see no occasion to retry that issue." 226 Md., at 429–430, 174 A. 2d, at 171. (Italics added.)

If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases "the Judges of Law" does not mean precisely what it seems to say.[3] The present status of that provision was reviewed recently in *Giles* v. *State*, 229 Md. 370, 183 A. 2d 359, appeal dismissed, 372 U. S. 767, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383, 183 A. 2d, at 365. The cases cited make up a long line going back nearly a century. *Wheeler* v. *State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell* v. *State*, 57 Md. 108, 120. And see *Beard* v. *State*, 71 Md. 275, 280, 17 A. 1044, 1045; *Dick* v. *State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel* v. *State*, 163 Md. 267, 162 A. 705.

---

[3] See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253–254.

We usually walk on treacherous ground when we explore state law,[4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles* v. *State*, *supra*. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.[5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a

[4] For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, that replaced an earlier opinion in the same case, 309 U. S. 703.

[5] "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell* v. *State*, *supra*, at 120; *Vogel* v. *State*, 163 Md., at 272, 162 A., at 706–707.

bifurcated trial (cf. *Williams* v. *New York*, 337 U. S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause.* We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City* v. *Central Savings Bank*, 306 U. S. 661; *Minnesota* v. *National Tea Co.*, 309 U. S. 551. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell* v. *Hood*, 327 U. S. 678,

*Md. Const., Art. 23; *Home Utilities Co., Inc.,* v. *Revere Copper & Brass, Inc.*, 209 Md. 610, 122 A. 2d 109; *Raymond* v. *State*, 192 Md. 602, 65 A. 2d 285; *County Comm'rs of Anne Arundel County* v. *English*, 182 Md. 514, 35 A. 2d 135; *Oursler* v. *Tawes*, 178 Md. 471, 13 A. 2d 763.

wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?[1] In my opinion an affirmative answer would

[1] I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86–88 of its opinion.

be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,[2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A. 2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is disposi-

[2] Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

692-438 O-63-10

tive of the crucial issue here. 226 Md., at 427–429, 174 A. 2d, at 170.[3]

Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt.[4]

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms

---

[3] It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day* v. *State*, 196 Md. 384, 76 A. 2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

[4] In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

CRIMINAL LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

July 26, 1988

David C. Long
Director of Research
State Bar
555 Franklin Street
San Francisco, California 94102

Subject: Secretary Referral from Canadian Bar Association on Discovery of Exculpatory Statements in Criminal Prosecutions

Dear Mr. Long:

The right to defense discovery of exculpatory statements is well established in California. Time does not permit an exhaustive brief on this subject, but the following citations may be helpful.

The right of an accused to discovery in the course of preparing his defense is a judicially created doctrine evolving in the absence of guiding legislation. The courts have inherent power to order discovery when necessary to guarantee the defendant a fair trial. The courts have held that this right extends to the earliest stages, that is, even before the preliminary hearing. See Hills v. Superior Court (1974) 10 Cal. 3d 812; Holman v. Superior Court (1981) 29 Cal. 3d 480 (attached).

See also Penal Code Section 859 (attached) which provides that the prosecutor shall deliver to the defendant or counsel copies of the police, arrest, or crime reports, upon the first court appearance of course or, if unavailable, within two calendar days.

Extremely relevant to this inquiry is People v. Ruthford (1975) 14 Cal. 3d 399 (attached) which held that a prosecutor was guilty of prejudicial misconduct when he failed to disclose to defense counsel the motivation for the adverse testimony of a key prosecution witness and made misrepresentations of such to the court. The conviction was reversed.

The court cited Brady v. Maryland (1963) 373 U.S. 83, and In re Ferguson (1971), 5 Cal. 3d 525 (attached). The latter case held that prosecutors were required to disclose to the defense sustantial material evidence favorable to the accused without request. Suppression of such favorable evidence denies the defendant a fair trial and requires reversal. The court in Ruthford held that these cases established a duty on the part of the prosecution, even in the absence of a request, to disclose all substantial material evidence favorable to an accused, whether relating to guilt, punishment, or to the credibility of a material witness.

It is hoped that this brief report and the attached cases will be helpful. Please feel free to contact me if you have further questions.

Sincerely,

Audrey B. Collins

AUDREY B. COLLINS
Chair
Criminal Law Section

mi

att.

c: Janet Carver

SEP 2 2 1988

107

PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE

1310 KING STREET
BOX 1328
WILMINGTON, DELAWARE 19899
(302) 658-5102

TELECOPIER
(302) 658-8111
(302) 658-7257
TELEX 845209

WILLIAM PRICKETT*
RICHARD I. G. JONES*
WAYNE N. ELLIOTT
DANIEL M. KRISTOL
CARL SCHNEE
RICHARD R. WIER, JR.*
WALTER P. McEVILLY, JR.*
MASON E. TURNER, JR.
JAMES L. HOLZMAN
JOHN H. SMALL*
RICHARD P. S. HANNUM*
GEORGE H. SEITZ, III
GARY F. DALTON
MICHAEL HANRAHAN
DAVID E. BRAND
WILLIAM L. WITHAM, JR.*
DENNIS SPIVACK
VERNON R. PROCTOR
JAMES P. DALLE PAZZE
TIMOTHY A. CASEY
WAYNE J. CAREY

PAUL M. LUKOFF
ELIZABETH M. McGEEVER
MICHAEL F. BONKOWSKI
WENDIE E. COHEN
KEVIN M. HOWARD
JOHN W. SCHRECK**
BETH E. EVANS*
NORMAN L. PERNICK
W. WADE W. SCOTT
JOSEPH GREY
MARK F. DUNKLE***
CATHERINE J. SPONSELLER
ELLISA R. OPSTBAUM**
KAREN R. LINES
PHILIP B. OBBARD*
KEVIN G. HEALY*
BRENDA F. WALKER
CLAUDIA B. DAMSKY**

DOVER OFFICE:
26 THE GREEN
DOVER, DE 19901
(302) 674-3841

PENNSYLVANIA OFFICE:
135 EAST STATE STREET
KENNETT SQUARE, PA 19348
(215) 444-1573

*ALSO ADMITTED IN PA
**ADMITTED ONLY IN PA
***ADMITTED ONLY IN GA

September 2, 1988

Gordon F. Proudfoot, Esquire
CBA-Nova Scotia Branch
c/o C.L.E. Society
Suite 201
1521 Dresden Row
Halifax, N.S.
B3J2K3

RE: Exculpatory Material

Dear Mr. Proudfoot:

Your request of August 5, 1988 to Arthur Connolly, president of the Delaware Bar Association, has today been referred to me since I am chairman of the Criminal Law Section of the Bar Association.

The obligation to produce exculpatory material in criminal proceedings in Delaware is derived from two sources: the U.S. Supreme Court and Delaware Supreme Court decisions in Brady v. Maryland, 373 U.S. 83, 83 Supr. Ct. 1194 (1963); United States v. Agurs, 427 U.S. 97, 96 Supr. Ct. 2392 (1974); Stokes v. State Del. Supr. 402 A2d 376 (1979); and the Code of Professional Responsibility of the Delaware Bar. Rule 3.8(d).

I enclose copies of those decisions for your review and a copy of the rule of the Code of Professional Responsibility.

In addition to the requirement to produce the Brady material, if the State has at one time possession of Brady material and then loses or destroys it, the courts in Delaware make a three-pronged analysis:

> "(1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or Brady?
>
> (2) if so, did the government have a duty to preserve the material?
>
> (3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach," DeBerry v. State, Del. Supr. 457 A2d 744 (1983) at 750 [a copy of which is enclosed].

The Court in that latter decision held:

> "The obligation to preserve evidence is routed in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware Constitution, Article 1, Section 7. The duty of preservation extends not only to the Attorney General's office, but all investigative agencies, local, county, and state."

At 751-752.

There are innumerable decisions by the Delaware Supreme Court in connection with Brady material which includes, of course, not only exculpatory evidence but also impeachment evidence. Should you wish copies of those decisions, please advise.

Respectfully submitted,

Richard R. Wier, Jr.

RRWjr/bfd
Enclosures
cc: Arthur Connolly, Esquire

apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client in any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) conforms provisions of DR 5-101(B)(1) and (2). mony relating to a formality, referred to 5-101(B)(2), in effect defines the phrase contested issue," and is redundant.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment. — A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Code Comparison. — DR 7-103(A) provides that "A public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

LE 3.9. ADVOCATE IN NON PROCEEI

lawyer representing a client before a l in a nonadjudicative proceeding shall d sentative capacity and shall conform ugh (c), 3.4(a) through (c) and 3.5(a)

mment. — In representation before bod- such as legislatures, municipal councils, executive and administrative agencies act- in a rule-making or policy-making capac- lawyers present facts, formulate issues and vance argument in the matters under con- ration. The decision-making body, like a rt, should be able to rely on the integrity of submissions made to it. A lawyer appear- before such a body should deal with the ibunal honestly and in conformity with appli- able rules of procedure.

Lawyers have no exclusive right to appear efore nonadjudicative bodies, as they do be- fore a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

TRANSACTIONS WITH PERS

RULE 4.1. TRUTHFULNESS OTHE

In the course of representing a cl

(a) make a false statement of

(b) fail to disclose a material

necessary to avoid assisting a

unless disclosure is prohibited

Comment.

Misrepresentation. — A lawyer is require to be truthful when dealing with others on client's behalf, but generally has no affirm tive duty to inform an opposing party of rel vant facts. A misrepresentation can occur if t lawyer incorporates or affirms a statement another person that the lawyer knows is fal Misrepresentation can also occur by failure act.

Statement of fact. — This Rule refers

compromise verdict in violation of *Hyman Reiver and Company v. Rose*, Del.Supr., 147 A.2d 500 (1958) and *Brown v. State*, Del. Supr., 369 A.2d 682 (1976). In *Reiver, supra*, this Court held that the total effect of the supplemental charge must be considered to determine whether the Trial Court unduly influenced the jury in reaching a verdict. 147 A.2d at 506. *Brown* requires that "the [*Allen*] charge include an admonition that each individual juror not surrender his or her honest convictions and not to return any verdict contrary to the dictates of personal conscience." 369 A.2d at 684.

The defendant contends that, notwithstanding *Brown* admonitions, the Trial Judge's reference to the jurors' "duty to consult with one another" and "duty to agree upon a verdict" abrogated the beyond-a-reasonable-doubt standard mandated for criminal trials and resulted in a compromise verdict. We disagree.

While the jurors were advised that it was their "duty" to consult and reach a verdict, each reference to such was accompanied by a "personal conscience" admonition. Indeed, an examination of the record reveals that the Trial Judge so admonished the jury five times in the charge.[6] Consequently, the wording of the charge was not coercive.

(3) The defendant contends that because the jury deliberated for nine hours before indicating deadlock and, a short time after the *Allen* charge, asked the Trial Judge whether it could recommend the punishment, a compromise verdict followed five additional hours of deliberation. We find this position wholly untenable in light of the repeated admonitions by the Trial Judge.

(4) Finally, the defendant argues that the complexity of the instant case confused certain jurors and made them susceptible to coercion. The record does not support this contention.

We hold that the charge was not coercive as a matter of law. The Trial Judge did not abuse his discretion.

* * * * * *

Affirmed.

6. Noteworthy is the conclusion of the charge, wherein the Court stated in pertinent part:

"*Remember, at all times, no juror is expected to yield his or her conscientious conviction which he may have as to the weight and effect of the evidence;* and remember also, that after the full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, *if you can do so without violating your individual judgment and conscience.*" (Emphasis supplied).

Tony T. DEBERRY, Defendant Below, Appellant,

v.

STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Submitted Oct. 19, 1982.

Decided Jan. 27, 1983.

Defendant was convicted before the Superior Court of first-degree rape, first-degree kidnapping, and possession of a deadly weapon during the commission of a felony, and he appealed. The Supreme Court, Moore, J., held that: (1) State's failure to produce or account for defendant's clothing, which defense had requested State to produce, was reversible error, and (2) alleged victim's out-of-court identification of defendant was admissible.

Reversed and remanded.

1. Criminal Law ⇐700

Claims that potentially exculpatory evidence was lost or destroyed by State require examination as to whether requested material, if extant in possession of State at

time of defense request, would have been subject to disclosure under criminal discovery rule or *Brady*, whether, if so, government had duty to preserve material, and if there was duty to preserve, whether duty was breached and what consequences should flow from breach. Superior Court Criminal Rule 16, Del.C.Ann.

2. Criminal Law ⇐627.6(3)

In rape prosecution, defendant's clothing was subject to disclosure under criminal discovery rule. 11 Del.C. §§ 764, 783A, 1447; Superior Court Criminal Rule 16(b), Del.C.Ann.

3. Criminal Law ⇐627.6(3)

Where defense only made general *Brady* request, defendant's clothing was material for *Brady* purposes only if in context of entire record clothing would create reasonable doubt not otherwise present.

4. Criminal Law ⇐627.6(3)

Assuming absence of hair or blood or semen stains on defendant's clothing, clothing would have been discoverable in rape prosecution under *Brady* and *Agurs*. 11 Del.C. §§ 764, 783A, 1447.

5. Criminal Law ⇐1035(2)

Where State did not object to disclosure of defendant's clothing on grounds of immateriality or that request for disclosure was unreasonable, State was precluded from arguing that clothing, if preserved, was not subject to disclosure under criminal discovery rule. Superior Court Criminal Rules 16, 16(b), Del.C.Ann.; Sup.Ct. Rules, Rule, Del.C.Ann. 8.

6. Constitutional Law ⇐268(5)

State's duty to disclose evidence includes duty to preserve it as well, rooted in due process provisions of Federal and State Constitutions. U.S.C.A. Const.Amend. 14; Del.C.Ann. Const. Art. 1, § 7.

7. Criminal Law ⇐700

State's duty to preserve evidence extends not only to Attorney General's office but all investigative agencies, local, county, and state. U.S.C.A. Const.Amend. 14; Del. C.Ann. Const. Art. 1, § 7.

8. Criminal Law ⇐627.6(1)

As matter of prudence, agencies that create rules for evidence preservation should broadly define discoverable evidence to include any material that could be favorable to defendant. Superior Court Criminal Rule 16(b), Del.C.Ann.

9. Criminal Law ⇐700

In determining whether State has breached duty to preserve evidence, and, if so, what effect such breach has on conviction, Supreme Court draws balance between nature of State's conduct and degree of prejudice to accused; State must justify conduct of police or prosecutor, and defendant must show how his defense was impaired by loss of evidence. Superior Court Criminal Rule 16(b), Del.C.Ann.

10. Criminal Law ⇐700

When examining conduct of State in loss or destruction of evidence, court should inquire whether evidence was lost or destroyed while in State's custody, whether State acted in disregard for interests of accused, whether State was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, whether acts, if deliberate, were taken in good faith or were reasonable justification, and whether government attorneys prosecuting case participated in events leading to loss or destruction of evidence. Superior Court Criminal Rule 16(b), Del.C.Ann.

11. Criminal Law ⇐700

Testimony of persons who had custody of material, any procedures for preserving evidence, specific practices followed in particular case, and steps taken to recover lost material after discovery of loss are relevant to inquiry into State's conduct in loss or destruction of evidence. Superior Court Criminal Rule 16(b), Del.C.Ann.

12. Criminal Law ⇐1171.1(1)

When analyzing prejudice to defense resulting from State's loss of evidence, court should consider centrality of evidence to case and its importance in establishing elements of crime or motive or intent of

defendant, probative value and reliability of secondary or substitute evidence, nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to accused, and probable effect on jury from absence of evidence. Superior Court Criminal Rule 16(b), Del.C.Ann.

13. Criminal Law ⇐1171.1(1)

When loss of evidence has severely prejudiced accused, degree of culpability of State is immaterial. Superior Court Criminal Rule 16(b), Del.C.Ann.

14. Criminal Law ⇐700

When physical evidence such as defendant's clothing is lost or otherwise becomes unavailable through some apparent default of police, State bears heavy burden of overcoming defendant's claim of prejudice, and haphazard explanation of loss is insufficient. Superior Court Criminal Rule 16(b), Del.C.Ann.

15. Criminal Law ⇐318

Failure of State to produce defendant's clothes upon request or to conduct scientific tests, as was done on apparel of alleged rape victim, permitted inference that any scientific evidence obtained from such items would have been favorable to defendant. 11 Del.C. §§ 764, 783A, 1447; Superior Court Criminal Rule 16(b), Del.C.Ann.

16. Criminal Law ⇐1166(1)

Failure of State to produce or account for defendant's clothing, upon defense request, was reversible error where defendant testified that police removed all of his clothing from his room, one detective testified that another detective took clothes and second detective denied doing so, police were in superior position to preserve or protect defendant's clothing when police took him into custody, actions of police in obtaining alleged rape victim's clothes reflected importance of clothing, only evidence linking defendant to actual rape was victim's account, physical and medical evidence was inconclusive, and absence of hair or blood on defendant's clothing would support defendant's denial of having intercourse with victim. 11 Del.C. §§ 764, 783A, 1447; Superior Court Criminal Rule 16(b), Del.C.Ann.

17. Criminal Law ⇐1192

Although failure of State to produce or account for defendant's clothing, on defense request, was reversible error, State had option of entering nolle prosequi to any or all of charges against defendant or retrying him but, because State had to bear responsibility for loss of evidence, and defendant therefore enjoyed inference that evidence of clothing would be exculpatory in nature, State had to stipulate in retrial that if defendant's clothing was introduced it would not contain any evidence incriminating to him. 11 Del.C. §§ 764, 783A, 1447; Superior Court Criminal Rule 16(b), Del.C.Ann.

18. Criminal Law ⇐339.8(6)

Prompt on-site confrontation of alleged rape victim with defendant was not unnecessarily suggestive and therefore alleged victim's out-of-court identification of defendant was admissible, notwithstanding victim's inability to further describe defendant other than by part in his hair, where victim knew defendant, identified him initially by his first name and bunk house in which he lived, and unhesitatingly identified defendant as her assailant. 11 Del.C. §§ 764, 783A, 1447.

19. Criminal Law ⇐339.8(6)

Identification of defendant by alleged rape victim in prompt on-site confrontation was reliable, notwithstanding alleged victim's inability to further describe defendant other than by part in his hair, where victim knew defendant, identified him initially by first name and bunk house in which he lived, and unhesitatingly identified defendant as her assailant. 11 Del.C. §§ 764, 783A, 1447.

Upon appeal from Superior Court. Reversed and remanded.

Raymond J. Otlowski, Asst. Public Defender, Wilmington, for appellant.

James B. Ropp, Deputy Atty. Gen., Wilmington, for appellee.

SEP 19 1988

113

1707 L Street, N.W.
Sixth Floor
Washington, D.C.
20036-4202
(202) 331-3883

THE DISTRICT OF COLUMBIA BAR

Lawyer Referral
and Information Service
(202) 331-4365

Sections Office
(202) 331-4364

Membership Office
(202) 331-0705

September 9, 1988

Gordon F. Proudfoot, Esquire
Boyne Clarke
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5
CANADA

Dear Mr. Proudfoot:

I apologize for the delay in resonding to your letters of June 10 and August 5, which just reached me.

It is indeed a basic principle of professional ethics in the District of Columbia that a prosecutor's primary duty is to justice rather than to success in obtaining a conviction.

For your information I am enclosing a copy of proposed Rule 3.8 of the Proposed Rules of Professional Conduct promulgated (for discussion) by our Court of Appeals on September 1, 1988. Although these rules are not yet formally in effect, they would simply restate the existing understanding of a prosecutor's ethical duty.

I hope this material is useful to you.

Sincerely,

enc.

(b) A LAWYER MAY NOT ACT AS ADVOCATE IN A TRIAL IN WHICH ANOTHER LAWYER IN THE LAWYER'S FIRM IS LIKELY TO BE CALLED AS A WITNESS IF THE OTHER LAWYER WOULD BE PRECLUDED FROM ACTING AS ADVOCATE IN THE TRIAL BY RULE 1.7 OR RULE 1.9.

COMMENT:

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Subparagraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subparagraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, subparagraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

[5] If the only reason for not permitting a lawyer to combine the roles of advocate and witness is possible prejudice to the opposing party, there is no reason to disqualify other lawyers in the testifying lawyer's firm from acting as advocates in that trial. In short, there is no general rule of imputed disqualification applicable to Rule 3.7. However, the combination of roles of advocate and witness may involve an improper conflict of interest between the lawyer and the client in addition to or apart from possible prejudice to the opposing party. Whether there is such a client conflict is determined by Rule 1.7 or 1.9. For example, if there is likely to be a significant conflict between the testimony of the client and that of the lawyer, the representation is improper by the standard of Rule 1.7(b) without regard to Rule 3.7(a). The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is, in the first instance, the responsibility of the lawyer involved. *See* Comment to Rule 1.7. Rule 3.7(b) states that other lawyers in the testifying lawyer's firm are disqualified only when there is such a client conflict and the testifying lawyer therefore could not represent the client under Rule 1.7 or 1.9. The principles of client consent, embodied in Rules 1.7 and 1.9, also apply to paragraph (b). Thus, the reference to Rules 1.7 and 1.9 incorporates the client consent aspects of those Rules. Paragraph (b) is designed to provide protection for the client, not rights of disqualification to the adversary. Subject to the disclosure and consultation requirements of Rules 1.7 and 1.9, the client may consent to the firm's continuing representation, despite the potential problems created by the nature of the testimony to be provided by a lawyer in the firm.

[6] Even though a lawyer's testimony does not involve a conflict with the client's interests under Rule 1.7 or 1.9 and would not be precluded under Rule 3.7, the client's interests might nevertheless be harmed by the appearance as a witness of a lawyer in the firm that represents the client. For example, the lawyer's testimony would be vulnerable to impeachment on the grounds that the lawyer/witness is testifying to support the position of the lawyer's own firm. Similarly, a lawyer whose firm colleague is testifying in the case should recognize the possibility that the lawyer might not scrutinize the testimony of the colleague carefully enough and that this could prejudice the client's interests, whether the colleague is testifying for or against the client. In such instances, the lawyer should inform the client of any possible adverse effects on the client's interests which might result from the lawyer's relationship with the colleague/witness, so that the client may make a meaningful choice whether to retain the lawyer for the representation in question.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL NOT:

(a) IN EXERCISING DISCRETION TO INVESTIGATE OR TO PROSECUTE, IMPROPERLY FAVOR OR INVIDIOUSLY DISCRIMINATE AGAINST ANY PERSON;

(b) FILE IN COURT OR MAINTAIN A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;

(c) PROSECUTE TO TRIAL A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE SHOWING OF GUILT;

(d) INTENTIONALLY AVOID PURSUIT OF EVIDENCE OR INFORMATION BECAUSE IT MAY DAMAGE THE PROSECUTION'S CASE OR AID THE DEFENSE;

(e) INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE, AT A TIME WHEN USE BY THE DEFENSE IS REASONABLY FEASIBLE, ANY EVIDENCE OR INFORMATION THAT THE PROSECUTOR KNOWS OR REASONABLY SHOULD KNOW TENDS TO NEGATE

THE GUILT OF THE ACCUSED OR TO MITIGATE THE OFFENSE, OR, IN CONNECTION WITH SENTENCING, INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE ANY UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR AND NOT REASONABLY AVAILABLE TO THE DEFENSE, EXCEPT WHEN THE PROSECUTOR IS RELIEVED OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL;

(f) ~~EXCEPT FOR SUCH STATEMENTS AS ARE NECESSARY TO INFORM THE PUBLIC OF THE NATURE OF THE PROSECUTOR'S ACTION,~~ MAKE EXTRAJUDICIAL COMMENTS WHICH SERVE TO HEIGHTEN CONDEMNATION OF THE ACCUSED WITHOUT A LEGITIMATE LAW ENFORCEMENT PURPOSE;

(g) CONDITION A DISMISSAL OF CHARGES, NOLLE PROSEQUI, OR SIMILAR ACTION ON THE ACCUSED'S RELINQUISHMENT OF THE RIGHT TO SEEK CIVIL REDRESS;

(h) IN PRESENTING A CASE TO A GRAND JURY, INTENTIONALLY INTERFERE WITH THE INDEPENDENCE OF THE GRAND JURY, PREEMPT A FUNCTION OF THE GRAND JURY, ABUSE THE PROCESSES OF THE GRAND JURY, OR FAIL TO BRING TO THE ATTENTION OF THE GRAND JURY MATERIAL FACTS TENDING SUBSTANTIALLY TO NEGATE THE EXISTENCE OF PROBABLE CAUSE; OR

(i) PEREMPTORILY STRIKE JURORS ON GROUNDS OF RACE, RELIGION, NATIONAL OR ETHNIC BACKGROUND, OR SEX; ~~OR~~.

~~(j) SUBPOENA A LAWYER TO A GRAND JURY WITHOUT PRIOR JUDICIAL APPROVAL IN CIRCUMSTANCES IN WHICH THE PROSECUTOR SEEKS TO COMPEL THE LAWYER/WITNESS TO PROVIDE EVIDENCE CONCERNING A PERSON OR ENTITY WITH WHOM THE LAWYER/WITNESS CURRENTLY HAS OR PREVIOUSLY HAD A LAWYER CLIENT RELATIONSHIP.~~

COMMENT:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor.

[4] Apart from the special responsibilities of a prosecutor under this Rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 5.3 relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[5] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE BODY IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3, 3.4(a) THROUGH (c), AND 3.5.

COMMENT:

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with it honestly and in conformity with applicable rules of procedure.

(116)

JUN 15

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

June 9, 1988

Mr. Gordon F. Proudfoot
BOYNE CLARKE
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

Pursuant to your letter dated May 25, 1988, plese find enclosed a copy of Rule 3.220, Rules of Criminal Procedure entitled, Discovery, which sets out Florida's discovery procedures.

The rule is self-explanatory and detailed. The Florida courts have strictly construed said rule and have been quick to apply sanctions for violations by either side.

I trust this information provided meets your need.

Sincerely,

Carolyn M. Snurkowski
Assistant Attorney General

CMS/jp

Enclosure

117

RULES OF COURT

STATE

1987

Committee Note

1980 Adoption. This section implements the prior statutory law permitting conditional release. For complementary statute providing for conditional release, see section 925.27, Florida Statutes (Supp.1980) [designated as Fla.St.1980, Supp. § 916.17].

VI. DISCOVERY

Rule 3.220. Discovery

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement, provided, however, if the court determines *in camera* proceedings as provided in subsection (i) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure. The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(iii) Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

(iv) Any written or recorded statements and the substance of any oral statements made by a co-defendant if the trial is to be a joint one.

(v) Those portions of recorded grand jury minutes that contain testimony of the accused.

(vi) Any tangible papers or objects which were obtained from or belonged to the accused.

(vii) Whether the State has any material or information which has been provided by a confidential informant.

(viii) Whether there has been any electronic surveillance, including wiretapping, of the premises of the accused, or of conversations to which the accused was a party; and, any documents relating thereto.

(ix) Whether there has been any search or seizure and any documents relating thereto.

(x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(xi) Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

(3) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to him and defense counsel or as ordered by the court.

(4) The court may deny or partially restrict disclosures authorized by this Rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

(5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

(b) Disclosure to Prosecution.

(1) After the filing of the indictment or information and subject to constitutional limitations, a judicial officer may require the accused to:

(i) Appear in a line-up;

(ii) Speak for identification by witnesses to an offense;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving re-enactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of his blood, hair and other materials of his body which involves no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting; and

(ix) Submit to a reasonable physical or medical inspection of his body.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provisions may be made for appearances for such purposes in an order admitting the accused to bail or providing for his pre-trial release.

(3) Within seven days after receipt by defense counsel of the list of names and addresses furnished by the prosecutor pursuant to Section (a)(1)(i) of this Rule the defense counsel shall furnish to the prosecutor a written list of all witnesses whom the defense counsel expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by defense counsel, except for trial subpoenas, reasonable notice shall be given to defense counsel as to the time and place of examination pursuant to the subpoena. At such examination, defense counsel shall have the right to be present and to examine the witness.

(4) If the defendant demands discovery under Section (a)(1)(ii), (x), (xi) of this Rule, the defendant shall disclose to the prosecutor and permit him to inspect, copy, test and photograph, the following information and material which corresponds to that which the defendant sought and which is in the defendant's possession or control:

(i) The statement of any person whom the defendant expects to call as a trial witness other than that of the defendant.

(ii) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(iii) Any tangible papers or objects which the defense counsel intends to use in the hearing or trial.

Defense counsel shall make the foregoing disclosures within fifteen days after receipt by him of the corresponding disclosure from the prosecutor. Defense counsel shall perform the foregoing obligations in any manner mutually agreeable to him and the prosecutor; or as ordered by the court.

The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this section. If a protective order is granted, the defendant may, within two days thereafter, or at any time before the prosecutor furnishes the information or material which is the subject of the motion for protective order, withdraw his demand and not be required to furnish reciprocal discovery.

(c) Matters Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

(2) *Informants.* Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused.

(d) Discovery Depositions.

(1) At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order. The party taking the deposition shall give reasonable written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendant or consolidated cases, no person shall be deposed more than once except by consent of the parties, or by order of the court issued upon good cause shown. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in per-

son. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(2) No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is: (a) agreed between the State and any defendant that the deposition should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause is filed with the court, or (b) ordered by the court upon a showing that the deposed witness is material or upon showing of good cause. This rule shall not apply to applications for reimbursement of costs pursuant to Florida Statute 939.06 and Article I Section 9 of the Florida Constitution.

(e) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel, or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(f) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly disclose or produce such witnesses or material in the same manner as required under these rules for initial discovery.

(g) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules upon good cause shown.

(h) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial use thereof.

(i) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting the relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(j) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule, or an order issued pursuant thereto, may subject counsel to appropriate sanctions by the court.

(k) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(*l*) Pre-trial Conference. The trial court may hold one or more pre-trial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives this in writing. Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247); July 18, 1980, effective Jan. 1, 1981 (389 So.2d 610); Nov. 26, 1986 (498 So.2d 875).

Committee Note

1972 Revision. The committee studied the ABA Standards for Criminal Justice relating to discovery and procedure before trial. Some of the Standards are incorporated in the committee's proposal, others are not. Generally, the Standards are divided into five parts:

Part I deals with policy and philosophy and while the committee approves the substance of Part I, it was determined that specific rules setting out this policy and philosophy should not be proposed.

Part II provides for automatic disclosures (avoiding judicial labor) by the prosecutor to the defense of almost everything within the prosecutor's knowledge, except for work product and the identity of confidential informants. The committee adopted much of Part II, but felt that the disclosure should not be automatic in every case; the disclosure should be made only after request or demand and within certain time limitations. The ABA Standards do not recommend reciprocity of discovery, but the committee deemed that a large degree of reciprocity is in order and made appropriate recommendations.

Part III of the ABA Standards recommends some disclosure by the defense (not reciprocal) to which the State was not previously entitled. The committee adopted Part III and enlarged upon it.

Part IV of the Standards set forth methods of regulation of discovery by the court. Under the Standards the discovery mentioned in Parts II and III would have been automatic and without the necessity of court orders or court intervention.

Part III provides for procedures of protection of the parties and was generally incorporated in the recommendations of the committee.

Part V of the ABA Standards deals with Omnibus Hearings and pre-trial conferences. The committee rejected part of the Standards dealing with Omnibus Hearings because it felt that it was superfluous under Florida procedure. The Florida committee determined that a trial judge may, within his discretion, schedule a hearing for the purposes enumerated in the ABA Omnibus Hearing, and that a rule authorizing it is not necessary. Some of the provisions of the ABA Omnibus Hearing were rejected by the Florida committee, i. e., stipulations as to issues, waivers by defendant, etc. A modified form of pre-trial conference was provided in the proposals by the Florida committee.

(a)(1)(i) Same as ABA Standard 2.1(a)(i) and substance of Standard 2.1(e). Formerly Florida Criminal Procedure Rule 3.220(e) authorized exchange of witness lists. When considered with proposal 3.220(a)(3), it is seen that the proposal represents no significant change.

(ii) This rule is a modification of Standard 2.1(a)(ii) and is new in Florida, although some such statements might have been discoverable under Florida Criminal Procedure Rule 3.220(f). Definition of "statement" derived from 18 U.S.C. § 3500.

Requiring law enforcement officers to include irrelevant or sensitive material in their disclosures to the defense would not serve justice. Many investigations overlap and information developed as a by-product of one investigation may form the basis and starting point for a new and entirely separate one. Also, the disclosure of any information obtained from computerized records of the Florida Crime Information Center and the National Crime Information Center should be subject to the regulations prescribing the confidentiality of such information so as to safeguard the right of the innocent to privacy.

(iii) Same as Standard 2.1(a)(ii) relating to statements of accused; words, "... known to the prosecutor, together with the name and address of each witness to the statement" added, and is new in Florida.

(iv) From Standard 2.1(a)(ii). New in Florida.

(v) From Standard 2.1(a)(iii) except for addition of words, "that have been recorded" which were inserted to avoid any inference that the proposed rule makes recording of grand jury testimony mandatory. This discovery formerly available under Florida Criminal Procedure Rule 3.220(a)(3).

(vi) From Standard 2.1(a)(v). Words, "books, papers, documents, photographs" were condensed to "papers or objects" without intending to change their meaning. This was previously available under Florida Criminal Procedure Rule 3.220(b).

(vii) From Standard 2.1(b)(i) except word "confidential" was added to clarify meaning. This is new in this form.

(viii) From Standard 2.1(b)(iii) and is new in Florida in this form. Previously this was disclosed upon motion and order.

(ix) From Standard 2.3(a), but also requiring production of "documents relating thereto" such as search warrants and affidavits. Previously this was disclosed upon motion and order.

(x) From Standard 2.1(a)(iv). Previously available under Florida Criminal Procedure Rule 3.220(a)(2). Defendant must reciprocate under proposal 3.220(b)(4).

(xi) Same committee note as (b) under this subsection.

(2) From Standard 2.1(c) except omission of words "or would tend to reduce his punishment therefor" which should be included in sentencing.

(3) Based upon Standard 2.2(a) and (b) except Standards required prosecutor to furnish voluntarily and without demand while this proposal requires defendant to make demand and permits prosecutor 15 days in which to respond.

(4) From Standards 2.5(b) and 4.4. Substance of this proposal previously available under Florida Criminal Procedure Rule 3.220(h).

(5) From Standard 2.5. New in Florida.

(b)(1) From Standard 3.1(a). New in Florida.

(2) From Standard 3.1(b). New in Florida.

(3) Standards did not recommend that defendant furnish prosecution with reciprocal witness list; however, formerly, Florida Criminal Procedure Rule 3.220(e) did make such provision. The committee recommended continuation of reciprocity.

(4) Standards did not recommend reciprocity of discovery. Previously, Florida Criminal Procedure Rule required some reciprocity. The committee recommended continuation of former reciprocity and addition of exchanging witness' statement other than defendants'.

(c) From Standard 2.6. New in Florida, but generally recognized in decisions.

(d) Not recommended by Standards. Previously permitted under Florida Criminal Procedure Rule 3.220(f) except for change limiting the place of taking the deposition and eliminating requirement that witness refuse to give voluntary signed statement.

(e) From Standard 4.1. New in Florida.

(f) Same as Florida Criminal Procedure Rule 3.220(g).

(g) From Standard 4.4 and Florida Criminal Procedure Rule 3.220(h).

(h) From Standard 4.4 and Florida Criminal Procedure Rule 3.220(h).

(i) From Standard 4.6. Not previously covered by rule in Florida, but permitted by decisions.

(j)(1) From Standard 4.7(a). New in Florida except court discretion permitted by Florida Criminal Procedure Rule 3.220(g).

(2) From Standard 4.7(b). New in Florida.

(k) Same as prior rule.

(*l*) Modified Standard 5.4. New in Florida.

1977 Amendment. The proposed change only removes the comma which currently appears after (a)(1).

1980 Amendment. The intent of the rule change is to guarantee that the accused will receive those portions of police reports or report summaries which contain any written, recorded or oral statements made by the accused.

1986 Revision. The showing of good cause under (d)(2) of this rule may be presented ex parte or in camera to the court.

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

Rule 3.230. Disqualification of Judge

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity within the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(e) When the prosecuting attorney or defendant shall have suggested the disqualification of a trial judge and an order shall have been made admitting the disqualification of such judge, and another judge shall have been assigned to act in lieu of the judge so held to be disqualified the judge so assigned shall not be disqualified on account of alleged prejudice against the party making the motion in the first instance, or in favor of the adverse party, unless such judge shall admit and hold that it is then a fact that he, the said judge, does not stand fair and impartial between the parties and if such judge shall hold, rule and adjudge that he does stand fair and impartial as between the parties and their respective interest, he shall cause such ruling to be entered on the minutes of the court, and shall proceed to preside as judge in the pending cause. The ruling of such judge may be reviewed by the appellate court, as are other rulings of the trial court.

Committee Note

Same as prior rule.

Rule 3.231. Substitution of Judge

If by reason of death or disability the judge before whom a trial has commenced is unable to proceed with the trial, or posttrial proceedings, another judge, certifying that he has familiarized himself with the case, may proceed with the disposition of the case.

Committee Note

New. Follows ABA Standard 4.3, Trial by Jury. Inserted to provide for substitution of trial judge in specified instances.

VIII. CHANGE OF VENUE

Rule 3.240. Change of Venue

(a) The state or the defendant may move for a change of venue on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge.

(b) Every motion for change of venue shall be in writing and be accompanied by:

(1) Affidavits of movant and two or more other persons setting forth facts upon which the motion is based; and

The Florida State University
Tallahassee, Florida 32306-1034

College of Law
Telecopier: 904/644-5487

123

JUL 18 1988

July 8, 1988

Gordon F. Proudfoot, Esq.
Boyne Clarke
Barristers and Soliciters
P. O. Box 876
Dartmouth, Nova Scotia BYY ZZZ5

RE: Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

I have received a copy of your letter requesting information regarding the prosecution's obligation to disclose exculpatory material to the defense. The matter was referred to me as Chairman of the Criminal Law Section of the Florida Bar by Rutledge R. Liles, the President of the Florida Bar.

In the United States we have a copious jurisprudence on the issue. The United States Supreme Court held in the early decision of Brady V. Maryland, 373 U.S. 83 (1963), that the supression by the prosecution of evidence favorable to an accussed on guilt or punishment violates our constitutional protection of due process of law. The most recent decision from the United States Supreme Court on the issue is United States V. Bagley, __ U.S.__, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The troublesome issue in our cases has been whether the fact that the defense made or did not make a specific request for the nondisclosed item should affect the standard for whether a conviction should be vacated or not. In the Bagley decision, the Court finally held that the standard of materiality (i.e. whether a conviction should be vacated for nondisclosure) does not depend upon whether a request was made by the defense for the non-disclosed information. In Bagley the Court held that if exculpatory evidence has not been disclosed by the prosecution, the standard to be applied when deciding to vacate a conviction is as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Florida Supreme Court recently applied the Bagley standard in Arango V. State, 497 So. 2d 1161 (Fla. 1986). I have enclosed a copy of this decision. There are of course a multitude of decisions in the lower courts involving this particular issue. I think it is fair to say that although the claim is often made by convicted defendants, it is usually unavailing. The claim was successful in Arango, however.

The general constitutional obligation of the prosecution to disclose exculpatory material is codified in the Florida Rules of Criminal Procedure 3.220 (a) (2). I have also enclosed a copy of this provision.

I hope that this will be of some use to you. As I said earlier, there are many lower court decisions dealing with the issue. The Bagley decision is the significant recent decision by the United States Supreme Court. There have also been many law review articles dealing with the question and discussing the decisions.

Sincerely,

John F. Yetter
Professor and Associate Dean

JY/cd

cc: Rutledge R. Liles, Esq.
Professor Gerald Bennett

Enclosures

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Appellant,

v.

The STATE of Florida, Appellee.

No. 64721.

Supreme Court of Florida.

Oct. 2, 1986.

Rehearing Denied Dec. 22, 1986,

Defendant, whose first-degree murder and death sentence was affirmed, 411 So.2d 172, sought postconviction relief. The Circuit Court, in and for Dade County, Robert M. Deehl, J., denied relief, and defendant appealed. The Supreme Court, 437 So.2d 1099, remanded to trial court. Following denial of relief, the Supreme Court, 467 So.2d 692, vacated death sentence and remanded for new trial. The United States Supreme Court, 106 S.Ct. 41, vacated and remanded for further consideration. The Supreme Court held that reasonable probability existed that had suppressed evidence been disclosed to defendant, results of proceedings would have been different, and therefore, defendant was entitled to new trial.

Remanded for new trial.

Ehrlich, J., dissented.

Criminal Law ⇐998(10)

Reasonable probability existed that had suppressed evidence, consisting of pistol found under balcony of defendant's apartment, been disclosed to defense, results of defendant's murder prosecution would have been different, and therefore, post-conviction petitioner was entitled to new trial, where prosecutor had argued to jury that nothing was kept from jury and that defendant's testimony was not real because it did not "jibe" with physical evidence, and pistol was exculpatory evidence supportive of defense that three armed males had overpowered defendant and victim and then escaped, one jumping off bedroom balcony.

Sharon B. Jacobs of Sharon B. Jacobs, P.A., Miami, for appellant.

Jim Smith, Atty. Gen., and Calianne P. Lantz, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

The United States Supreme Court has entered an order* vacating *Arango v. State*, 467 So.2d 692 (Fla.1985), and remanding it for further consideration in light of *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). We have jurisdiction, article V, section 3(b)(1), Florida Constitution.

Arango was convicted of first-degree murder and sentenced to death. We affirmed on direct appeal. *Arango v. State*, 411 So.2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). Arango sought post-conviction relief, arguing that he discovered, after trial and direct appeal, that a pistol had been found under the balcony of his apartment and turned over to the police; that the pistol was exculpatory evidence supportive of his defense that three armed Latin males overpowered him and the victim and then escaped, one jumping off the bedroom balcony. We reversed the trial court's denial of relief, finding that Arango had stated a prima facie case of a discovery violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 11, 4, 10 L.Ed.2d 215 (1963), and remanded to the trial court for a hearing on the claimed *Brady* violation. *Arango v. State*, 437 So.2d 1099 (Fla.1983).

The trial court again denied relief. This Court reversed the trial court's denial, vacated the death sentence, and remanded to the trial court for a new trial. We found that the state had suppressed evidence favorable to the defense following a specific defense request for disclosure, that the suppressed exculpatory evidence was mate-

* — U.S. —, 106 S.Ct. 41, 88 L.Ed.2d 34 (1985).

rial in that it might have affected the outcome of the trial, *see United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that, in fact, Arango was deprived of a fair trial. "The prosecutor was able to argue to the jury that 'nothing was kept from you, whatever we had is on the table,' that Arango's testimony was 'not real because it does not jive [sic] with the physical evidence' and, therefore, 'does not create a reasonable doubt.'" *Arango*, 467 So.2d at 694. We found that due process required a new trial under the circumstances—suppressed exculpatory evidence coupled with the foregoing prosecutorial argument to the jury.

In *Bagley* the Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* 105 S.Ct. at 3384 (Blackmun, J.), 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* 105 S.Ct. at 3384.

Applying the *Bagley* test of materiality, we are satisfied that we reached a correct conclusion in *Arango v. State*, 467 So.2d 692 (Fla.1985). Our review of the record convinces us that there is a reasonable probability that had the suppressed evidence been disclosed to the defense, the results of the proceedings would have been different. Having reconsidered the case in light of the United States Supreme Court mandate, we remand to the trial court for a new trial.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, SHAW and BARKETT, JJ., concur.

EHRLICH, J., dissents.

Roger Dean LEWIS, Appellant,

v.

The STATE of Florida, Appellee.

No. 85-1761.

District Court of Appeal of Florida, Third District.

Nov. 18, 1986.

The Circuit Court, Monroe County, M. Ignatius Lester, J., denied defendant's petition for postconviction relief, and defendant appealed. The District Court of Appeal held that failure of State to provide defendant with evidence that coperpetrator of crime was told by police that they wanted defendant and not coperpetrator did not violate defendant's *Brady* discovery rights.

Affirmed.

Jorgenson, J., specially concurred and filed opinion.

Criminal Law ⇐627.8(6)

Failure of State to provide defendant with evidence that coperpetrator of crime was told by police that they wanted defendant and not coperpetrator did not violate defendant's *Brady* discovery rights, as there was no showing of reasonable probability that, had evidence been disclosed, result of proceeding would have been different.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., and Richard E. Doran, Asst. Atty. Gen., for appellee.

Before BASKIN, FERGUSON and JORGENSON, JJ.

PER CURIAM.

Appellant alleges, and we agree, that the State failed to provide him with evidence

VI. DISCOVERY

RULE 3.220. DISCOVERY

(a) **Prosecutor's Obligation.**

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement, provided, however, if the court determines *in camera* proceedings as provided in subsection (i) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure. The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(iii) Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

(iv) Any written or recorded statements and the substance of any oral statements made by a co-defendant if the trial is to be a joint one.

(v) Those portions of recorded grand jury minutes that contain testimony of the accused.

(vi) Any tangible papers or objects which were obtained from or belonged to the accused.

(vii) Whether the State has any material or information which has been provided by a confidential informant.

(viii) Whether there has been any electronic surveillance, including wire-tapping, of the premises of the accused, or of conversations to which the accused was a party; and, any documents relating thereto.

(ix) Whether there has been any search or seizure and any documents relating thereto.

(x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(xi) Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

(3) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to him and defense counsel or as ordered by the court.

(4) The court may deny or partially restrict disclosures authorized by this Rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

(5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

(b) **Disclosure to Prosecution.**

(1) After the filing of the indictment or information and subject to constitutional limitations, a judicial officer may require the accused to:

ULTON
OUNTY

128

LEWIS R. SLATON
DISTRICT ATTORNEY-ATLANTA JUDICIAL CIRCUIT
THIRD FLOOR COURTHOUSE • ATLANTA, GEORGIA 30335

August 12, 1988

AUG 2 2 1988

Mr. Gordon Proudfoot
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Aldernay Drive
P. O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

RE: Prosecutorial Misconduct

Dear Mr. Proudfoot:

In response to your letter to Jim Elliott, President of the State Bar of Georgia, I have prepared a memorandum addressing those questions that you raised.

It is important for the criminal justice system to work effectively but not to surrender those principles of honesty and fair play. As our United States Supreme Court once said in Bruton vs. U.S., "a defendant is entitled to a fair trial but not a perfect one".

If you have any questions please contact me.

Sincerely,

A. Tom Jones
Assistant District Attorney
Atlanta Judicial Circuit

b

cc: A. James Elliott, President
State Bar of Georgia
100 Galleria Parkway, Suite 1200
Atlanta, Ga. 30339

MEMORANDUM OF LAW

TO: Assistant District Attorney Tom Jones
Boyne Clarke, The Canadian Bar Association

FROM: John H. Zwald

DATE: August 12, 1988

RE: Canadian Bar Submission to the Royal Commission on the prosecution of Donald Marshall, Jr.

Question Presented

Whether the prosecution must disclose any and all exculpatory evidence, which tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, to the defense counsel, prior to trial in criminal cases?

Brief Answer

In applying the Brady Doctrine in Georgia, the court imposed an affirmative duty on the prosecution to disclose evidence favorable to him in advance of trial. Both the Disciplinary Rules and the Ethical Considerations of the Georgia Code of Professional Responsibility require a prosecutor to disclose any "Brady" material to the defense counsel.

Statement of Facts

The Federal Government of Canada and the Government of Nova Scotia, has launched a Royal Commission of Inquiry into the prosecution of Donald Marshall, Jr.. Mr Marshall was wrongfully convicted of murder and spent 11 years in jail before being determined to be innocent. A major issue in his case was the lack of disclosure of exculpatory statements, either by the police or Crown Counsel to the defense counsel before, during, or after the trial.

Discussion

I. Whether the prosecution, in accordance with the Brady doctrine must disclose any and all exculpatory evidence to the defense counsel, prior to trial in criminal cases.

No Georgia statute or rule of practice exists which will allow discovery in criminal cases. Hicks v. State, 323 Ga. 393, 207 S.E. 2d. 30 (1974). At common law, the defendant has no right to examine the evidence in the case against him prior to trial. GA. CRM.TRIAL PRAC., (1986 ed.) §14-5. However, recently, notions of fair trial and due process have opened the way to limited discovery in criminal cases in Georgia. See e.g., Brady v. Maryland, 373 U.S. 83 (1963).

In the landmark case of Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court addressed the issue of whether exculpatory evidence must be disclosed by the prosecution to the defense counsel in a criminal case.

In Brady, the defendant and a companion named Boblit were charged with murder. Brady was tried first. At his trial, Brady admitted participating in the crime but claimed that his companion did the actual killing. Prior to the trial, Mr. Brady's defense counsel had requested the prosecution to allow him to examine Mr. Boblit's extra-judicial statements. Several of these were shown to him; but one in which Mr. Bablit admitted the actual killing was withheld by the prosecution. The non-disclosure by the prosecution of Boblit's statement did not come to Brady's notice until after he had been tried, convicted and sentenced. Id. at 84.

The court in Brady held that the suppression, by the prosecution, of evidence favorable to an accused, upon request, violates the Due Process Clause of the Fifth and 14th Amendments, where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87. The court defined favorable evidence as evidence that would tend to exculpate the defendant or reduce the penalty. Id. at 88.

Writing for the court, Mr. Justice Douglas stated "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of Justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. 83, 87 (1963). The court went on to state that a prosecution that withholds evidence on demand of an accused which, if available, would tend to exculpate him or reduce the penalty, helps shape a trial that bears heavily on the defendant. Id. at 88.

The Georgia Supreme Court first recognized that the rule of Brady v. Maryland was applicable in Georgia in the case of Hicks v. State, 232 Ga. 393, 207 S.E. 2d. 30 (1974). In applying Brady in Georgia, the court imposed an affirmative duty on the prosecution to disclose, on defendant's pre-trial motion, evidence favorable to him in advance of trial. Id. The court also stated that Brady does not require the prosecution to open his file for the defendant's general inspection. Nor is the prosecution required to search for exculpatory evidence even if such material is more accessible to the state that to the defendant. Id.

The United States Supreme Court further defined what evidence

must be disclosed by a prosecutor in United States v. Agures, 427 U.S. 97 (1976). In that case, the court addressed the problem of whether the prosecutor has any obligation to provide the defense counsel with exculpatory information when no request has been made. The court answered this question by stating: "there are situations in which the evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 105. The Georgia Supreme Court has cited Agures and has followed it where no request for discovery had been made. Carter v. State, 237 Ga. 617 619, 229 S.E.2d. 411 412 (1976).

The Agures court stated further that a prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. United States v. Agures, 427 U.S. 97 (1976). The court said that a general request is equivalent to no request. When the defendant is seeking evidence favorable to his innocence or punishment and has made no request or a general request for any exculpatory evidence, it is not a reversible error unless the defendant shows that the omitted evidence creates a reasonable doubt that did not otherwise exist. See Id. If the defendant has made a specific request for exculpatory evidence, as in Brady, he must show that the suppressed evidence might have affected the outcome of the trial. Id.

* * * *

Practical Application of the Brady doctrine in Georgia

The courts in Georgia have ruled that Brady does not establish

any right to pre-trial discovery in a criminal case, but instead seeks only to insure the fairness of the defendant's trial and reliability of the jury' determinations. McCleskey v.Zant, 580 F. Supp 388 (1974). Unlimited discovery of the state's file would unduly impair effective prosecution of criminal cases. William v. Dutton, 400 F.2d. 797 (5th Cir. 1968). The prosecution does not have to make a complete and detailed accounting to the defense of all police work, Moore v. Illinois, 408 U.S. 786, 795 (1972), but Brady does extend to exculpatory evidence in the hands of the police as well as the District Attorney. Freeman v. State of Georgia, 599 F. 2d. 65 (5th Cir. 1979).

There is no duty to produce material which is known by the defendant. Thus Brady does not reach statements made by the defendant. Gilreath v. State, 247 Ga. 814, 279 S.E. 2d. 650 (1981). Likewise, the prosecution is not required to uncover exculpatory evidence even if the defendant is indigent. Pulliam v. Balkcom, 245 Ga. 99, 104, 263 S.E. 2d. 143 (1980).

Failure to disclose inadmissible but material evidence is not to be excused simply because it is inadmissible. Sellers v. Estelle, 651 F. 2d 1074, 1077 (5th Cir. 1981).

II. Georgia Ethical Considerations and Disciplinary Standards concerning non-disclosure of exculpatory statements in criminal prosecutions.

Ethical Considerations of the State Bar of Georgia's Code of Professional Responsibility are guidelines for attorney conduct,

but violation does not necessarily result in discipline unless the conduct at issue also violates a Disciplinary Standard. Georgia Code of Professional Responsibility (1987).

Ethical Consideration 7-13, "Role of the Public Prosecutor"' states that the responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. Georgia Code of Professional Responsibility, EC 7-13, (1987).

EC 7-13 goes on to state that the prosecution should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused. Id.

Disciplinary Standards are adopted by the Supreme Court of Georgia. A violation of a Disciplinary Standard can result in disciplinary proceedings and punishment, including but not limited to reprimands and disbarment. Georgia Code of Professional Responsibility, (1987).

The State Bar of Georgia's Code of Professional Responsibility does not have any Disciplinary Standards which apply directly to prosecutors who intentionally or knowingly violate the Brady doctrine. However, the Disciplinary Rules do contain two standards which prohibit any lawyer from refusing to disclose or from suppressing any evidence required by law to produce.

Standard 46 of the Georgia Code of Professional Responsibility states "... a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. A violation of this Standard may be punished by a public reprimand." Georgia Code of Professional Responsibility, Standard 46, (1987).

Standard 56 of the Code states: "A lawyer shall not suppress any evidence that he or his client has legal obligation to reveal or produce. A violation of this standard may be punished by disbarment." Id. at Standard 56.

The Brady doctrine requires the prosecution to turn-over exculpatory evidence. E.g., Brady v. Maryland, 373 U.S. 83 (1963). A prosecutor who intentionally and knowingly, suppresses or refuses to disclose Brady material could be in violation of the Georgia Code of Professional Responsibility and suffer the sanctions imposed as a result of the violation.

136

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU
1164 BISHOP STREET, HONOLULU, HAWAII 96813
AREA CODE 808 ● 523-4511

CHARLES F. MARSLAND, JR.
PROSECUTING ATTORNEY

SEP 0 8 1988

September 1, 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

The Hawaii State Bar Association has asked me to respond to your inquiry of June 10, 1988, regarding the duty of the prosecution to disclose exculpatory statements and evidence to defense counsel.

In Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), the United States Supreme Court held that the prosecution's suppression of an accomplice's confession at the defendant's state trial violated the due process clause of the Fourteenth Amendment but neither that clause nor the equal protection clause of that amendment was violated by restricting the new trial to the question of punishment.

Following the decision in Brady most of the states, including Hawaii, have adopted rules of discovery requiring disclosure by the prosecution of "any material ornformation which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefore." Rule 16(b)(2)(ii) Hawaii Rules of Penal Procedure.

Thus the suppression by the prosecution of evidence favorable to and requested by an accused violates due process whether the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

In United States v. Bagley, 473 U.S. 667, 674-75 (1985), the Supreme Court stated:

> The holding in Brady v. Maryland requires the disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment.' 'A fair analysis of the holding of Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. . . '
>
> > 'For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . .'
> >
> > But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.'

It is clear from the federal case law that Brady "involve[s] the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense." Bagley, 473 U.S. at 678 (emphasis added). The United States Supreme Court in United States v. Agurs, 427 U.S. 97 (1976), outlined the three situations in which Brady violations arise.

> The first situation was the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. . . At the other extreme is the situation in Agurs itself, where the defendant does not make a Brady request and the prosecutor fails to disclose certain evidence favorable to the accused. . . The third situation identified by the Court in Agurs is where the defense makes a specific request and the prosecutor fails to disclose responsible evidence.

Bagley, 473 U.S. at 678-81 (footnote omitted).

All of the three scenarios described above involve situations where the defense only learns of the favorable evidence after trial.

> For most exculpatory evidence, the prosecutor should be able to satisfy his constitutional obligation by disclosure at trial. So too, where the information is revealed at trial, though not disclosed by the prosecutor, that ordinarily will render the prosecutor's failure to disclose harmless error. See e.g., United States v. Nixon, 634 F.2d 306 (5th Cir. 1981), rehearing denied 645 F.2d 72, certiorari denied 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103; Hudson v. Blackburn, supra note 8. Where the disclosure is made at that point, the burden rests with the defendant to establish that the "lateness of that disclosure so prejudiced [defendant's] preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." United States v. Shelton, supra note 26. Moreover, if the defendant failed to request a continuance when disclosure was first made at trial, that failure often will be viewed as automatically negating any claim of actual prejudice. Gorham v. Wainwright, 588 F.2d 178 (5th Cir. 1978); Timmons v. Commonwealth, 555 S.W.2d 234 (Ky. 1977); State v. Roussel, 381 So.2d 796 (La. 1980).

* * *

> (f) Defense Awareness of the Information. In Agurs, the Court described the "Brady rule" as applicable to situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." Looking to this language, various cases have held that the prosecutor's constitutional obligation was not violated, notwithstanding the nondisclosure of apparently exculpatory evidence, where that evidence was known to the defendant or defense counsel. They have insisted, however, that the defense be aware of the potentially exculpatory nature of the evidence as well as its existence. In many of the cases, no special request for disclosure was made. The courts there have reasoned that the defendant must be held responsible for his failure to request disclosure once he learned of the existence of the potentially exculpatory material. Where a request was made, but the item requested was not furnished, the courts often have reasoned that the defendant still was not harmed since the defense was obviously aware of the item's exculpatory content and could have obtained it for

> introduction at trial by subpoena. In a few cases, where the information in question was a matter of public record, courts have held that neither Brady or Agurs was applicable since the defense could have itself obtained the information through the exercise of reasonable diligence.

Lafave and Israel, Criminal Procedure, Vol. 2, §§ 19.5(e) and (f) at 545-547 (fns. omitted in § (f)) (1984).

In the Marshall case, even if defense did not know of the "favorable evidence" until after trial, the Court would still have to determine that the exculpatory statement was material either to Defendant's guilt or punishment. Brady, supra; Agurs, supra. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682.

In addition to the foregoing the Hawaii Supreme Court in 1978 held that the prosecution is required only to present to the grand jury evidence which is clearly exculpatory in nature. State v. Bell, 60 Haw. 241, 589 P.2d 517. A copy of that opinion along with the discovery rules is enclosed for your convenience.

I trust this material will prove helpful in preparing your submission. If I can be of any further service, please do not hesitate to write again.

Sincerely,

Arthur E. Ross

Arthur E. Ross
Deputy Prosecuting Attorney

AER/sl

cc: William C. McCorriston, Esq.

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his deposition; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

(h) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

Rule 16. DISCOVERY.

(a) Applicability. Subject to subsection (d) of this rule, discovery under this rule may be obtained in and is limited to cases in which the defendant is charged with a felony, and may commence upon the filing in circuit court of an indictment or a complaint.

(b) Disclosure by the Prosecution.

(1) *Disclosure Upon Written Request of Matters Within Prosecution's Possession.* Upon written request of defense counsel, the prosecutor shall disclose to him the following material and information within the prosecutor's possession or control:

(i) the names and last known addresses of persons whom the prosecutor intends to call as witnesses, in the presentation of the evidence in chief, together with their relevant written or recorded statements, provided that statements recorded by the prosecutor shall not be subject to disclosure;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if intended to be used in a joint trial, together with the names and last known addresses of persons who witnessed the making of such statements;

(iii) any reports or statements of experts, which were made in connection with the particular case or which the prosecutor intends to introduce, or which are material to the preparation of the defense and are specifically designated in writing by defense counsel, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(iv) any books, papers, documents, photographs, or tangible objects which the prosecutor intends to introduce, or which were obtained from or which belong to the defendant, or which are material to the preparation of the defense and are specifically designated in writing by defense counsel;

(v) any prior criminal record of the defendant.

(2) *Disclosure Without Request of Matters Within Prosecution's Possession.* The prosecutor shall disclose to defense counsel the following material and information within the prosecutor's possession or control:

(i) whether there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or occurring on his premises; and

(ii) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(3) *Disclosure of Matters Not Within Prosecution's Possession.* Upon written request of defense counsel and specific designation by him of material or information which would be discoverable if in the possession or control of the prosecutor and which is in the possession or control of other governmental personnel, the prosecutor shall use diligent good faith efforts to cause such material or information to be made available to defense counsel; and if the prosecutor's efforts are unsuccessful the court shall issue suitable subpoenas or orders to cause such material or information to be made available to defense counsel.

(4) The term "statement" as used in subsection (b) (1) (i) and (c) (2) (i) of this rule means:

(i) a written statement made by the witness and signed or otherwise adopted or approved by him; or

(ii) A stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement.

(c) Disclosure by the Defendant.

(1) *Submission to Tests, Examinations or Inspections.* Upon

written request of the prosecutor, the court may require the defendant:

(i) to perform reasonable acts or undergo reasonable tests for purposes of identification; and

(ii) to submit to reasonable physical or medical inspection or examination of his body.

Reasonable notice of the time and place for such tests, inspections or examinations shall be given by the prosecutor to the defendant and his counsel who shall have the right to be present.

(2) *Disclosure of Materials and Information.* Upon written request of the prosecutor, the defendant shall disclose to him the following material and information within the defendant's possession or control:

(i) The names and last known addresses of persons whom the defendant intends to call as witnesses, in the presentation of the evidence in chief, together with their relevant written or recorded statements, provided that discovery of alibi witnesses is governed by Rule 12.1, and provided further that statements recorded by the defendant's counsel shall not be subject to disclosure;

(ii) any reports or statements of experts, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony;

(iii) any books, papers, documents, photographs, or tangible objects which the defendant intends to introduce as evidence at the trial.

(3) *Disclosure of Defenses.* The court may require that the prosecutor be informed of the nature of any defense which defense counsel intends to use at trial; provided, that the defense of alibi is governed by Rule 12.1.

(d) Discretionary Disclosure. Upon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure as provided for in this Rule 16 in cases other than those in which the defendant is charged with a felony, but not in cases involving violations.

(e) Regulation of Discovery.

(1) *Performance of Obligations.* The parties may perform their obligations of disclosure in any manner mutually agreeable to the parties or by notifying the attorney for the other party that material and information, described in general terms, may be inspected, obtained, tested, copied or photographed at specified reasonable times

and places.

(2) *Continuing Duty to Disclose.* If subsequent to compliance with these rules or orders entered pursuant to these rules, a party discovers additional material or information which would have been subject to disclosure pursuant to this Rule 16, he shall promptly notify the other party or his counsel of the existence of such additional material or information, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) *Custody of Materials.* Any material furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

(4) *Protective Orders.* Upon a showing of cause, the court may at any time order that specified disclosures or investigatory procedures be denied, restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled shall be disclosed in time to permit his counsel to make beneficial use thereof. If a prosecution request for a protective order allowing the nondisclosure of witnesses for their personal safety is denied the prosecution shall have the right to an immediate appeal prior to trial of such denial, or in the alternative at its option, a right to take a deposition under Rule 15.

(5) *Matters Not Subject to Disclosure.*

(i) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of a party's attorney or members of his legal staff, provided that the foregoing shall not be construed to prohibit the disclosures required under section (c) (3) of this rule and Rule 12.1.

(ii) *Informants.* Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure shall not be denied hereunder of the identity of a witness intended to be produced at a hearing or trial.

(6) *In Camera Proceedings.* Upon request of any person, the court may permit any showing of cause for a denial or regulation of disclosures or any portion of such a showing to be made in camera. When some parts of certain material are discoverable under these rules and other parts are not discoverable, as much of the material shall then be disclosed as is consistent with these rules. If the court enters an

order granting relief following a showing in camera, the entire record of such a showing, including any material excised pursuant to court order, shall be sealed, impounded and preserved in the records of the court to be made available to the reviewing court in the event of an appeal.

(7) *Impeding Investigations.* Except as is otherwise provided as to matters not subject to disclosure and protective orders, a party's attorney, his staff or his agents shall not advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(8) *Sanctions.*

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may order such party to permit the discovery, grant a continuance, or it may enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

(Amended February 28, 1983, effective February 28, 1983.)

Rule 17. SUBPOENA.

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served.

(b) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATE of Hawaii, Plaintiff-Appellant,

v.

Otis Pete BELL, Defendant-Appellee.

STATE of Hawaii, Plaintiff-Appellant,

v.

David Ernest HISAW, Defendant-Appellee.

STATE of Hawaii, Plaintiff-Appellant,

v.

Mitchell G. CHANG, also known as Sonny, Defendant-Appellee.

Nos. 6315, 6540 and 6910.

Supreme Court of Hawaii.

Dec. 26, 1978.

The First Circuit Court, City & County of Honolulu, Masato Doi and John C. Lanham, JJ., dismissed three indictments, two without and one with prejudice, and the State appealed. The Supreme Court, Ogata, J., held that prosecution is not required to present exculpatory evidence to grand jury unless that evidence is clearly exculpatory.

Reversed and remanded.

Kidwell, J., filed an opinion concurring in the result.

1. Grand Jury ⇐26, 36.8

Grand jury's responsibilities include both determination whether there is probable cause to believe that a crime has been committed and protection of citizens against unfounded criminal prosecution; however, fulfillment of these responsibilities does not require that grand jury have before it any and all evidence which might tend to exculpate a defendant.

2. Grand Jury ⇐36.8

To require prosecutor to present any and all information which might tend to exculpate accused would confer upon grand jury proceedings adversary nature more properly reserved for actual trial phase of prosecution.

3. Grand Jury ⇐36.8

Prosecution is not required to present exculpatory evidence to grand jury unless that evidence is clearly exculpatory, in which case failure of prosecutor to present such evidence justifies dismissal of indictment.

4. Constitutional Law ⇐265

Defendant's right to due process is not impinged by not requiring prosecutor to present all exculpatory evidence to grand jury since grand jury phrase is devoted only to preliminary determination whether proceedings should be instituted against any person and full trial phase, with its attendant evidentiary and procedural restrictions, still remains actual adjudicatory stage of guilt or innocence of accused.

5. Grand Jury ⇐36.8

Although witness' testimony that defendant was not person who shot victim arguably tended to negate defendant's guilt, such witness' testimony was not clearly exculpatory where another witness gave directly contradictory testimony and witness himself added colorable tinge by acknowledging that he was under influence of intoxicants, and thus prosecutor was not required to present such witness' testimony to grand jury.

6. Grand Jury ⇐36.8

Where circumstances relating to actual stabbing, which were crucial to final determination as to whether defendant acted in self-defense, were not brought out by witness' testimony, her testimony was not clearly exculpatory and thus need not have been presented to grand jury by prosecutor. HRS § 703-304(2).

7. Grand Jury ⇐36.8

Although raising spectre of physical violence directed at defendant prior to stabbing, where testimony of witness did not clearly exculpate defendant on self-defense or any other ground, prosecution was not required to present such witness' testimony to grand jury. HRS § 703-304(2).

8. Grand Jury ⇐33

Grand jury need not be instructed as to nature and significance of evidence relating to self-defense whenever evidence arguably raising that defense is presented; however, whenever evidence presented to grand jury clearly establishes that accused acted in self-defense, proper instruction on significance of that event should be given. HRS § 703–304(2).

9. Indictment and Information ⇐144.1(2)

Victim's failure to identify defendant at lineup was not clearly exculpatory where fact remained that she positively identified defendant outside police station shortly after alleged burglary, and thus prosecutor's failure to inform grand jury of lineup misidentification did not require dismissal of indictment.

10. Indictment and Information ⇐10.2(7)

It would be undue interference for court to attempt to surmise what significance grand jury would have attached to testimony of witnesses not called before it, and thus it is only where evidence would have clearly negated defendant's guilt that a court should find that defendant has been unfairly prejudiced with respect to evidence presented by prosecutor to grand jury.

11. Indictment and Information ⇐144.-1(2)

Although prosecutor's failure to inform second grand jury of misidentification at lineup was in fact procedurally suspect in view of circuit court's explicit reason for dismissing original indictment, prosecutorial action was not sufficient to warrant dismissal of second indictment; circuit court was free to reprimand prosecutor who handled second grand jury hearing, but should not have dismissed indictment.

Syllabus by the Court

1. The grand jury's responsibilities include both the determination of whether there is probable cause to believe that a crime has been committed and the protection of citizens against unfounded criminal prosecutions.

2. The prosecution is not required to present exculpatory evidence to the grand jury unless that evidence is *clearly* exculpatory.

3. The prosecution is not required to instruct the grand jury as to the nature and significance of evidence relating to self-defense unless the evidence *clearly* establishes that the accused acted in self-defense.

Arthur E. Ross, Deputy Pros. Atty., Honolulu, for plaintiff-appellant.

David C. Schutter, Honolulu (Schutter, O'Brien & Weinberg, Honolulu, of counsel), for defendants-appellees.

Before RICHARDSON, C. J., and KOBAYASHI, OGATA, MENOR and KIDWELL, JJ.

OGATA, Justice.

These three consolidated appeals present the same underlying question: whether the prosecution is required to present to the grand jury evidence which tends to negate the guilt of the accused.

In the three cases before us, indictments were returned by the Oahu Grand Jury against each of the defendants. The defendants thereafter moved for dismissal of the indictments on the ground that evidence tending to negate their guilt was not presented by the prosecution to the grand jury. In Cases No. 6315 and 6540, Circuit Judge Doi dismissed the indictments without prejudice, while in Case No. 6910, Circuit Judge Lanham dismissed the indictment with prejudice. The State has appealed.

We reverse the dismissals of these three indictments. In our opinion, the prosecution is required only to present to the grand jury evidence which is clearly exculpatory in nature. Our holding will be explained and developed more fully as each of the three cases is described and analyzed individually.

I. No. 6315—STATE v. BELL

In No. 6315, defendant Otis Pete Bell was indicted by the grand jury on charges of murder and carrying a firearm without a permit or license.

At the grand jury hearing, Michael O'Connell identified Bell as the person who shot and killed the victim, Calvin Silva. O'Connell stated, however, that he did not actually see Bell holding the gun because the victim was seated between Bell and O'Connell. O'Connell testified that he saw Bell approach the victim from behind, at which time O'Connell heard gunshots and saw the victim immediately fall to the floor.

Honolulu Police Officer Michael Sensano testified at the grand jury hearing that while responding to a police radio report of the shooting, he spotted Bell walking in the vicinity of the murder scene. Sensano ordered Bell, who was holding an object in his hand, to stop, but Bell put the object into his pocket and fled. Bell was apprehended shortly thereafter by another police officer. The object recovered from Bell's pocket was found to be a pistol.

At a preliminary hearing held prior to the grand jury hearing, Michael Nash testified as a witness for the defense. Nash, who was present at the murder scene, testified that Bell was not the person who had shot Calvin Silva. Nash acknowledged at that hearing, however, that he had been under the influence of intoxicants at the time of the shooting and had been unable to give the police a specific and accurate account of the incident. The district court found Nash's testimony to be unreliable for purposes of the preliminary hearing, and it committed Bell to the circuit court to answer the charges.

Bell contends that the prosecution has a duty to present all material and relevant exculpatory evidence of which it is aware to the grand jury. He argues that the prosecution's purposeful failure to present Michael Nash as a witness at the grand jury hearing constitutes a fatal flaw in the indictment process, thus necessitating the dismissal of the indictment returned against him. The circuit court agreed with his contention and dismissed the indictment.

[1] Initially, we note that the grand jury's responsibilities include both the determination of whether there is probable cause to believe that a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). We do not believe, however, that the fulfillment of these responsibilities requires that the grand jury have before it any and all evidence which might tend to exculpate the defendant.

[2] As stated in *United States v. Calandra, supra*, at 343-44, 94 S.Ct. at 618:

> A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.

To require the prosecutor to present any and all information which may have a tendency to exculpate the accused would, in our view, confer upon grand jury proceedings the adversary nature which is more properly reserved for the actual trial phase of prosecution. *See United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978).

Similar concerns have been expressed in M. Frankel and G. Naftalis, The Grand Jury 71 (1977):

> The rationale for not insisting on "defense" evidence is again related to preventing adversary proceedings in the grand jury room. In addition, determining what is or is not or may be exculpatory is often difficult. Evidence that does not appear to be terribly meaningful to a prosecutor preparing to present a case to the grand jury may take on altogether different significance when viewed from the standpoint of the defense counsel at trial. It might place an unmanageable burden on the prosecutor at this stage to require him to discern and disclose possible matters of exculpation.

The same authority has cited additional difficulties which may arise when an adversarial character is bestowed upon grand jury proceedings:

> The preliminary rehearsal of a trial in the grand jury room, but with counsel for only one side, entails dangers, or at least dubieties. Prospective defense witnesses may have their stories warped or colored unfairly in the grand jury room. It may be doubted that the average defense counsel would desire such an *ex parte* "rehearsal" of people he plans to call. Moreover, it is difficult enough as things stand to control the popular notion that a person indicted "must be guilty of something." The task is made more manageable by being able to remind trial jurors that the grand jury heard only the prosecutor's side. One may question the effects of a general understanding, however much a distortion, that the grand jury actually heard both sides.

Id. at 129–30.[1]

[3] We therefore do not think that to require all exculpatory evidence to be presented to the grand jury is, on balance, a requirement that will be of great benefit.

The difficulties cited above, however, do not arise where evidence of a *clearly* exculpatory nature is involved. We would require, therefore, that where evidence of a clearly exculpatory nature is known to the prosecution, such evidence must be presented to the grand jury. *See United States v. Mandel*, 415 F.Supp. 1033, 1042 (D.Md.1976). Clearly exculpatory evidence may be manifested, for example, by a witness whose testimony is not directly contradicted by any other witness and who maintains that the accused was nowhere near the scene of the crime when it occurred. Also, where it has become apparent to the prosecution, for example, that a sole eyewitness testifying as to the perpetration of the crime has perjured himself before the grand jury, that perjury must be revealed to the grand jury. The failure of the prosecutor to present such clearly exculpatory evidence to the grand jury would justify dismissal of the indictment. *See id.*

The federal courts have recognized that the prosecution is necessarily given wide discretion in presenting its case to the grand jury and that the prosecution is thus not required to present all exculpatory evidence to the grand jury. *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), *cert. denied*, 429 U.S. 828, 97 S.Ct. 87, 50 L.Ed.2d 92 (1976); *see United States v. Narciso*, 446 F.Supp. 252, 296 (E.D.Mich. 1977); *United States v. Mandel, supra*, at 1040–42. Under the rule which defendant Bell espouses, the defense in every instance would be able to argue that certain evidence is exculpatory in nature and should be presented to the grand jury. Such a procedure would unnecessarily impinge on the prosecution's broad discretion and would inject confusion and delay into the grand jury indictment process.

[4] Moreover, in our view, a defendant's right to due process would not be impinged where the prosecution is not required to present all exculpatory evidence to the grand jury. As stated, the grand jury phase is devoted only to a preliminary determination of whether criminal proceedings should be instituted against any person. The full trial phase—with its attendant evidentiary and procedural restrictions—still remains the actual adjudicatory stage of the guilt or innocence of the accused. As the court of appeals in *Hata, supra*, made clear:

> The root of these difficulties lies in the inherently contradictory role which the prosecutor is asked to fulfill before the grand jury, thus making it unrealistic to expect that he will never attempt to select or present evidence which will favor his view of the case. *See id.* at 1535.

1. A further discussion of the difficulties which can arise from the requirement that all evidence tending to negate guilt must be presented to the grand jury appears in Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 Mich.L. Rev. 1514, 1535–36 (1977), which is an article favoring implementation of the rule requiring presentation of exculpatory evidence

[T]he greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence.

535 F.2d at 512. The ex parte nature of the grand jury is based upon "an abiding confidence in the jury trial system", *id.*, and we thus perceive no due process infirmity in continuing to afford the prosecution considerable latitude in determining whether to present evidence of an arguably exculpatory nature to the grand jury.

Defendant Bell's reliance upon *Johnson v. Superior Court*, 15 Cal.3d 248, 124 Cal.Rtpr. 32, 539 P.2d 792 (1975), is not persuasive. The California Supreme Court held in *Johnson* that the prosecutor is obligated to present to the grand jury all evidence of which the prosecutor is aware which reasonably tends to negate guilt.

However, the decision in *Johnson* was explicitly based on statutory grounds,[2] and the court in that case thus declined to consider the defendant's due process argument. In addition, by requiring the presentation to the grand jury of evidence "tending to negate guilt", the court in *Johnson* apparently utilized the language of the ABA Standards, *The Prosecution Function* § 3.6(b) (1971), which provides:

The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt.

We decline to adopt the ABA approach for the same reasons enunciated in *United States v. Mandel, supra*. The court in *Mandel* seriously questioned whether it could in all instances be determined what evidence is sufficient to "negate guilt". The court went on to state:

It would be an undue interference with the grand jury for a court to attempt to surmise what significance the grand jury would have attached to the testimony of various witnesses who were not called before it. Only in a case in which the evidence clearly would have negated guilt or undermined the authority of the grand jury to act at all should a court act. Otherwise, a court runs the risk of interfering too much with the grand jury process and does so largely on the basis of guessing what evidence a grand jury might have found persuasive.

415 F.Supp. at 1041–42.

[5] In the instant case, Michael Nash's testimony that Bell was not the person who shot Calvin Silva arguably tended to negate Bell's guilt. However, Nash's testimony was not *clearly* exculpatory because one witness, Michael O'Connell, gave testimony which was directly contradictory to that of Nash. Furthermore, Nash himself added a colorable tinge to his own testimony by acknowledging that he was under the influence of intoxicants and was consequently unable to furnish the police with accurate and detailed information as to the events which had taken place. Under these circumstances, Nash's testimony was not clearly exculpatory, and the prosecutor was not required to present Nash's testimony to the grand jury.

Any other conclusion would require undue judicial interference with the grand jury's function, for in order to find that Bell was prejudiced by the failure to present Nash's testimony to the grand jury, we would have to find that inclusion of his testimony could have induced the grand jury not to return an indictment against Bell. Such conjecture as to the significance which the grand jury would have attached to testimony not presented to it would exceed this Court's supervisory authority over the grand jury system. *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977); *see United States v. Mandel, supra*.

We therefore reverse the dismissal of the indictment in No. 6315.

2. The statute upon which the *Johnson* case was based was California Penal Code § 939.7, which provides:

The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

II. No. 6540—STATE v. HISAW

In No. 6540, defendant David Ernest Hisaw was indicted for manslaughter. The victim, Scott Robert Ramo, was allegedly stabbed by Hisaw on the premises of a restaurant known as the "Country Meating", which is located in Wahiawa, City & County of Honolulu.

At a preliminary hearing held prior to the grand jury hearing, Wynelle Adaniya, a hostess at the Country Meating, was called as a witness by the State. Adaniya testified that Ramo and two other men chased Hisaw into the restaurant and that they shoved him up against a wall near the restaurant entrance. Adaniya further indicated that the three men accosted Hisaw and that Hisaw appeared to be frightened.

According to Adaniya, Hisaw broke away from the three men and ran farther into the restaurant. Two of the men—one of whom was Ramo—pursued Hisaw and cornered him. Adaniya testified that Hisaw faced the two men and, while holding a knife in his hand, told them, "Come and get me. I'm ready for you." At that point, however, Adaniya moved away from the doorway of the restaurant and was unable to further observe what took place inside the restaurant. A few moments later, she saw the three men who had been chasing Hisaw come out of the restaurant. The last of the three to leave the restaurant was Ramo, who fell against a wall and then fell to the floor. Adaniya at that point noticed "a lot of blood" on Ramo's shirt.

Adaniya was not called as a witness before the grand jury. Hisaw objects to the prosecution's failure to call her as a witness, for he contends that her testimony was exculpatory in nature.

Another witness, Colin Walsh, who had been one of Hisaw's companions on the night of the stabbing testified at a deposition held prior to the preliminary hearing that he, another male acquaintance, and Hisaw were unexpectedly attacked in a parking lot in Wahiawa and that some fights resulted. Walsh did not take part in the fights, nor did he know who had attacked him and his companions.

Walsh was not called as a witness at either the preliminary hearing or the grand jury hearing. Hisaw objects to the prosecution's failure to present Walsh's assertedly exculpatory testimony to the grand jury.

Karen Martinez, an employee of the Country Meating, did testify for the State at the grand jury hearing. Martinez was the only person testifying before the grand jury who witnessed the actual stabbing. According to Martinez, she saw three men backing Hisaw into the restaurant, and one of the men (Ramo) hit Hisaw two or three times. Hisaw, who had a "strap" in his right hand, then swung at Ramo. Martinez testified that Ramo looked down at his blood-soaked shirt and said to Hisaw, "You stabbed me". Ramo cussed at Hisaw and then turned around and walked toward the entrance of the restaurant, where he leaned against a wall and fell to the floor.

Hisaw further objects to the prosecution's failure to advise the grand jury as to the possibility of self-defense as a justification for his use of deadly force.[3] He claims that the facts as presented to the grand jury, including the testimony of Karen Martinez, raise such a possibility of self-defense.

We first discuss Hisaw's objection to the prosecution's failure to present the testimony of Wynelle Adaniya and Colin Walsh to the grand jury. This objection may be simply disposed of, for the testimony of neither of these two witnesses was clearly exculpatory in nature.

[6] Although it is true that Wynelle Adaniya's testimony at the preliminary

3. Under the Hawaii Penal Code, Title 37, HRS, a person may be justified in using deadly force for self-protection. HRS § 703-304(2). Such justifiable use of force is a defense for which the burden of producing evidence is on the defendant. Commentary on HRS § 703-301. If the defendant produces such evidence, or if such evidence appears as part of the prosecution's case, the defendant is entitled to have the defense considered by the trial jury. *Id.* Hisaw apparently seeks to have these operative principles applied to the grand jury situation as well.

hearing indicated that Hisaw was physically threatened by the victim and two other males, she did not actually see the stabbing take place. At the point at which she saw Hisaw turn toward the men who had cornered him and say, "Come and get me. I'm ready for you", Adaniya left her vantage point near the restaurant entrance. Therefore, the circumstances relating to the actual stabbing, which are crucial to a final determination as to whether Hisaw acted in self-defense, are not brought out by Adaniya's testimony.[4] Her testimony was thus not clearly exculpatory and need not have been presented to the grand jury.

[7] The deposition testimony of Colin Walsh was even less exculpatory in nature than that of Wynelle Adaniya. Walsh testified only that he, another male and Hisaw were unexpectedly attacked in a Wahiawa parking lot by a few men. He did not identify any of the men who had attacked him, nor did he witness the stabbing. Therefore, although his testimony—like that of Adaniya—raises the spectre of physical violence directed at Hisaw prior to the stabbing, it does not *clearly* exculpate Hisaw on self-defense or any other grounds. The prosecution was thus not required to present Walsh's testimony to the grand jury.

We now discuss Hisaw's contention that, given the state of the facts actually presented to the grand jury, the prosecution should nevertheless have instructed the grand jury as to the nature and significance of evidence relating to self-defense.[5]

The only direct authority which Hisaw relies upon is *People v. Ferrara*, 82 Misc.2d 270, 370 N.Y.S.2d 356 (Co.Ct.1975). In *Ferrara*, it was held that where the evidence establishes an affirmative defense, the prosecution is required to instruct the grand jury as to the nature or importance of that evidence. However, in New York the district attorney is by statute the legal adviser of the grand jury and, as such, he "must instruct the grand jury concerning the law with respect to its duties or any matter before it". NYCPL § 190.25[6]. No similar statute or rule requiring the prosecutor to instruct the grand jury exists in Hawaii. Hence, we do not regard *Ferrara* as controlling.

We further reject Hisaw's attempt to construe § 6-703(d) of the Charter of the City and County of Honolulu (as revised) as a valid requirement that the prosecutor must instruct the grand jury regarding possible defenses. Section 6-703(d), which provides that the prosecuting attorney shall "attend before and give advice to the grand jury whenever cases are presented to it for its consideration", merely describes one of the city prosecutor's general functions and cannot affect the manner in which the grand jury investigatory and indictment process is to be conducted.[6]

4. HRS § 703-304(2) provides as follows:

> The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.

Adaniya's testimony does not clearly indicate that Hisaw's use of deadly force was justified under the terms of the above statute. She did not see whether Hisaw stabbed Ramo because the latter was advancing upon Hisaw, or whether perhaps it was Hisaw who took the offensive and attacked Ramo after being cornered. These circumstances are crucial to the determination of whether such facts existed as to justify the belief on the part of Hisaw that the use of deadly force was necessary in order to protect himself.

5. In positing this argument, Hisaw implicitly recognizes that the testimony of Karen Martinez did raise the possibility before the grand jury that Hisaw acted in self-defense.

6. Generally, on matters of statewide interest and concern, such as the manner in which cases are presented to the grand jury, Honolulu and the other counties are not given specific authority to oversee or legislate with respect to that function. Therefore, although in this State local prosecutors conduct the bulk of prosecution work, the authority of the local governments does not extend to the direction of the fundamental procedures by which grand jury proceedings are to be conducted. *Cf. Kunimoto v. Kawakami*, 56 Haw. 582, 585, 545 P.2d 684, 686 (1976). Such governance of the grand jury system is more appropriately reserved for statutory and rule-made authority of statewide application.

[8] We find no requirement that the grand jury should be instructed as to the nature and significance of evidence relating to self-defense whenever evidence arguably raising that defense is presented to the grand jury. We do believe, however, that in fairness to the accused, whenever the evidence presented to the grand jury *clearly* establishes that the accused acted in self-defense, a proper instruction on the significance of that evidence should be presented to the grand jury.

Here, although the testimony of Karen Martinez raised the possibility of self-defense, it did not clearly establish that defense. Hence, we reverse the dismissal of the indictment in No. 6540.

III. No. 6910—STATE v. CHANG

[9] In No. 6910, the grand jury indicted defendant Mitchell G. Chang for burglary in the first degree. Chang had allegedly identified himself as a police officer in order to gain entry to a private residence. Once inside the residence, he began to grab at the victim, who was alone in the house at the time. The victim managed to break away from the defendant's grasp and flee the premises.

The victim was subsequently taken to the police station for further investigation of the incident. As the police car in which she was riding neared the police station, the victim spotted the defendant by chance and identified him as the person who had entered her home and assaulted her. However, at a later lineup, the victim identified a different person as the culprit.

The person identified by the victim at the lineup was some three inches taller and forty-five pounds heavier than the defendant. There was, however, some indication from testimony adduced at a preliminary hearing that the victim was wearing shoes at the lineup which increased her height by approximately three to four inches, and that she was also tired when viewing the lineup.

At a grand jury hearing held on January 5, 1977, the prosecution did not inform the grand jury of the victim's misidentification at the lineup. The indictment returned on that date against the defendant was quashed without prejudice by the circuit court due to the prosecution's failure to inform the grand jury of the misidentification.

Subsequently, on December 7, 1977, Chang was again indicted by a different grand jury on the identical charge of burglary in the first degree. However, the prosecution failed again to inform this second grand jury about the victim's lineup misidentification, and the circuit court dismissed the indictment with prejudice. This dismissal is the subject of the instant appeal.

Although when it dismissed the original indictment the circuit court did not specify that the State was required, in the event that it chose to reindict the defendant, to inform the grand jury of the victim's misidentification, the court felt that such a requirement was clearly implied. The circuit court concluded that the failure of the State to notify the grand jury of the misidentification violated the requirement that an indictment be returned by an unprejudiced grand jury.

The conclusion reached by the circuit court was based primarily on *State v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971), in which this Court held that the prosecutor's comments to the grand jury regarding a witness's motivation in testifying were prejudicial to the defendant's constitutional right to a fair and impartial grand jury proceeding. In the instant case, the circuit court viewed the failure of the prosecution to notify the first and second grand juries of the misidentification as being misleading to the grand juries in their evaluation of all the evidence presented to them.

We have already stated that the prosecution is not required to present exculpatory evidence to the grand jury unless that evidence is *clearly* exculpatory. The victim's failure to identify Chang at the lineup is not clearly exculpatory, for the fact remains that the victim still positively identified Chang outside the police station.

The victim's lineup misidentification reflects upon her ability to recognize her assailant, however, and it ultimately reflects upon her credibility in general. Nevertheless, we remain satisfied that the prosecution is not required to produce before the grand jury all evidence which may tend to undermine the credibility of the witnesses presented. *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968).

As stated in *People v. Filis*, 87 Misc.2d 1067, 386 N.Y.S.2d 988 (Sup.Ct.1976), the prosecutor is accorded wide discretion in the manner of presenting his case to the grand jury.

> He need only select those witnesses and those facts which most expeditiously establish a prima facie case. He is under no duty to present all of his evidence or engage in a dress rehearsal of his case.

Id. at 1069, 386 N.Y.S.2d at 989.

In *Filis, supra*, the victim's wife originally reported that she saw "a man" shoot her husband. She later testified that she saw certain specific men commit the homicide. The court held that the fact that a witness gives conflicting testimony does not taint the grand jury's factfinding role, nor does it necessitate the conclusion that the grand jury's ultimate determination could logically be different. The court stated that the conflicting testimony of a witness is a matter to be resolved during trial when all the circumstances surrounding that testimony may be thoroughly explored by both sides. It thus refused to dismiss the indictment for the failure of the prosecution to inform the grand jury of the inconsistent statements made by the witness.

A similar result was reached in *United States v. Brown*, 574 F.2d 1274 (5th Cir. 1978), in which the prosecution failed to advise the indicting grand jury that the witness had given inconsistent statements to another grand jury. The court in *Brown* held that the prosecution "is under no duty to present to a grand jury evidence bearing on the credibility of witnesses." *Id.* at 1276. The court recognized that the defendant was accorded every opportunity to present the inconsistent statements to the trial jury, and that he in fact did so. Therefore, no prejudice to the defendant was deemed to have resulted.

We adhere to the results reached in both *Filis* and *Brown, supra*, and we hold that the prosecution in the instant case was not required to produce before the grand jury evidence which may have tended to undermine the victim's credibility. The defense is free to present at trial evidence as to the victim's lineup misidentification, the significance of which the trial jury would be at liberty to resolve once and for all. *Brown, supra.*

Furthermore, we are not convinced of the propriety of the circuit court's finding that had the prosecution informed the grand jury of the victim's misidentification, the grand jury "might well have declined to indict" defendant Chang. Therefore, we do not agree that *State v. Joao, supra*, requires dismissal of the indictment.[7]

[10] We are unable to conclude that the circuit court was correct in attempting to postulate in the first place what the grand jury might have concluded if the misidentification information had been presented to it. As we have established herein, it would be an undue interference for a court to attempt to surmise what significance a grand jury would have attached to testimony of witnesses *not* called before it. We would attach the same conclusion to other evidence of less than clearly exculpatory nature as well. *United States v. Mandel, supra.* Only where the evidence would have clearly negated the defendant's guilt should a court find that the defendant has been unfairly prejudiced.

Moreover, we are impressed by the fact that even if a court were able to find that a grand jury may or may not have decided to

7. In *Joao*, the circuit court reached a finding that the grand jury "might not have returned an indictment" if the prosecution had not made its statement bolstering the credibility of the State's witness. Such a finding was deemed by this Court to have established a tendency to prejudice, and we thus affirmed the quashing of the indictment.

indict had certain information been made known to it, the information involved in this case certainly by no means compels a finding that the grand jury would have chosen not to indict if that information had been presented to it. The fact of misidentification merely raises a question as to the victim's ability to identify Chang, but it in no way clearly exculpates the defendant. The lineup misidentification is an issue which the defense could freely explore during the trial itself, and we thus perceive no unfairness or prejudice as a result of the prosecution's actions.

[11] The victim's testimony in this case was not clearly exculpatory. We consequently reverse the dismissal of the indictment in No. 6910.[8]

Cases No. 6315, 6540 and 6910 are hereby remanded to the circuit court for trial.

KIDWELL, Justice, concurring.

I concur in the result reached by the court in these cases. However, in announcing that indictments may be attacked for failure of the prosecutor to present to the grand jury evidence which is "clearly exculpatory" the opinion fails to provide adequate guidance and proposes a standard which is open to varying interpretation. The rationale of the opinion dictates a more restrictively defined standard. I add these remarks to indicate what I believe to be the criteria which should govern.

The opinion confirms that a grand jury proceeding is not adversary in nature. An application of this principle is found in the rule that an indictment may not be attacked on the ground of the incompetency of the evidence considered by the grand jury, where prosecutorial misconduct is not involved. *State v. Layton*, 53 Haw. 513, 497 P.2d 559 (1972); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The function of a grand jury to protect against unwarranted prosecution does not entail a duty to weigh the prosecution's case against that of the defense, or even to determine that the prosecution's case is supported by competent evidence.

On the other hand, an indictment that is the result of prosecutorial misconduct or other circumstances which prevent the exercise of fairness and impartiality by the grand jury may be successfully attacked. *State v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971); *State v. Pacific Concrete and Rock Co.*, 57 Haw. 574, 560 P.2d 1309 (1977). I view the opinion as equating the withholding of clearly exculpatory evidence with prosecutorial misconduct in the context of these decisions. The criteria by which clearly exculpatory evidence is to be identified should accordingly be determined with reference to the prosecutor's function.

The conclusions reached in the cases here before the court make it clear that the prosecutor's function does not include the presentation of the potential defense to the grand jury. While not precluded from presenting conflicting evidence to the grand jury, the prosecutor need ordinarily present only the evidence which supports the prosecution's case. At least where the prosecutor may in good faith choose to rely upon a version of the facts supported by evidence, the decisions in these cases demonstrate that he need not also present to the grand jury another version which tends to negate guilt.

The opinion suggests, as examples of situations in which clearly exculpatory evidence is required to be presented to the grand jury, instances in which evidence which is not directly contradicted places the accused away from the scene of the crime or shows that a witness has perjured himself. Each of the examples presents a situation in which the withholding of the evidence may be viewed as deliberately misleading the grand jury. Since the evidence in question

8. Although the prosecutor's failure to inform the second grand jury of the misidentification was in fact procedurally suspect in view of the circuit court's explicit reasons for dismissing the original indictment, we do not believe that such prosecutorial action (or inaction) was sufficient to warrant dismissal of the second indictment. The circuit court was free to reprimand the prosecutor who handled the second grand jury hearing, but it should not have gone so far as to have dismissed the indictment.

is uncontradicted, the hypothetical case is necessarily one in which guilt depends on circumstantial evidence. I see as the unstated premise of the examples the proposition that a prosecutor may not, in his presentment to the grand jury, build a circumstantial case upon only a part of the circumstances which the prosecution must acknowledge to be existing, and is under a duty at least to acquaint the grand jury with all of the relevant circumstances which he expects the evidence to show if all conflicts are resolved in favor of the prosecution. I agree with this proposition, but question whether this court can so clearly foresee all possible circumstances that an unvarying rule can be stated to govern cases of the sort dealt with in the examples. Where the prosecutor can in good faith assert that the exculpatory evidence is contradicted by circumstantial evidence of guilt, I would not treat the case as different in principle from one in which the exculpatory evidence is directly contradicted by an eye witness.

I conclude that evidence should be considered clearly exculpatory within the meaning of the opinion only when the prosecution could not in good faith rely on other evidence. My approach is consistent with what I believe to be the underlying assumptions in the opinion of the court. While I am unable to join in the opinion, my concern is with respect to expressions which are extraneous to the decision of the cases before the court. The precise application in other cases of the principle for which I believe that the opinion stands is a matter for future determination.

STATE of Hawaii, Plaintiff-Appellee,

v.

David H. BRIGHTER, Defendant-Appellant.

No. 5830.

Supreme Court of Hawaii.

Jan. 12, 1979.

Defendant was convicted in the Third Circuit Court, County of Hawaii, Shunichi Kimura, J., of promoting detrimental drugs in the first degree, and he appealed. The Supreme Court, Kidwell, J., held that: (1) marijuana plants on defendant's property, visible from open driveway under normal conditions, were not subject of a reasonable expectation of privacy although temporarily screened by laundry on line and, hence, were not subject to suppression when subsequently seized pursuant to search warrant, and (2) possessing no reasonable expectation of privacy with respect to visual observation of marijuana plants, defendant could not assert that observation which furnished probable cause for issuance of search warrant infringed constitutional guarantees against unreasonable search.

Affirmed.

1. Searches and Seizures ⇐7(1)

Reasonableness of a search consisting of visual observation into private premises depends on whether observation contravenes a reasonable expectation of privacy.

2. Searches and Seizures ⇐7(20)

If defendant's marijuana plants were sufficiently exposed to viewing by members of the public, defendant could not entertain a reasonable expectation of privacy with respect to them and could not invoke the prohibition against unreasonable searches.

3. Criminal Law ⇐394.4(11)

That police officer was intruding without justification upon defendant's property when he went from driveway into shade of tree from which he viewed marijuana plants was irrelevant to question whether defendant could assert an objection to admission of evidence in subsequent prosecu-

(156)

JUL 14 1988

ILLINOIS STATE BAR ASSOCIATION

75 E. WACKER DRIVE, Suite 2100 • CHICAGO, ILLINOIS 60601 • TELEPHONE 312—726-8775

JEFFREY W. WILLIAMS
DIRECTOR OF SECTION PROGRAM

July 8, 1988

Gordon F. Proudfoot, Esq.
c/o Boyne Clark
Belmont House
Suite 700
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B 2Y 3Z5

RE: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Your letter to ISBA President Jerome Mirza has been referred to me for reply.

I enclose for your information a summary of Illinois case law relating to the disclosure by the prosecution of exculpatory evidence in criminal prosecutions. I hope this information is responsive to your inquiry.

Sincerely yours,

Jeffrey W. Williams

JWW:sdh

Enclosure

cc w/encl: Jon W. DeMoss, Esq.

dent commuted the sentence to life imprisonment, without parole. The Court rejected petitioner's contention that the non-parole condition was invalid in light of **Furman v. Georgia**.

McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) There is no constitutional right to a bifurcated trial nor is there a requirement that a jury must be given standards in determining whether to impose or withhold the death penalty.

People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975) The Illinois capital punishment statute, Ch. 38, sec. 1005-8-1A (effective November 8, 1973) is unconstitutional under the Illinois Constitution.

The court decided four issues: (1) The provision of the statute calling for a three-judge panel to act collectively in determining the existence of any of the circumstances requiring the death penalty and in pronouncing sentence is defective because each of the judges constituting the panel is deprived of the jurisdiction vested in him by the Illinois Constitution; (2) The enumerated situations which require imposition of the death penalty are not vague and uncertain; (3) The statutes "mercy provisions" as interpreted by the State (that the compelling reasons for mercy can be found only in the circumstances surrounding the crime itself) is too narrow a view as to what may and must be considered in determining whether mercy should be extended - "The offender as well as the crime must be examined." The court also made the "additional observation" that the mercy provision is defective for failing to contain "standards or guidelines to be considered in determining whether there are compelling reasons for mercy"; (4) The statute's provision for appeal to the Appellate Court after imposition of the death penalty is contrary to the Illinois Constitution (Art. VI, sec. 4(b)) which mandates such appeals to the Supreme Court as a matter of right.

Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) Defendant was properly sentenced under the death penalty procedure in effect at the time of his trial rather than under the death penalty procedure in effect at the time of the crime. The change in the statute only altered the methods employed in sentencing, not the quantum of punishment, and thus, merely a procedural change which was not an ex post facto violation.

The existence of a death penalty statute at the time of the crime, although subsequently held to be unconstitutional, served as an "operative fact" to warn the defendant of the penalty which would be sought if he were convicted of first-degree murder. Contra, **People v. Hill,** 78 Ill.2d 465, 401 N.E.2d 517 (1980).

Ch. 15

DISCOVERY

§15-1 Generally - Evidence Favorable to Defense

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) Suppression by the State of evidence favorable to the accused upon request violates due process. See also, **Giles v. Maryland,** 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) The defendant argued that the prosecutor's failure to disclose the deceased's prior criminal record, consisting of assault and carrying a deadly weapon, denied her due process at trial where she was convicted of second degree murder and her defense was self-defense.

The Supreme Court stated that the rule of **Brady v. Maryland,** arguably applies in three different situations. The first situation is where the undisclosed evidence shows perjury and the prosecutor knew or should have known of the perjury. In such a case, the conviction is fundamentally unfair and "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

The second situation is where there is a pretrial request for specific evidence. If the subject matter of such a request is material or if a substantial basis for claiming materiality exists, the prosecutor is required to either furnish the information or submit the problem to the judge - the failure to make any response is seldom, if ever, excusable and the suppression of evidence favorable to accused, upon request, violates due process which vitiates the proceeding.

The third situation, which exists in this case, is where there is no request or only a general request for exculpatory matter. There is "no significant difference between . . . a general request . . . (and) no request at all." In this situation the defendant "should not have to satisfy the severe burden of demonstrating that newly discovered evidence would have resulted in acquittal," yet the judge "should not order a new trial every time he is unable to characterize a non-disclosure as harmless under the customary harmless error standard."

Therefore, the test to be applied in the third situation is as follows: "If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered there is no justification for a new trial."

In this case the omitted evidence did not create a reasonable doubt and the conviction was upheld.

Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment.

People v. Murdock, 39 Ill.2d 553, 237 N.E.2d 442 (1968) State must disclose evidence which is favorable to defense.

People v. Flowers, 51 Ill.2d 25, 281 N.E.2d 299 (1972) Error to deny defendant's request for disclosure of evidence favorable to him; for a list of witnesses; for permission to examine physical evidence; and for pretrial statements of prosecution witnesses.

People v. Schmidt, 56 Ill.2d 572, 309 N.E.2d 557 (1974) The Supreme Court's criminal discovery rules do not apply to offenses that do not carry the possibility of imprisonment in the penitentiary.

In misdemeanor cases the State is required to furnish a list of witnesses, any confessions, and evidence negating the defendant's guilt.

People v. DeWitt, 78 Ill.2d 82, 397 N.E.2d 1385 (1979) A defendant is not entitled to discovery at a probation revocation hearing.

People v. Kline, 92 Ill.2d 490, 442 N.E.2d 154 (1982) The defendant, along with two co-defendants, was indicted for murder. Each was tried separately and Kline was convicted following a bench trial and sentenced to 50 to 100 years. The co-defendants received sentences of 15-25 and 20-25 years, respectively.

The defendant contended that the State knowingly concealed exculpatory information at his trial. At defendant's trial the State argued that the deceased was struck with a golf club; however, at the co-defendant's trial, the State claimed that the deceased was struck with a tire iron. The Supreme Court rejected the defendant's contention. Neither the golf club nor the tire iron was introduced at either trial and "defendant has failed to produce any evidence which established the instrument used or that the State had knowledge or possession of the weapon involved . . . if the State . . . had the tire iron in its possession, and failed to disclose this evidence, defendant's charge of misconduct might well be supported. On the facts before us, however, we cannot say that the State knowingly concealed evidence of the weapon involved in the offense."

Additionally, the defendant pointed out that at his trial the State argued that a camera was stolen from the victim on the day of the murder; however, at the co-defendant's trial, the State established that no camera had been taken. The Supreme Court stated that there is no proof the State was aware, at defendant's trial, that no camera had been stolen. Thus, improper concealment on the part of the State has not been established. Conviction affirmed.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The defendant contended that he was entitled to a new trial because the State had failed to disclose certain exculpatory information. Defendant and a co-defendant were convicted of three murders. A man named Anderson was an alternative suspect in the murders.

At the hearing on post-trial motions, the

defendant called a witness who testified that Anderson's wife had stated that she (wife) had been present at the murders in question. The witness also testified that he had mentioned this to the prosecutor and a police officer. The State disclosed the witness' name as someone they had talked to, but did not inform the defense as to the substance of his relevations.

The Supreme Court held that there was no discovery violation because the above evidence was not "material" and could not possibly have affected the outcome of the trial.

"The nondisclosed evidence here . . . is completely hearsay and would not have been admissible as evidence. Further, defendant can point to no admissible evidence which the [above witness'] information would have led to. For this reason the failure to disclose [the witness'] relevations did not deprive defendant of a fair trial."

§15-2 Statements of Defendant

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) The defendant was charged with the murder of her husband. On the ninth day of trial, a State witness testified about a statement by defendant that she had an affair with a third party. Defense counsel asked that the testimony be stricken or a mistrial be granted because the statement by defendant had not been disclosed by the State in response to defendant's discovery motion.

The Supreme Court held that the State violated the discovery rules in failing to disclose the defendant's statement and that, because the statement concerning the alleged affair was prejudicial, the trial judge was required to exclude it or grant a mistrial. Conviction reversed.

People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1980) The State's failure to make pretrial disclosure of the substance of an oral statement by the defendant was a violation of the discovery rules (Rule 412(a)(ii)), but was not reversible error.

The Court stated that although the defendant "was clearly entitled to the substance of this oral statement," the non-compliance with the discovery requirements "does not require reversal absent a showing of prejudice." In this case the defendant was not prejudiced by the failure to disclose.

People v. Purify, 43 Ill.2d 351, 253 N.E.2d 437 (1969) A tape-recorded confession is a "written" confession for purposes of discovery.

People v. Morgan, 112 Ill.2d 111, 492-N.E.2d 1303 (1986) At defendant's trial for murder, a State witness, on direct examination, testified that defendant placed a pillow over the muzzle of the gun and said "this is what Jews and Italians do when they want to snuff somebody out." This statement by the defendant had not been included in the discovery material produced by the State. Defense counsel requested a mistrial, the trial judge found the statement should have been produced, instructed the jury to disregard it, and denied the mistrial motion.

The Supreme Court stated that the sanction to be applied for a discovery violation is left to the trial judge's discretion and whether a new trial is warranted depends on several factors, including the strength of the State's evidence and the importance of the undisclosed statement. In the instant case the above statement did not have a bearing on defendant's guilt and the evidence was not "so close" or "the prejudice created by the statement was [not] so strong as to require a new trial." The Court also noted that defense counsel elicited the same statement from another State witness on cross-examination and repeated the statement in his closing argument.

People v. Orr, 149 Ill.App.3d 348, 500 N.E.2d 665 (1st Dist. 1986) At defendant's jury trial for arson, the complainant's daughter (Gloria) testified that a few days before the incident she and defendant had an argument and defendant stated that he was going to burn her mother's house. The defense objected, and moved for mistrial, on the ground that defendant's alleged statement had not been disclosed to the defense. The prosecutor responded that all police reports had been tendered, the State was under no obligation to reduce statements to writing and Gloria, who was listed as a State witness, could have been interviewed prior to trial. The defense motion was denied.

The Appellate Court held that the State's failure to disclose the above statement was reversible error.

1. Rule 412 requires the State to disclose the "substance of any oral statements made by the accused" and a "list of witnesses to the making and acknowledgement of such statements." This rule is not limited to formal statements made to the authorities, but encompasses any "statements made to anyone that might have bearing on the defendant's guilt or innocence."

Since the defendant's alleged statement to Gloria was a direct threat to commit the offense charged, it had a bearing on guilt, and should have been disclosed in response to the defendant's pretrial discovery motion.

2. The State did not comply with its discovery obligation by furnishing the defense with the police reports. The record shows that the pertinent statement was not contained within the police reports. The closest reference was that Gloria felt the fire occurred because of revenge - defendant trying to get even with her. This was not sufficient to disclose the alleged specific threat by defendant.

3. Although the State is not required to reduce oral statements to writing, Rule 412 does require the State "to disclose both the substance of the defendant's oral statement and a list of witnesses thereto." In the instant case the State did not disclose the substance of the defendant's alleged statement and did not disclose which of the almost forty persons listed as potential witnesses may testify about a statement by the defendant.

People v. DeBord, 61 Ill.App.3d 239, 377 N.E.2d 1308 (4th Dist. 1978) The State has the duty to disclose, upon request, all oral statements made by the defendant and known to the State, regardless of whether such statements are reduced to writing. See Ill.Sup.Ct. Rule 412(a).

People v. Manley, 19 Ill.App.3d 365, 311 N.E.2d 593 (2d Dist. 1974) The Appellate Court upheld the trial judge's order directing the prosecutor to reduce the defendant's oral statement to memorandum and furnish it to defendant.

People v. Young, 59 Ill.App.3d 254, 375 N.E.2d 442 (1st Dist. 1978) State's use of an oral inculpatory statement of defendant was improper since the statement was not disclosed to defense upon timely request. The Appellate Court held this to be prejudicial even though the trial judge ultimately held that the State couldn't use the statement and admonished the jury to disregard it - "the admonition to the jury was insufficient to overcome the potential prejudice to the defendant." Reversed and remanded.

People v. Abendroth, 52 Ill.App.3d 359, 367 N.E.2d 571 (4th Dist. 1977) The State's failure to produce a tape recording of defendant's interview with police was reversible error. Although the recording was specifically requested by the defense it was not produced until it was "found" during the period that the jury was deliberating.

People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 (1st Dist. 1984) At defendant's trial for armed robbery, the victim was allowed to testify, over objection, that during the incident the defendant stated that he had just robbed another man. The defendant was not informed of the foregoing statement or the State's intent to use it during pretrial discovery.

The Appellate Court held that the State was required to disclose the above statement pursuant to Rule 412 and the failure to do so was reversible error.

People v. Cauthen, 51 Ill.App.3d 516, 366 N.E.2d 1037 (1st Dist. 1977) Trial court erred in denying defendant's pretrial request for production of certain electronic tape recordings which contained statements by defendant. Although the tapes were not discoverable under Supreme Court Rule 411 since defendant was charged with a misdemeanor, they were required to be produced under **Brady v. Maryland,** 373 U.S. 83 since the tapes contained information favorable to the defendant.

People v. Thompson, 18 Ill.App.3d 613, 310 N.E.2d 504 (5th Dist. 1974) Prior to trial, defendant filed a motion to produce confession and the State responded that defendant failed to make any written or oral statement regarding his participation in the crime.

During the trial, the State admitted that there was an oral statement of defendant which would be offered. Defense objected and a motion to suppress was denied and the court ruled that the statements could be used for the limited purpose of impeachment.

After defense rested, the State presented a rebuttal witness who related a statement by defendant which was exculpatory but inconsistent with his trial testimony.

Conviction reversed. Chapter 38, sec. 114-10 requires production of both inculpatory and exculpatory statements where there is no showing that the State's Attorney was unaware of the statement or could not have become aware of it through due diligence.

People v. Miles, 82 Ill.App.3d 922, 403 N.E.2d 587 (1st Dist. 1980) The State's failure to disclose, upon request, an oral statement allegedly made by the defendant to a police officer was a violation of Rule 412(a)(ii). Although the prosecutor may have been unaware of the statement, he would have been aware of it if he had exercised due diligence - the police officer who was on the State's list of witnesses should have

been questioned by the prosecutor before trial and "it is the duty of the State to see that there is a proper flow of information between the various branches and personnel of its law enforcement agencies and its legal officers."

The State argued that defendant couldn't claim error because the oral statement was initially brought out during defense counsel's cross-examination of a police officer. The Appellate Court rejected the State's contention since the defense counsel did move to have the testimony about the statement stricken and the trial court denied the motion. Reversed and remanded.

People v. Bailey, 103 Ill.App.3d 503, 431 N.E.2d 723 (4th Dist. 1982) Defendant was convicted of burglary based primarily upon his possession and attempt to sell the victim's television sets on the day after the offense. The defendant testified that he had never been in the victim's home. In rebuttal, a police officer testified about an oral statement by the defendant, in which defendant stated that the victim had given him the televisions to sell for her.

The Appellate Court held that the State's use of the above oral statement of defendant was error since the State had not disclosed the statement to the defense during discovery.

People v. Chriswell, 133 Ill.App.3d 458, 478 N.E.2d 1176 (2d Dist. 1985) There was no discovery violation where a police officer destroyed his notes of the interview with the defendant. The officer's two page report was an "adequate substitute for the notes," the State did not use any statements which were not in the report, and defendant wasn't surprised by the officer's testimony. The defendant failed to show that the destroyed notes contained any exculpatory information.

§15-3 Statements of Witnesses

People v. Allen, 47 Ill.2d 57, 264 N.E.2d 184 (1970) Statements made by State witnesses must be furnished, on demand, to defense for possible impeachment purposes. Defense was entitled to examine written statement in form of police report prepared by State witness - the value, or lack of it, of a statement is to be decided by the defense, not by the prosecution. See also, **People v. Robinson,** 46 Ill.2d 229, 263 N.E.2d 57 (1970).

People v. Bassett, 56 Ill.2d 285, 307 N.E.2d 359 (1974) Cards which contained transcription of interview notes should have been made available to defense for impeachment purposes. See also, **People v. Sumner,** 43 Ill.2d 228, 252 N.E.2d 534 (1969).

People v. Flowers, 51 Ill.2d 25, 281 N.E.2d 299 (1972) Error to deny defendant's request for disclosure of evidence favorable to him; for a list of witnesses; for permission to examine physical evidence; and for pretrial statements of prosecution witnesses.

People v. Peter, 55 Ill.2d 443, 303 N.E.2d 398 (1973) Although a witness need not grant an interview to opposing counsel, neither the prosecutor nor defense counsel should advise persons to refrain from discussing the case with opposing counsel.

People v. Silverstein, 60 Ill.2d 464, 328 N.E.2d 316 (1975) It was improper for a Department of Revenue official to direct an auditor not to talk with defense counsel, but the record fails to show a deprivation of due process which justified the trial court's dismissal of the complaints. The record fails to reflect or suggest what information defendant hoped to obtain from the interview with the auditor which was not already made available in the People's responses to defendant's discovery motions.

People v. Jolliff, 31 Ill.2d 462, 202 N.E.2d 506 (1964) Where State witnesses testified on direct that he had given a police officer a description of the perpetrator and the officer wrote down the description, defense counsel was entitled to witness' statement for possible use for impeachment.

People v. Szabo, 94 Ill.2d 327, 447 N.E.2d 193 (1983) An important State witness was interviewed by an Assistant State's Attorney about twenty times, over thirty hours, prior to trial. The defendant requested disclosure of any memoranda summarizing the oral statements of this witness. The State claimed that the rough notes taken by the Assistant State's Attorney were work product and, thus, the State was not obligated to produce them. The State also pointed out that the rough notes of the conversations were destroyed after the Assistant prepared an eight page outline of the witness' expected trial testimony. The trial court denied the defendant's request.

The Supreme Court held that the determination of whether or not the rough notes were, in fact, work product and not discoverable is to be made by the trial court in camera and not by the prosecutor. Consequently, the defendant was entitled to have the Assistant's notes produced for inspection by the trial court and to disclosure of any unprivileged, substantially verbatim statements they contained for possible use in impeaching the witness' testimony.

Since the rough notes were destroyed, the Court could not determine whether the nondisclosure resulted in prejudicial error. Therefore, the defendant's convictions were vacated and the cause remanded for the State to reconstruct the written memoranda of the witness' statements and deliver them to the trial court for in camera inspection. If the notes contain discoverable statements, they are to be delivered to defense counsel and a new trial must be granted. If the notes do not contain discoverable statements, then the trial court is directed to reinstate the convictions. See also, **People v. Amos,** 140 Ill.App.3d 14, 488 N.E.2d 290 (3d Dist. 1985).

People v. Szabo, 113 Ill.2d 83, 497 N.E.2d 995 (1986) On remand, the notes taken by the prosecutor during the pretrial interviews were tendered to the judge. After an in camera inspection the judge found that they were "work product", not impeaching, and did not raise a reasonable doubt as to defendant's guilt. The convictions were then reinstated.

1. The defendant contended that the trial judge failed to follow the Supreme Court's mandate to grant a new trial if the materials in question were discoverable.

The Supreme Court stated:

"[A]t the time of the first Szabo opinion this court did not have the benefit of examining the notes, and thus could not speculate on their contents. An examination of that earlier opinion reveals that the court was indeed concerned with the possibility that the notes contained nothing of any value to the defense. At this juncture, having examined the notes and finding that defendant was not prejudiced by their nondisclosure, we see no reason to grant a new trial. Defendant's conviction is therefore affirmed."

2. The Court also held that the trial judge erred in finding that the notes in question were work product. The "work product privilege applies to substantially verbatim attorney notes only if 'they contain opinions, theories or conclusions' of the attorney." In the instant case, the notes were merely a shorthand transcription of the witness' own statements. Thus, they were not work product.

People v. Camel, 10 Ill.App.3d 968, 295 N.E.2d 266 (4th Dist. 1973) Notes of police officer which coincided in substantial respects to testimony by policeman and complaining witness constituted near verbatim transcripts and defendant was entitled to the notes in pretrial discovery.

People v. Witherspoon, 69 Ill.App.3d 391, 388 N.E.2d 1 (1st Dist. 1979) The right to production applies to written or recorded statements, substantially verbatim reports of witnesses' oral statements and to a list of memoranda reporting or summarizing their oral statements.

The State has no duty to reduce a witness' oral statement to writing, and in this case there was no discovery violation since there was no showing of the existence of any reports in the witness' own words or substantially verbatim.

In Re Forrest, 12 Ill.App.3d 250, 298 N.E.2d 197 (1st Dist. 1973) State required to furnish, on demand, specific statements made by State's witnesses which are in witnesses' own words or substantially verbatim - doesn't apply to "thumbnail" summaries. A proper foundation must be laid to determine existence of the statement, and, once established, defendant has right to in camera inspection of such writings. The inspection is waived if not requested.

People v. Abbott, 55 Ill.App.3d 21, 370 N.E.2d 286 (4th Dist. 1977) Discovery rules did not require the State to reduce a witness' pretrial oral statement to writing for the defense where the witness was listed on the State's pretrial answer to discovery.

People v. Green, 14 Ill.App.3d 972, 304 N.E.2d 32 (1st Dist. 1973) Although defendant is entitled to discovery of contents of written statement, he is not entitled to contents of oral statement, but only to witnesses to oral statement.

People v. Trolia, 69 Ill.App.3d 439, 388 N.E.2d 35 (1st Dist. 1979) The State's failure to disclose a certain witness and her statement which was favorable to the defense, upon request, was reversible error. Both the name of the witness and her statement were in police files.

The State contended that the conviction should not be reversed since the trial judge considered the favorable evidence during post-trial motions and concluded it was not sufficient to warrant a new trial. The Appellate Court rejected this contention: "We conclude that the cure for the State's failure to comply with Supreme Court Rule 412(c) and disclose such evidence

must be a new trial, rather than speculation by this or any other court as to what use or effect the evidence would have been to defendant had it been timely and properly disclosed."

People v. Sanders, 39 Ill.App.3d 473, 348 N.E.2d 229 (1st Dist. 1976) Defendant, on trial for rape, presented an alibi witness who was cross-examined by the State concerning certain contradictions based upon a statement made to police and of which written notes were made. Defendant moved to obtain a copy of the entire statement that the witness gave to police; defendant's request was denied.

The Appellate Court held that the trial judge erred in denying defendant's motion for the statement since it could have contained additional information explaining the conflicts and may have been used to rehabilitate the witness. However, the error was held harmless beyond a reasonable doubt.

People v. Rose, 65 Ill.App.3d 264, 381 N.E.2d 1215 (4th Dist. 1978) Prior to trial the defense requested that the State produce statements made by two key, State accomplice witnesses to FBI agents. The trial court denied the request on the basis that the State did not have the statements in its possession, both sides had equal access to the statements, and the State has no duty to furnish information held by a Federal agency.

The Appellate Court reversed for a hearing to determine if the statements are in existence and are available to the prosecution; if so, and if subject to production, the defendant must be granted a new trial. If the statements cannot be produced, such a finding is to be certified to the Appellate Court for further consideration.

People v. Kucala, 7 Ill.App.3d 1029, 288 N.E.2d 622 (1st Dist. 1972) State's failure to disclose co-defendant's statement which corroborated defendant's theory, irrespective of good or bad faith, was reversible error.

People v. DeStefano, 30 Ill.App.3d 935, 332 N.E.2d 626 (1st Dist. 1975) The State's primary witness against the defendant was an alleged accomplice who for nine years denied involvement in the murder, but in 1972 confessed to the murder (implicating defendant) in order to receive immunity. Although this accomplice-witness was interviewed at least five times prior to trial no notes or memoranda were taken because of the order of the Chief of the State's Attorney's Criminal Division.

The Appellate Court held that the order not to take written statements, etc. was for the purpose of defeating the defendant's right to discovery under Rule 412(c) and was a denial of due process and equal protection. Reversed and remanded.

People v. Bass, 84 Ill.App.3d 624, 405 N.E.2d 1182 (1st Dist. 1980) The prosecution's failure to disclose that one of its key witnesses, the only eyewitness to the incident, had taken a polygraph test and had made certain statements to the examiner was reversible error.

The defense filed a timely discovery motion sufficient to require production of the polygraph interview records, but learned of the polygraph test for the first time during the redirect examination of the above witness. Although the results of a polygraph test are not admissible with respect to proof of guilt or innocence, the defendant was not merely seeking to use the results of the test, but was seeking the report to ascertain whether any statements made by the witness contained information or leads bearing upon defense strategy and trial preparation.

The polygraph examiner's report, which was revealed during post-trial motions, showed that the witness told the examiner that he didn't know the name of the perpetrator of the offense; however, at trial the witness testified that "Dink" (defendant's nickname) committed the offense. Since the above witness was an eyewitness and the only witness to supply a description of the perpetrator, his credibility was crucial and prior statements were highly relevant to his credibility. Reversed and remanded.

People v. Dixon, 19 Ill.App.3d 683, 312 N.E.2d 390 (1st Dist. 1974) The State failed to furnish a statement of a potential witness in response to defendant's discovery motion. The statement was favorable to defendant since it gave a version of that incident which differed in several important details from the testimony of the State's major witness - thus, the statement reflected adversely upon the credibility of the State's "sole witness."

People v. Baxtrom, 61 Ill.App.3d 546, 378 N.E.2d 182 (5th Dist. 1978) The State committed reversible error by failing to produce, until jury deliberations, a police report, ballistics report and a statement of a third party which were favorable to defendant. The defendant had requested the material by discovery motion and the State was aware of the material prior to trial.

§15-4 List of Witnesses

People v. Flowers, 51 Ill.2d 25, 281 N.E.2d 299 (1972) A defendant is entitled, upon request, to a list of witnesses the State intends to call. See also, Ch. 38, sec. 114-9; Ill.Sup.Ct. Rule 412(a).

People v. Richardson, 50 Ill.App.3d 550, 365 N.E.2d 603 (1st Dist. 1977) State had duty to inform the defense of its decision to call a certain person as a rebuttal witness as soon as such decision was made. See also, **People v. Fain,** 41 Ill.App.3d 872, 355 N.E.2d 61 (1st Dist. 1976); **People v. Manley,** 19 Ill.App.3d 365, 311 N.E.2d 593 (2d Dist. 1974); **People v. Jarrett,** 22 Ill.App.3d 61, 316 N.E.2d 659 (2d Dist. 1974).

People v. Gomez, 107 Ill.App.3d 378, 437 N.E.2d 797 (1st Dist. 1982) State's failure to disclose a rebuttal witness did not cause prejudice and the trial judge did not abuse discretion in allowing the witness to testify.

People v. Longstreet, 23 Ill.App.3d 874, 320 N.E.2d 529 (1st Dist. 1974) The discovery rules do not require that the State disclose the names of all occurrence witnesses to the defense, but only requires disclosure of the names and addresses of those whom the State intends to call as witnesses.

People v. Williams, 24 Ill.App.3d 666, 321 N.E.2d 74 (3d Dist. 1975) Although discovery rules do not expressly require the discovery of occurrence witnesses, the trial judge may order such disclosure. In this case the defendant should have been given the names of the inmates who were in the cell house when the alleged incident occurred.

People v. Hughes, 46 Ill.App.3d 490, 360 N.E.2d 1363 (1st Dist. 1977) The State is not required to call every witness on its list of witnesses.

People v. Mourning, 27 Ill.App.3d 414, 327 N.E.2d 279 (5th Dist. 1975) Defendant alleged that the State failed to comply with discovery and the State responded that it was under no duty to comply with defendant's discovery motions since the trial court never ordered compliance.

The Appellate Court rejected the State's argument, holding that where the defense moves for a list of witnesses and the State furnishes a list, in purported compliance, without a ruling by the trial court, the State has waived the requirement that defendant's motion be filed and ruled upon.

People v. Millan, 47 Ill.App.3d 296, 361 N.E.2d 823 (1st Dist. 1977) Trial court erred in allowing the State to call the co-defendant (who had pleaded guilty about 2½ months previously) at defendant's trial since he was not on the list of witnesses and there was no justification for the State waiting until trial to disclose the intent to call him.

The Appellate Court noted that although defense counsel was given the opportunity, and did in fact, interview the co-defendant during trial, "allowing a hurried interview with the witness during trial is not a satisfactory substitute for prompt compliance (with discovery)... Without sufficient time for preparation, disadvantage and errors are included which erode the guarantee of a fair trial." Reversed and remanded.

In Re Lane, 71 Ill.App.3d 576, 390 N.E.2d 82 (1st Dist. 1979) The trial judge may exclude a witness when a party fails to list the person on the list of witnesses; however, this is an extremely harsh action, and an inappropriate use of this action may prejudice a defendant and require reversal. Exclusion was not appropriate in this case. See also, **People v. Echols,** 146 Ill.App.3d 965, 497 N.E.2d 32 (1st Dist. 1986); **People v. Foster,** 145 Ill.App.3d 477, 495 N.E.2d 1141 (1st Dist. 1986).

People v. Jackson, 48 Ill.App.3d 769, 363 N.E.2d 392 (4th Dist. 1977) The defendants were inmates of a correctional institution and were convicted, by a jury, for aggravated battery of a guard.

After the State rested its case, the defense sought to call fourteen eyewitnesses, all inmates, but the trial judge excluded their testimony because their names had not been previously disclosed to the State in response to discovery motions. The Appellate Court reversed holding that the trial judge abused his discretion in using the exclusion sanction since the fourteen eyewitnesses were needed to establish or corroborate defendant's alibis, the State was presumed to have had knowledge of the witnesses who were all inmates, and the trial judge could have more equitably solved the problem by ordering a short recess or ordering an in camera proceeding. Reversed and remanded.

People v. Rayford, 43 Ill.App.3d 283, 356 N.E.2d 1274 (5th Dist. 1976) The trial court abused its discretion in applying the exclusion sanction (Sup.Ct. Rule 415(g)(i)) to a defense expert witness who would tend to discredit the State's only eyewitness, for defendant's failure to disclose the expert until trial had begun.

The Appellate Court stated that the defense met its duty to disclose as soon as the intent to call the witness was informed, and then the trial court's duty was simply to safeguard against surprise (which could have been done by a short continuance), rather than impose a sanction for failure to comply with a discovery rule. The sanction of excluding the witness was excessive and denied defendant the right to present witnesses in his own defense.

People v. DeStefano, 30 Ill.App.3d 935, 332 N.E.2d 626 (1st Dist. 1975) The State on its witness list merely stated the name of a person with "address unknown." However, at that time the person was a justice of the Appellate Court with chambers in the same building as the State's Attorney's office. "This conduct by the State can only be regarded as a deliberate attempt to withhold valuable information from the defendant and to mislead defendant into believing it was another person by the same name."

People v. Hughes, 11 Ill.App.3d 224, 296 N.E.2d 643 (2d Dist. 1973) Improper for prosecutor to mislead defendant concerning location of a witness, by stating witness was a fugitive whereas prosecutor knew witness was in custody in another county.

People v. Avery, 61 Ill.App.3d 327, 377 N.E.2d 1271 (1st Dist. 1978) The State may not obstruct the defendant's attempts to locate a witness.

§15-5 Material to Impeach Witnesses

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) The right of confrontation of witnesses is paramount to State policy of protecting the anonymity of a juvenile offender. Thus, defendant was denied the right of confrontation of witnesses by being prohibited from cross-examining key prosecution witness to show that witness was on probation following an adjudication of juvenile delinquency - defendant had the right to attempt to show that witness was biased, under undue pressure, because of his vulnerable status as probationer.

People v. Norwood, 54 Ill.2d 253, 296 N.E.2d 852 (1973) Arrest record of juvenile accomplice is discoverable, notwithstanding Ch. 37, sec. 702-8, for impeachment where accomplice was principal State witness.

Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) Nondisclosure of evidence that witness had been promised immunity for cooperation was reversible error. A promise by one prosecutor who dealt with the witness is attributable to the government regardless of whether he failed to disclose the promise to prosecutor who tried the case.

U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) The prosecution's failure to disclose impeachment evidence (i.e. that prosecution witnesses were paid to provide information) is constitutional and reversible error only if such evidence might have affected the outcome of the trial.

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); **People v. McKinney,** 31 Ill.2d 246, 201 N.E.2d 431 (1964) It is incumbent upon a prosecutor to correct false testimony.

Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); **Alcorta v. Texas,** 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); **People v. Martin,** 46 Ill.2d 565, 264 N.E.2d 147 (1970). Prosecution must correct false testimony that goes only to the credibility of witnesses.

Pennsylvania v. Ritchie, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) Defendant charged with sexual assault against a child is entitled to have the trial judge review, in camera, confidential youth agency records pertaining to the child for information material to the defense. Defense counsel need not be allowed to examine the records.

People v. Coates, 109 Ill.2d 431, 488 N.E.2d 247 (1985) The defendant was convicted of child pornography and indecent liberties at a jury trial. The alleged victim was the nine year old daughter of defendant's wife and the wife testified for the State.

Defendant sought to subpoena records from the Department of Children and Family Services (DCFS) to be used to impeach his wife's testimony. Defendant's theory was that his wife - the mother of the victim, had a history of child neglect and unfounded claims of sexual abuse by her various boyfriends and husbands. DCFS argued that such records were confidential and should not be disclosed to defense counsel (Ch. 23, sec. 2061 et seq.).

1. The trial court conducted an in camera inspection of the records without counsel present and permitted the defense to use a portion of the records for impeachment. Defendant, relying on **People v. Dace,** 104 Ill.2d 96, 470 N.E.2d 993 (1984) and **People v. Phipps,** 98 Ill.App.3d 413, 424 N.E.2d 727 (4th Dist. 1981), contended that the records should have been examined in a hearing attended by counsel.

The Supreme Court rejected the defendant's contention, finding that Dace and Phipps are distinguishable.

"Both cases presented the question whether the mental health records of prosecution witnesses were discoverable for purposes of impeachment. In neither opinion did the court purport to modify the rule that the determination of whether material is discoverable and subject to disclosure is to be made by the circuit court. The opinions are authority for the proposition that if either the witness or the therapist seeks to invoke the statutory privilege, the appropriate procedure is for the court to hold an in camera hearing in the presence of counsel for both sides."

2. Defendant also contended that the trial court failed to comply with Rule 415(f) in that no record was made of the in camera proceeding and the records involved were not sealed, impounded and preserved. The Court held that defendant did not request such action in the trial court; thus, "there is nothing before us for review."

People v. Galloway, 59 Ill.2d 158, 319 N.E.2d 498 (1974) Prior to and during trial, defense counsel requested the arrest or police record of the State's key witness. The court denied the request after the prosecutor stated that the witness had no convictions that could be used for impeachment and that there were no pending charges against the witness since the time of the defendant's arrest. After trial, defense counsel learned that the witness had been released from jail on a pending armed robbery charge shortly before the trial. Also prior to and after the trial, charges against the witness were stricken upon State motions.

The Supreme Court held that the defense was entitled to the arrest report to show interest or bias on the part of the witness, and the State's false representation of the record of the witness deprived defendant of due process. The error, being of constitutional magnitude, was not harmless beyond a reasonable doubt.

People v. Cagle, 41 Ill.2d 528, 244 N.E.2d 200 (1969) Defendant is entitled to the production of a document that is contradictory to the testimony of a State witness. See also, **People v. Murray,** 73 Ill.App.2d 376, 220 N.E.2d 84 (1st Dist. 1966).

People v. Dace, 114 Ill.App.3d 908, 449 N.E.2d 1031 (3d Dist. 1983), Aff'd., 104 Ill.2d 96, 470 N.E.2d 993 (1984) The defendant was convicted of burglary based upon the testimony of an admitted accomplice - the accomplice's testimony was the only evidence showing that defendant entered the premises in question. The defendant moved for discovery of mental health history of the accomplice after discovering that she had been involuntarily committed to a mental health center about two years before the burglary. The State claimed privilege, the trial judge reviewed the commitment proceeding case file in camera, and denied the defendant's request.

The Appellate Court held that, in spite of the statutory privilege, Ch. 9½, sec. 801, the mental history of a witness is relevant to credibility and is a permissible area of impeachment (Sup.Ct. Rule 412(h). The State contended that the defendant's request was based upon mere speculation that the mental health records would contain some proper impeachment information. The Court rejected the State's contention because there is no way for a defendant to demonstrate the relevance of the information without having access to it.

In the instant case, the trial judge examined the records pertaining to the accomplice's commitment proceeding, but did not have information concerning her diagnosis, treatment of release. Thus, the trial judge could not reasonably conclude, in the absence of such information, that the mental health history of the accomplice was irrelevant. Consequently, the defendant is entitled to the information requested and if privilege is claimed by the accomplice or her therapist, the trial judge should conduct an in camera hearing, in the presence of counsel, to determine which information would be relevant to the accomplice's credibility.

The Supreme Court did not discuss the issue except to state: "It suffices to say that we agree with the appellate court that, under the circumstances shown by the evidence, the refusal to permit the discovery was reversible error."

People v. Redmond, 146 Ill.App.3d 259, 496 N.E.2d 1041 (1st Dist. 1986) The State is required to disclose, upon request, impeachment evidence relating to the credibility of its witnesses. "Noncompliance with this obligation is excused only where the prosecution did not know, and could not, through the exercise of due diligence, have been aware of the matter in question."

People v. Stokes, 121 Ill.App.3d 72, 459 N.E.2d 989 (2d Dist. 1984) The Appellate Court held that the prosecutor violated discovery rules by failing to disclose a prior conviction of a State witness to the defendant upon the latter's discovery request.

People v. Higgins, 71 Ill.App.3d 912, 390 N.E.2d 340 (1st Dist. 1979) The State, under Rule 412, has an affirmative obligation to obtain the criminal histories of its potential witnesses and disclose them to the defense upon request. See also, **People v. Pearson**, 102 Ill.App.3d 732, 430 N.E.2d 304 (1st Dist. 1981).

People v. Faulkner, 7 Ill.App.3d 221, 287 N.E.2d 243 (1st Dist. 1972) Where State witness testified she knew defendant during six months before crime, prosecutor's failure to disclose defendant's discharge from jail two weeks before crime was reversible error.

People v. Tonkin, 142 Ill.App.3d 802, 492 N.E.2d 596 (3d Dist. 1986) At a jury trial, the defendant was convicted of rape. The State's evidence consisted primarily of the testimony of the complainant. The defendant testified and claimed the intercourse was consensual.

The Appellate Court held that the State committed reversible error in failing to disclose that the complainant had three prior convictions for forgery. Supreme Court Rule 412 places a "continuing duty" upon the prosecution to disclose any criminal record which may be used for impeachment of its witnesses.

1. The State contended that it did not know of the prior convictions despite the exercise of due diligence. However, in this case, the prosecutor only checked the records in one county - the county where this trial took place.

The Appellate Court held that the prosecutor did not exercise due diligence since he failed to check with local police or other State authorities.

2. The State also contended that it was not required to produce the above information because defendant did not submit a written discovery request. The Appellate Court noted that at defendant's arraignment, pursuant to the "usual" practice in this county, "the prosecutor and defense counsel orally agreed to, and the court ordered, reciprocal discovery under the Supreme Court Rules."

"For the State to now argue that a written discovery request was necessary in spite of its oral agreement to full discovery is patently unfair to defendant. For us to allow or adopt that argument would provide a convenient safety net for the prosecutor whose efforts fell below the constitutional requirements."

3. Finally, the Court held that the discovery violation was not "harmless beyond a reasonable doubt" because the defendant's conviction rested upon the credibility of the complainant. The Court declined to apply, at the State's request, the "harmless error" standard of "reasonably probable that the result of the proceeding would have been different had the information been disclosed."

People v. Bolton, 10 Ill.App.3d 902, 295 N.E.2d 11 (3d Dist. 1973) State's failure to correct false testimony was reversible error - State witness testified he had not been promised leniency in exchange for testimony.

People v. Tidwell, 88 Ill.App.3d 808, 410 N.E.2d 1163 (2d Dist. 1980) At defendant's trial for armed robbery, an accomplice testified as the State's main witness. On cross-examination the accomplice specifically denied that any promises of leniency had been offered to him for his testimony. The State did not present any evidence to correct this false testimony, but in closing argument the prosecutor stated that the accomplice would not be charged in consideration of his testimony against the defendant.

The Appellate Court held that the defendant's due process rights were violated by the State's failure to correct the accomplice's false testimony. "It was highly unfair to permit (the accomplice) to swear without contradiction that he received no benefit from testifying when, in fact, in return for his testimony he was immunized from prosecution for armed robbery."

The Court also held that the prosecutor's closing argument did not cure the error of allowing the accomplice's testimony to stand uncorrected - the jury was instructed that it could base its decision only on the evidence and that closing arguments are not evidence. Reversed and remanded.

People v. Griffin, 124 Ill.App.3d 169, 463 N.E.2d 1063 (5th Dist. 1984) At defendant's trial for murder, a State witness identified the defendant as the perpetrator. The witness also testified that he knew of no promises or negotiations concerning his pending charges in return for his testimony. However, at a post-conviction hearing the State's Attorney admitted that he had an understanding with the witness' attorney that the State wanted the witness' cooperation in this case and was "holding off" on the witness' pending case in order to maintain "leverage" on the witness.

Although the above witness denied that his attorney had told about the understanding with the prosecutor, the Appellate Court found that "it seems unlikely that an attorney would have withheld information about a possible benefit his client could gain through his own action." The Court also noted that special permission had been obtained for the witness to leave the state on personal business.

The Court concluded that the jury was entitled to know of the above "under standing" and the State had the "duty to correct any false impression left by [the witness] flat denial that he expected any consideration from the State." Reversed and remanded for a new trial.

People v. Elston, 46 Ill.App.3d 103, 360 N.E.2d 518 (4th Dist. 1977) Evidence that two of the five occurrence witnesses who testified at trial had identified someone other than the defendant at a lineup and that another two had been unable to make any identification was clearly information favorable to the accused.

The State's failure to disclose the above information until trial was reversible error. If the information had been disclosed prior to trial defense might have had time to make further investigation and to adjust trial strategy, but "as the trial progressed, defense counsel's task of incorporating the new information into trial strategy became more difficult."

"We cannot say that defendant would not have been able to make other even more effective use of the favorable discovery to which he was entitled."

People v. DiMaso, 100 Ill.App.3d 338, 426 N.E.2d 972 (1st Dist. 1981) Defendant was charged with aggravated battery and armed violence against one Harry Verner; the defendant presented an alibi defense. Verner was the only witness to the incident. During pretrial investigation, the defense learned that ten days before the incident Verner had apparently passed out and was treated at a hospital. The defense sought to obtain Verner's hospital records to show that Verner suffered blackouts and was disoriented due to alcoholism and drug addiction. The trial judge refused the defense request for the records due to the confidentiality provision of the Mental Health Act, Ch. 91½, sec. 801.

The Appellate Court held that the State's interest in protecting the patient must yield to defendant's right to effective cross-examination in this case. Verner's testimony was critical and his habitual drug use and alcoholism were relevant to his perceptual capacity. Reversed and remanded.

§15-6 Informers

Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) Right of confrontation was violated by failure to reveal true name and address of informer who was principal witness against defendant.

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) Failure to reveal identity of informer at preliminary hearing to determine probable cause is not unconstitutional.

Shaw v. Illinois, 394 U.S. 214, 89 S.Ct. 1016, 22 L.Ed.2d 211 (1969) Cause remanded in light of **Smith v. Illinois**, where defense was prohibited from cross-examining informant as to his residence and employment. (Conviction reversed on remand). See **People v. Shaw**, 117 Ill.App.2d 16, 254 N.E.2d 602 (1st Dist. 1969).

Roviaro v. U.S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) The government's privilege to withhold disclosure of an informer's identity must give way, where the identity, or the contents of his communication is relevant and helpful to the defense of an accused.

Rugendorf v. U.S., 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964) Disclosure of informer is waived when not asked for in trial court.

People v. Lewis, 57 Ill.2d 232, 311 N.E.2d 685 (1974) The defendant was entitled to disclosure of the informer's identity at trial, where the informer was the only person present, other than defendant and a policeman, at an alleged drug sale and was then, the only witness who could amplify or contradict the officer's testimony.

In such instances the defendant must, at minimum, be allowed to interview the informer, and if he desires, call him as his own witness, and the informer should not be made to disclose his true name and address if it can

truly be shown that his life or safety is in jeopardy. See Ill.Sup.Ct. Rule 412(j).

People v. Chaney, 63 Ill.2d 217, 347 N.E.2d 138 (1976) An informant, named Holt, told police that defendant was going to burglarize a certain apartment. Police staked out the apartment and arrested defendant. Holt, who was with defendant at the burglary scene, escaped.

The State did not reveal that Holt was the informer nor that Holt had given a statement to the police (which was unfavorable to defendant), despite the fact that Holt was listed as a defense witness and testified for defendant at trial.

The Court held that the State was required to reveal Holt as the informer and disclose Holt's prior statement "when it became apparent that Holt was actually going to be called by the defense." It was improper for the State to allow Holt to testify on behalf of the defense with the realization that his credibility could be damaged with his prior statement, and in fact, the State did cross-examine Holt with the prior statement as well as comment on this in closing argument. Reversed and remanded.

People v. Williams, 40 Ill.2d 367, 240 N.E.2d 580 (1968) Conviction reversed where material witness for the defense was deliberately sent out of the state by federal officers.

People v. Castro, 10 Ill.App.3d 1078, 295 N.E.2d 538 (1st Dist. 1973) State must inform the defense of whereabouts of informer who was present when alleged sale of narcotics was made, where whereabouts was only known by the State and defense alleges that informer would testify that no sale was made.

People v. Perez, 25 Ill.App.3d 371, 323 N.E.2d 399 (1st Dist. 1974) State's failure to disclose the existence of an informer, who took part in a delivery of narcotics, upon specific request by defense in discovery motion, "not only frustrated the purpose of discovery, but (the State) became, in effect, the self-appointed arbiter of defendant's constitutional rights."

The trial court's refusal to order disclosure of the informer's identity when, during trial, his existence became apparent, was reversible error. The informer observed the narcotic transaction and heard what was said, he was a material witness, and his knowledge was potentially significant on the issue of guilt or innocence; thus, the determination of whether his testimony would aid in the defense is matter for the accused, not for the State to decide.

The Appellate Court rejected the State's contention that the disclosure of the informer's identity is required only where the informer is the sole witness, other than the purchasing agent, who can testify concerning the transaction. Despite the fact that two officers viewed the transaction from a distance of sixty feet, their corroborative testimony does not obviate disclosure. Conviction reversed.

People v. Contursi, 73 Ill.App.3d 458, 392 N.E.2d 331 (1st Dist. 1979) When the State is required to disclose the identity of an informer, the name and last known address of the informer must be given. The State is not required to physically produce the informer in court. In this case the State did not suppress the informer where the informer's whereabouts were not known to the State and the informer was not within the State's control.

People v. Raess, 146 Ill.App.3d 384, 496 N.E.2d 1186 (1st Dist. 1986) The defendant was charged with delivery of a controlled substance and filed a discovery motion requesting the disclosure of the identity and whereabouts of an informant, one "Vinnie". The trial court found that the disclosure of the informant could be relevant and instrumental in the preparation of the entrapment defense and ordered the State to disclose the informant's identity. The State refused and the trial court dismissed the charges. The State appealed.

The Appellate Court affirmed the dismissal.

The Court found that the uncontradicted assertions in defendant's affidavit in support of discovery were sufficient to raise the issue of entrapment. Also, the informant, although not physically present at the illegal transaction, had made persistent appeals for defendant's assistance in procuring cocaine. The Court concluded that "it appears that Vinnie, through a course of conduct spanning approximately three weeks, played a prominent, if not pivotal, role in laying the groundwork for the offense and, possibly, in inducing defendant to commit it."

Thus, the trial court properly granted defendant's motion for disclosure of the identity and whereabouts of the informant, Vinnie. Also, the dismissal was warranted since the trial court stated its belief that dismissal was the only appropriate sanction and the State continued to refuse to comply with the disclosure order, but also "made no argument against dismissal and offered no alternative sanction."

People v. Forsythe, 84 Ill.App.3d 643, 406 N.E.2d 58 (1st Dist. 1980) The trial judge dismissed the indictment against the defendant as a sanction against the State's failure to comply with discovery. The State failed to disclose the identity of the informant used in its drug investigation.

The Appellate Court upheld the trial judge's conclusion that the State was required to identify the informant, but held that the sanction of dismissal of the indictment was an abuse of discretion. The trial judge should have considered other sanctions such as ordering a continuance. Reversed and remanded "for a consideration of the full panoply of possible sanctions and the imposition of an appropriate one."

People v. Gibson, 54 Ill.App.3d 898, 370 N.E.2d 262 (4th Dist. 1977) Trial court's refusal to compel disclosure of the identities of two informers, who were material witnesses, until the close of the State's case was reversible error. Merely allowing defense counsel to interview the informers, prior to trial, without disclosure of their identities and without the participation of defendant was not a valid substitute for the disclosure of their identities.

The disclosure of the names of the informers, but without their addresses, at the close of the State's case was not sufficient to provide the defense adequate opportunity to prepare. Reversed and remanded.

In Re J.T., 65 Ill.App.3d 865, 382 N.E.2d 1288 (3d Dist. 1978) State was not required to disclose identity of informer where informer was not present at alleged drug sale and did not arrange the sale, but merely introduced the defendant to the undercover officer. See also, **People v. Molsby,** 66 Ill.App.3d 647, 383 N.E.2d 1336 (1st Dist. 1978).

People v. Jones, 73 Ill.App.2d 55, 219 N.E.2d 12 (1st Dist. 1966) Where State failed to call informer to rebut defendant's testimony concerning entrapment, State failed to meet its burden of proof. Conviction reversed.

People v. Avery, 61 Ill.App.3d 327, 377 N.E.2d 1271 (1st Dist. 1978) The State, by obstructing defendant's attempts to locate an informer who the defendant knew, unfairly refused to afford defendant the opportunity of deciding for himself whether or not the informer could provide testimony helpful to his defense.

People v. Wolfe, 73 Ill.App.2d 274, 219 N.E.2d 634 (1st Dist. 1966) An informer who participates in a crime must be disclosed at a pretrial hearing on a motion to suppress, if other evidence does not establish probable cause.

People v. Gomez, 67 Ill.App.3d 266, 384 N.E.2d 845 (1st Dist. 1978) Police need not invariably be required to disclose an informer's identity at pretrial suppression hearings challenging an arrest if the trial court is convinced, by evidence submitted in open court that the police did rely in good faith upon credible information supplied by a reliable informant.

People v. Brown, 151 Ill.App.3d 446, 502 N.E.2d 850 (2d Dist. 1986) The police failure to obtain the name of anonymous informers who provide information to a "crime stoppers" program does not violate due process.

People v. Meacham, 53 Ill.App.3d 762, 368 N.E.2d 400 (3d Dist. 1977) Contingent payments to an informer are not prohibited and an informer is not a "detective" or "investigator"; consequently, evidence obtained through the use of a paid informer is not inadmissible under Ch. 38, sec. 201-51 (which states that evidence obtained by a detective or investigator compensated on the basis of success is not admissible). See also, **People v. Carter,** 109 Ill.2d 15, 248 N.E.2d 847 (1969).

§15-7 Police Reports

People v. Burns, 75 Ill.2d 282, 382 N.E.2d 394 (1979) The State's failure to furnish certain police reports to defendant, upon specific request, was a violation of **Brady v. Maryland,** 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requiring a new trial. Defendant filed a pretrial motion requesting oral statements and summaries thereof, but the State failed to produce police reports which contained oral statements. The reports were favorable to the defense because there were discrepancies between the trial testimony and the oral statements of State witnesses.

People v. Walker, 91 Ill.2d 502, 440 N.E.2d 83 (1982) The defendant contended that the State's failure to disclose certain police reports, containing allegedly favorable information, prior to trial was reversible error.

The Supreme Court rejected the defendant's contention. The reports were disclosed during trial, were used by the defendant, no claim of surprise was made at trial no continuance was requested, and there was no showing of prejudice by the delay in the disclosure of the reports. Conviction affirmed.

People ex rel. Fisher v. Carey, 77 Ill.2d 259, 396 N.E.2d 17 (1979) The Supreme Court held that defense counsel may properly obtain police reports by way of subpoena duces tecum prior to preliminary hearing, after the accused has been charged. It is not necessary for defense counsel to wait until discovery proves unsuccessful before seeking a subpoena.

The Court also held that the State's Attorney may not be the conduit for the subpoenaed police reports, from the police department to the defense counsel. The State's Attorney may not intercept such subpoenaed reports. The subpoenaed material should be sent directly to the court, for the court to determine the relevance and materiality of the materials, whether they are privileged, and whether the subpoena is unreasonable or oppressive. Since the State's Attorney must have knowledge of the material in order to raise reasonable objections to the subpoena, he is not barred from seeing what materials the subpoena has produced.

People v. Huntley, 144 Ill.App.3d 64, 493 N.E.2d 1193 (5th Dist. 1986) The defendant was charged by information and prior to the preliminary hearing his privately retained counsel filed a request for production of certain police reports, relying on **People ex rel. Fisher v. Carey,** 77 Ill.2d 259, 396 N.E.2d 17 (1979). The prosecutor did not furnish the police reports.

When the case was called for preliminary hearing, the trial judge ordered the prosecutor to turn over the requested police reports. The prosecutor refused, stating that he would furnish copies of the reports if defense counsel paid ten cents per page. Since counsel refused to pay this fee, the prosecutor refused to furnish the police reports. The trial judge found the prosecutor in direct criminal contempt.

1. The Appellate Court held that the trial judge lacked authority under the discovery rules to order the State to produce the police reports. The discovery rules are not applicable prior to preliminary hearing. Pursuant to Carey, supra, the police reports may be subject to a subpoena prior to preliminary hearing, but no subpoena was sought in this case.

"After the State's Attorney's initial refusal, it became incumbent upon defense counsel to seek a subpoena under Carey. Carey does not stand for the proposition that defense counsel may make a simple request to the State's Attorney for the police reports. Rather, Carey provides counsel an opportunity to better prepare a client's defense at that critical stage, to provide effective cross-examination of witnesses, and to discover weaknesses in the State's case. Thus, in this case, defense counsel should have sought a subpoena duces tecum."

2. Since the trial judge lacked the power under the discovery rules to order the State to produce the police reports, the order to produce was void ab initio, and the contempt finding was reversed.

People v. Nunez, 24 Ill.App.3d 163, 320 N.E.2d 462 (1st Dist. 1974) Defendant was convicted of unlawful use of weapons - possessing a shotgun with a barrel of less than eighteen inches. The shotgun was found under defendant's bed.

Defendant's mother testified in defense that she found the gun outside of their apartment, took it in the apartment, and called the police to report the gun, but the police did not come in response to the call.

Prior to trial, defense counsel sought police logs relating to complaints made by defendant's mother. The prosecutor admitted that he had the logs, but refused to allow inspection by defense counsel, claiming the information to be irrelevant and immaterial. The trial court denied the defense request.

The Appellate Court remanded the case for the trial court to conduct an examination of the police logs, and if the logs reveal that a call for assistance was made, a new trial must be granted. If no such information is found in the logs, the trial court shall enter a finding of fact to that effect and enter a new judgment of conviction.

People v. Wilken, 89 Ill.App.3d 1124, 412 N.E.2d 1071 (3d Dist. 1980) At the defendant's jury trial for burglary, a police officer testified that he saw the defendant at the crime scene. Defense counsel moved for a mistrial, claiming surprise, since the officer's police report had not been furnished to the defense. The police reports that had been disclosed indicated that defendant's presence at the scene would be proved only by the testimony of two co-defendants. A continuance was granted until the next morning and defense counsel received the officer's report. The next morning defense counsel again moved for a mistrial stating that the "information in the report would have changed his cross-examination of (the officer) and could have prompted further investigation." The mistrial motion was denied, the officer resumed his testimony, and defendant was convicted.

The Appellate Court held that the State's failure to disclose the police report was error and "cannot be considered harmless" because the officer "was the only non-co-defendant witness to place the defendant at the scene of the crime, and the jury, in disregarding the defendant's alibi defense, could have placed great weight on (the officer's) testimony. As a result, the defendant was prejudiced in that he was hindered in the preparation of his defense by the prosecution." Reversed and remanded for a new trial.

People v. Jenkins, 18 Ill.App.3d 52, 309 N.E.2d 397 (1st Dist. 1974) Conviction for theft following bench trial reversed. Defense had the right to inspect a report prepared by store detective which was used to refresh her memory. The Appellate Court stated that there is no rational basis to justify a rule distinguishing between reports prepared by police officers and those prepared by officers employed by private corporations.

People v. Holdman, 76 Ill.App.3d 518, 395 N.E.2d 72 (1st Dist. 1979) Policeman's inadvertent destruction of his notes concerning his interview with the complainant was not prejudicial to defendant.

People v. Green, 133 Ill.App.2d 244, 272 N.E.2d 721 (1st Dist. 1971) Error not to furnish defense a police report which contained the descriptions given by State witnesses. The report must be made available to cross-examine those witnesses, whether or not the policemen who took the description testify.

People v. Howze, 1 Ill.App.3d 253, 273 N.E.2d 733 (4th Dist. 1971) Report by FBI agent concerning the drug transaction should have been produced where it may have assisted defense on cross-examination and may have been in conflict with a report of another agent.

People v. Baxtrom, 61 Ill.App.3d 546, 378 N.E.2d 182 (5th Dist. 1978) The State committed reversible error by failing to produce, until jury deliberations, a police report. The defendant had requested the material by discovery motion and the State was aware of the material prior to trial.

People v. Norris, 8 Ill.App.3d 931, 291 N.E.2d 184 (1st Dist. 1973) Defendant entitled to in camera examination of police report to determine if it contained substantially verbatim description of robber.

People v. Jenkins, 30 Ill.App.3d 1034, 333 N.E.2d 497 (4th Dist. 1975) Prior to trial the State made certain police reports available to the trial court for an in camera examination. The judge ordered one page furnished to the defendant and ordered the remainder sealed.

Defendant's appellate counsel sought to view the sealed material and the Appellate Court refused. The Appellate Court examined the sealed material and held that it was not subject to disclosure under Rule 412, and the denial of disclosure had no adverse effect on either the conduct of defendant's trial or the preparation of his appeal.

§15-8 Physical Evidence, Photos, Documents, Test Results

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) The defendants were arrested for drunk driving and submitted to Intoxilyzer (breath) tests. Defendants contended that it was error to introduce the results of the tests at their trials, over objection, because the officers failed to preserve the breath samples of the defendants.

The Supreme Court held that due process does not require the State to preserve such breath samples in order to introduce the breath analysis tests at trial.

1. The State authorities "did not destroy [defendants'] breath samples in a calculated effort to circumvent the disclosure requirements established by **Brady v. Maryland** and its progeny." Instead the officers in this case acted in "good faith" and in accord with their "normal practices."

2. The duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense" - that is evidence which possesses "an exculpatory value that was apparent before the evidence was destroyed, and also of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

In this case, the "chances are extremely low that preserved samples would have been exculpatory" and defendants could have used alternative means to challenge the Intoxilyzer tests. The Intoxilyzer test might malfunction in only a limited number of ways (i.e. faulty calibration, extraneous interference and operator error). Defendants have the opportunity to inspect the machine used and the weekly calibration results - this data could have been used to impeach the machine's reliability. Also, defendants could have introduced evidence of possible interference, such as the test was conducted near radio waves or defendants were dieting, resulting in chemicals in the blood, which could have affected the results. Finally,

the test operator could have been cross-examined concerning whether the test was properly administered.

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) At defendant's trial for murder, the State presented the testimony of forensic odontologists concerning their examination of the victim's jaw and their opinions, based upon such examination and the so-called "pink tooth theory", that death was possibly caused by strangulation. Defendant contended that he was denied due process because the victim's jaw was destroyed and, thus, he did not have an opportunity to independently examine the evidence.

The Supreme Court, relying on **California v. Trombetta,** held that the State's failure to preserve the jaw did not violate due process.

"As in Trombetta, there is nothing in the record here to indicate that the State's actions were designed to defeat its duty of disclosure under **Brady v. Maryland,** 373 U.S. 83 (1963). The State did not destroy the jaw to deliberately suppress exculpatory evidence; rather, it returned the jaw to the family pursuant to a statutory mandate [deceased's remains be released to the next of kin for burial purposes (Ch. 31, sec. 107.1)]. In addition, assuming arguendo that the jaw would have been exculpatory, defendant had an alternate means of raising doubt in the mind of the trier of fact as to the cause of death. Defendant had the opportunity to present evidence as to the causes of 'pink tooth' and was also able to scrutinize the State's experts to attempt to discredit their testimony, and as the record indicates, he took full advantage of that right. Both the State's experts and defendant's experts identified only a small number of causes of 'pink tooth'; however, each expert did list strangulation as one cause of the phenomena. We conclude that, based upon these facts, the Trombetta requirements - that the evidence possess an exculpatory value that was apparent before it was destroyed and that a defendant be unable to obtain comparable evidence by another means - are not met. Accordingly, we hold that the State's failure to preserve the victim's jaw did not infringe upon defendant Jordan's right to due process."

People v. Flowers, 51 Ill.2d 25, 281 N.E.2d 299 (1972) The defendant is entitled to examine the physical evidence which the State intends to introduce. Ill.Sup.Ct. Rule 412(a).

People v. Nichols, 63 Ill.2d 443, 349 N.E.2d 40 (1976) The State's failure to produce a shoe which was found outside the window of the burglarized premises after specific, timely demand by defendants constituted suppression of evidence favorable to the accused and was reversible error.

People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) The trial court allowed the defense to inspect crime scene photos which the State intended to introduce at trial, but denied the request to inspect all other photos of the crime scene. The denial was affirmed. Photos are not automatically discoverable unless the State intends to use them at trial, they were obtained from the defendant, or are favorable to the defense.

People ex rel. Walker v. Pate, 53 Ill.2d 485, 292 N.E.2d 387 (1973) Defendant requested documents prepared by a crime technician who examined the crime scene. The State objected on relevancy grounds. The trial court then properly examined the documents, found them irrelevant, and denied the defense request.

U.S. ex rel Raymond v. Illinois, 455 F.2d 62, (7th Cir. 1971) State's failure to disclose negative results of a police laboratory test for spermatozoa to defense counsel was error. The defendant was informed of the results, but his counsel did not learn of the test until after defendant had been found guilty.

People v. Dodsworth, 59 Ill.App.3d 207, 376 N.E.2d 499 (4th Dist. 1978); **People v. Taylor,** 54 Ill.App.3d 454, 369 N.E.2d 573 (5th Dist. 1977) Reversible error for State to introduce results of chemical test where State had unnecessarily destroyed the substance involved before defendant could have an analysis of it made.

People v. Hummell, 38 Ill.App.3d 233, 347 N.E.2d 305 (4th Dist. 1976) Discovery order requiring the State to produce "a description of the procedure by which the alleged scientific tests were made on (the alleged controlled substance) and a statement of the educational background and training of the criminalist" was unreasonable and beyond the scope of Rule 412(h).

People v. Flatt, 75 Ill.App.3d 930, 394 N.E.2d 1049 (3d Dist. 1979) The police failure to preserve the physical evidence (window panes) from which latent fingerprints were lifted at the crime scene was not improper. Such preservation is not necessary as long as the procedures employed by the technician who lifted the prints and made the comparisons are sufficient to verify the accuracy of the evidence sought to be admitted.

People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 (3d Dist. 1981) Defendant requested production of certain hair samples in order to conduct tests thereon. The Court allowed defendant's motion. The State refused to deliver the samples to the defense counsel, but insisted on sending the samples directly to the testing lab. Defendant then moved to suppress the samples, and the motion was denied.

The Appellate Court noted that defendant has the constitutional right to conduct his own tests on physical evidence, but also held that this is not without limitation. The State had an interest in preserving its evidence and insuring its admissibility, and since the State's request to deliver the samples directly to the lab did not interfere with defendant's right to inspect and test the physical evidence, the trial judge's ruling was proper.

People v. Steptoe, 35 Ill.App.3d 1075, 343 N.E.2d 1 (1st Dist. 1976) Police loss of paper bag allegedly used in attempt robbery did not deny due process. The Court noted that there may be instances where due process would require a new trial if police negligently lost confiscated evidence, depriving a defendant of the opportunity of seeing whether the evidence might be helpful in his defense.

People v. Anthony, 38 Ill.App.3d 190, 347 N.E.2d 179 (4th Dist. 1976) During the cross-examination of defendant, at kidnapping, etc. trial, the State im peached him with a "list" of things to be purchased, written by defendant. The list included a gun, knife, tape for eyes, etc.

The list was obtained during a search, pursuant to warrant of defendant's room. The inventory returned on the warrant did not set out the above "list", but merely noted "the seizure of a garbage can and its contents of tape and torn papers . . . papers, tape, gauze and a woman's bra and a bag of waste paper."

The Appellate Court discussed discovery Rule 412(a) and the ABA standards, and held that the State had no duty to point out the significance of the "list" to the defendant.

People v. Coslet, 39 Ill.App.3d 302, 349 N.E.2d 496 (4th Dist. 1976) The State's failure to furnish the defense with the X-rays of the deceased at murder trial, or to inform defense where the X-rays could be seen was improper under Rule 412. However, the defense was not surprised or prejudiced since the existence of the X-rays and their importance was disclosed in other discovery, thus there was no reversible error.

People v. Baxtrom, 61 Ill.App.3d 546, 378 N.E.2d 182 (5th Dist. 1978) State committed reversible error in failing to produce ballistics test report.

People v. Keith, 66 Ill.App.3d 93, 383 N.E.2d 182 (5th Dist. 1978) Where copy of neutron activation analysis report furnished by State to defense was illegible, State failed to comply with discovery. The fact that the analysis results were "inconclusive" does not show that the report could not be material favorable to the defense.

People v. Loftis, 55 Ill.App.3d 456, 370 N.E.2d 1160 (1st Dist. 1977) In a rape case where the complainant testified that her attacker "tore her panties off," reversible error was committed by prosecutor's failure to disclose the existence of the panties until the redirect examination of the complainant. Since the condition of the panties, with at best a slight tear, tended to negate the element of force, the prosecution's failure to disclose was a violation of Supreme Court Rule 412(c). Reversed and remanded.

People v. Wisniewski, 8 Ill.App.3d 768, 290 N.E.2d 414 (5th Dist. 1972) State's failure to disclose lead pipe found near scene was reversible error where self-defense was raised in that deceased struck defendant with a pipe.

People v. Hill, 97 Ill.App.2d 385, 240 N.E.2d 373 (1st Dist. 1968) State's failure to produce, in response to defendant's subpoena, spent cartridges recovered at homicide scene was error - but held harmless.

People v. Baltimore, 7 Ill.App.3d 633, 288 N.E.2d 659 (2d Dist. 1972) Failure to disclose police report which indicated that the gun used in the offense for which defendant was charged was also used in a prior offense for which others pleaded guilty, was reversible error.

People v. Parton, 40 Ill.App.3d 753, 354 N.E.2d 12 (4th Dist. 1976) During defendant's trial for forgery the State used a certain deposit slip which was not previously disclosed to the defense. The State argued, however, that it made an "open file" offer which satisfied the requirements of discovery. The Appellate Court rejected the State's position, holding that Rule 412 pro-

vides that the State "describe in general terms" the documents to be inspected, which the State failed to do in this case.

The Appellate Court reversed and remanded, noting that "it is not the function of an appellate court to speculate to what use a defendant and his counsel may put material evidence withheld (from) them."

People v. Ross, 132 Ill.App.3d 498, 477 N.E.2d 1258 (1st Dist. 1985) The defendant was not prejudiced at his trial for the murder of his wife by the police failure to test defendant's and his wife's hands for gunshot residue and failure to obtain sufficient blood samples from the scene in sufficient quantities for accurate testing.

People v. Molsby, 66 Ill.App.3d 647, 383 N.E.2d 1336 (1st Dist. 1978) Defendant was not entitled to production of photos in this case. The photos were not the defendants the State didn't intend to use them at trial (they were only used in rebuttal), and they were not favorable to the defense.

People v. McCabe, 75 Ill.App.3d 162, 393 N.E.2d 1199 (5th Dist. 1979) The defendant's conviction for rape was reversed and remanded due to the State's failure to comply with discovery.

The defendant requested all information the State had which tended to negate his guilt. The State possessed a composite sketch which the victim stated resembled the defendant who was in the proximity of the crime scene. The State, however, did not furnish the sketch or the police report to the defendant until the afternoon of the first day of trial. The "eleventh hour delivery of the thrice requested discovery items (was) violative of defendant's due process rights and of Supreme Court Rule 412."

§15-9 Transcripts of Prior Proceedings

Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) The State must provide an indigent defendant with a transcript of prior proceedings, such as a mistrial, when that transcript is needed for an effective defense or appeal.

Dennis v. U.S., 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) The failure of the trial court to permit defendants to examine the witnesses' grand jury testimony constituted reversible error.

People v. Lentz, 55 Ill.2d 517, 304 N.E.2d 278 (1973) State must produce upon request, recorded grand jury testimony, but the failure to have grand jury proceedings recorded does not require dismissal of indictment.

People v. Tate, 63 Ill.2d 105, 345 N.E.2d 480 (1976) The defendant claimed that the State violated **Brady v. Maryland** in withholding exculpatory grand jury testimony by a certain witness, who testified for defendant at trial.

The Supreme Court held that Brady was not violated and defendant was not prejudiced since defense counsel was furnished a copy of the grand jury testimony during the State's cross-examination of the witness.

People v. Miller, 35 Ill.2d 620, 221 N.E.2d 653 (1966) Denial of indigent defendant's request for transcript of his former trial (a mistrial) was a denial of equal protection. See also, **People v. Delafosse**, 36 Ill.2d 327, 223 N.E.2d 125 (1967).

People v. Jones, 66 Ill.2d 152, 361 N.E.2d 1104 (1977) Defendant filed a post-conviction petition alleging that the State's failure to disclose to him a certain persons' favorable grand jury testimony was a denial of due process. The trial court dismissed the petition and the Supreme Court upheld the dismissal, holding that the petition did not make a "substantial showing of a constitutional violation."

Relying on **U.S. v. Agurs**, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court held that the defendant by making a general request for discovery prior to trial did not make a "demand" for the grand jury testimony which would have required the prosecutor to produce the exculpatory matter under **Brady v. Maryland**. However, a prosecutor, even without a specific request or demand, is obliged to furnish defendant with any evidence that is "highly probative of innocence," and a defendant's constitutional rights are violated if the prosecutor's failure to disclose resulted in the denial of a fair trial. Thus, "the omission must be evaluated in the context of the entire record" ... (and) "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

The Supreme Court evaluated the omitted grand jury testimony in this case, in the context of the entire record and concluded that it did not otherwise exist, therefore there was no constitutional violation and the dismissal of the post-conviction petition was proper.

People v. Russell, 7 Ill.App.3d 850, 289 N.E.2d 106 (1st Dist. 1972) Indigent defendant was entitled to transcript of the prior trial of co-defendants, to aid him in the preparation of his defense.

A defendant is not prejudiced only when he is denied access to transcripts which were employed by the State at trial. A transcript which is of little value to the State in preparation of its case might be of great value to the defense in preparation of its case.

People v. Wolff, 75 Ill.App.3d 966, 394 N.E.2d 755 (3d Dist. 1979) Trial court's denial of defendant's motion for a free transcript of a previous mistrial was not error.

Defendant did not allege an equal protection violation, nor does the record show such, the transcript was not needed by him to vindicate any legal right, and defendant's motion, made on the eve of trial, was untimely.

People v. Stinger, 22 Ill.App.3d 371, 317 N.E.2d 340 (2d Dist. 1974) The State's Attorney was held in contempt for failing to comply with trial court order to have a court reporter at the grand jury proceeding.

The Appellate Court reversed, holding that the trial court exceeded its powers by ordering the State's Attorney to assign a court reporter at the grand jury hearing. The trial court may, as provided in Ch. 38, sec. 112-6, appoint a court reporter to attend the grand jury proceeding, but the court may not order the State's Attorney to do so.

§15-10 Disclosure by Defendant

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 1893 (1970) State notice of alibi defense rule upheld - the validity of such rules may depend on reciprocal discovery by defendant.

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) Defendant has right to reciprocal discovery when disclosing alibi defense. See also, **People v. Fields**, 59 Ill.2d 516, 322 N.E.2d 33 (1974); **People v. Cline**, 60 Ill.2d 561, 328 N.E.2d 534 (1975).

People ex rel. Bowman v. Woodward, 63 Ill.2d 382, 349 N.E.2d 57 (1976) The defendant may only be required to disclose information which he intends to use at trial. Also a defendant may not be compelled to provide materials of a "testimonial or communicative nature."

People v. Fritz, 84 Ill.2d 72, 417 N.E.2d 612 (1981) The Supreme Court held that a defendant who presents an occurrence witness to testify that the defendant was not at the crime scene is not presenting an alibi defense and is therefore not required to give notice of an alibi pursuant to Supreme Court Rule 413(d)(iii) - "To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say he was not at the scene and must therefore have been elsewhere."

Additionally, the defendant was not attempting to present an alibi defense merely because his occurrence witness (his wife in this case) volunteered testimony that when defendant left the crime scene prior to the incident he "said he was going to work." The "volunteered, unresponsive statement that defendant told her he was going to work cannot be considered as evidence of alibi; first, because it was volunteered; second, because (the witness) did not know whether defendant was actually going to work; and third because (the witness) was present at the scene of the alleged offense, not elsewhere. Moreover, other than (the above witness' statement), the defendant never offered any evidence that he was present at any other definite place. His theory was simply that he was not at the (crime scene when the offense allegedly occurred). Hence no evidence of an alibi was presented in this case."

Since no alibi defense was presented, the trial court erred in allowing the prosecutor to examine the above witness outside the presence of the jury as a means of requiring the defendant to disclose information required by Rule 413(d)(iii). Reversed and remanded.

People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487 (1981) The defendant was charged with a misdemeanor and defense counsel filed a discovery motion requesting, inter alia, a list of witnesses. The State provided the list and then filed its own discovery motion, requesting the names of defendant's witnesses. The trial court ordered defense counsel to comply, and when he refused to do so he was held in contempt of court. Defense counsel appealed the contempt finding.

The Supreme Court held that a trial court does not have authority under the discovery rules, nor the inherent authority, to order discovery of the defendant by the State in a non-felony case.

Since the trial court's order of discovery was

invalid, the contempt judgment which was based thereon was also invalid. Contempt reversed.

People v. Boclair, — Ill.2d —, — N.E.2d — (1987) The Supreme Court held that the trial judge properly ordered the defense, upon the State's request, to produce the notes of the defense investigator which were prepared during interviews with State witnesses.

People v. Jones, 30 Ill.App.3d 562, 333 N.E.2d 725 (2d Dist. 1975) Trial court's order for production of a blood sample from defendant, under Rule 413, was affirmed. Defendant's right to be protected against unreasonable search and seizure was protected in this case. See also, **People v. Turner,** 56 Ill.2d 201, 306 N.E.2d 27 (1973).

People v. Dickerson, 119 Ill.App.3d 568, 456 N.E.2d 920 (1st Dist. 1983) Five days before the scheduled date of defendant's armed robbery trial, he notified the State of an alibi defense and the three witnesses who he intended to call. The State objected on the ground that the untimely notice was prejudicial to its case. The trial judge barred the defendant's alibi defense.

The Appellate Court held that the above untimely notice of alibi was not the type of situation contemplated by Rule 415(g) as warranting the strictest sanction. There was evidence that defendant and his counsel didn't have a good relationship - defendant didn't trust his lawyer and believed that early disclosure would weaken his case, and counsel informed the court of the alibi as soon as he was told of it by defendant. Additionally, after being ordered to make an investigation and report to the court one day before trial, the prosecutor informed the court that it would be unduly burdensome for the State to conduct an investigation since the alibi witnesses were not within the county.

"In our view, the facts of this case are such that the purpose of Supreme Court Rule 415(g) was not served by the sanction imposed. The effect was to deny defendant his right to present a defense. This was not and is not the intent of the rule. The better approach would have been to allow a continuance so that both parties could investigate the defense and interview witnesses." See also, **People v. Osborne,** 114 Ill.App.3d 443, 451 N.E.2d 1 (4th Dist. 1983); **People v. Jones,** 86 Ill.App.3d 1013, 408 N.E.2d 764 (5th Dist. 1980).

People v. Grier, 90 Ill.App.3d 840, 413 N.E.2d 1316 (1st Dist. 1980) At defendant's trial for robbery, he raised the issue of the complainant's sobriety. The complainant testified that she had nothing to drink before the robbery, but two police officers testified that she had the odor of alcohol on her breath. On cross-examination one of the officers denied telling anyone that the complainant was drunk. A public defender, who represented defendant at the preliminary hearing, testified that the officer told him that complainant "had been drinking and was drunk." On cross-examination the defender stated that his notes concerning the conversation with the officer were in the possession of defendant's trial counsel.

The prosecutor moved for production of the above notes and, over defense objection, the trial court ordered production of excised portions of the notes. The notes were produced and used to impeach the defender, in that the notes did not indicate that the officer used the term "drunk."

The Appellate Court affirmed the order of production, holding that, even if the notes were part of the defender's work product he waived invocation of the privilege by taking the stand and testifying as to the conversation about which he took the notes. By "electing to present (the defender) as a witness for the purpose of contrasting (his) recollection ... with the recollection of the officer, defendant waived the privilege with respect to matters covered in (the defender's) testimony. The trial court did not open up defense counsel's file to the State... (but) allowed only those portions of (the) notes which related his conversation with (the officer) to be excised and turned over to the prosecution for possible use as impeachment." Conviction affirmed.

Ch. 16

DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) State statute making it a crime to use opprobrious or abusive language tending to cause breach of the peace, held unconstitutional since the statute had not been narrowed by state courts to apply only to "fighting words" which tend to incite an immediate breach of the peace.

Plummer v. Columbus, 414 U.S. 2, 94 S.Ct. 17, 38 L.Ed.2d 3 (1973) City Code which provides that "no person shall abuse another by using menacing, insulting, slanderous, or profane language" is unconstitutional since it punishes only spoken words and is not limited in application to punish only unprotected speech.

While the ordinance may be neither vague, or otherwise invalid as applied to the defendant, he may raise its vagueness or unconstitutional overbreadth as applied to others. If the law is found deficient, it may not be applied to him until a satisfactory limiting construction is placed on it.

Norwell v. Cincinnati, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973) Defendant's conviction for disorderly conduct is reversed. Defendant was convicted merely because he verbally and negatively protested the policeman's treatment of him. One may not be punished for nonprovocatively voicing his objection to what he feels is the highly questionable detention by the police officer. The ordinance operated to punish defendant for his constitutionally protected speech.

Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) The defend ant's words "we'll take the fucking street later" spoken while facing a crowd at an antiwar demonstration, while sheriff and deputies were attempting to clear the street, could not be punished as obscene or as "fighting words" or as having "a tendency to lead to violence." The words come within the constitutional freedom of speech.

Lewis v. New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) City ordinance which states that it shall be unlawful for any person to wantonly curse or revile or to use obscene or opprobious language toward city police while in actual performance of his duties, is unconstitutional. The ordinances punishes the spoken word which is constitutionally protected.

Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969) A protest march, if peaceful and orderly, is protected by the First Amendment, regardless of the fact that onlookers became unruly.

Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) Convic tion for peacefully remaining in public library, without creating a disturbance, after being asked to leave was reversed.

People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595 (1968) Disorderly conduct stat ute, Ch. 38, sec. 26-1, is upheld over claim that it is vague and overbroad.

Chicago v. Morris, 47 Ill.2d 226, 264 N.E.2d 1 (1970) Conviction for disorderly conduct upheld. The defendant was engaged in loud argument, persisted in questioning and criticizing a police officer, a tense crowd gathered which required the summoning of additional police assistance.

Chicago v. Wender, 46 Ill.2d 20, 262 N.E.2d 470 (1970) Loud inquiries by vehicle occupants concerning the authority of officers to stop vehicle and officers' identity was not disorderly conduct.

Chicago v. Perez, 45 Ill.2d 258, 259 N.E.2d 4 (1970) Sit in demonstrators in public building who did not disturb any normal activities of the agency in the building were not guilty of disorderly conduct.

Chicago v. Meyer, 44 Ill.2d 1, 253 N.E.2d 400 (1969) Error to convict defendant for disorderly conduct solely because of the manner in which he conducted his forum and not because his conduct forecast an imminent threat of violence.

People v. Davis, 82 Ill.2d 534, 413 N.E.2d 413 (1980) The defendant was convicted of disor-

168

Indiana State Bar Association

PRESIDENT-ELECT
Jeanne S. Miller
407 Broadway
P.O. Box 246
New Haven, Indiana 46774
(219) 493-4451

AUG 29 1988

August 22, 1988

Gordon F. Proudfoot
P.O. Box 876
Dartmouth, Nova Scotia, B2Y 3Z5

Dear Mr. Proudfoot:

I am sending you a copy of Rule 3.8 of the Indiana Rules of Professional Conduct as adopted by the Indiana Supreme Court. This rule requires the prosecutor to make timely disclosure to the defense of all exculpatory information.

Sincerely yours,

Jeanne S. Miller

Jeanne S. Miller, President-Elect,
Indiana State Bar Association

JSM:jw

Enclosure

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.