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Province of
British Columbia

Ministry of
Attorney General

Criminal Justice Branch
Third Floor, Harbour Square
910 Government Street
Victoria
British Columbia
V8V 1X4

1

OUR FILE 1830-54-29

YOUR FILE

July 19, 1988

JUL 29 1988

Messrs. Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 875
Dartmouth, Nova Scotia
B2Y 3Z5

Attention: Mr. Gordon F. Proudfoot

Dear Sirs:

Thank you for your letter of May 20, 1988 addressed to the Attorney General which has been referred to myself for reply.

Rather than complete the questionnaire as you have requested I will outline the profile of the Criminal Justice Branch and also answer your questions about disclosure in the body of my letter.

I report directly to the Deputy Attorney General and I have four Regional Crown Counsel who report directly to me. Throughout the Province we employ one hundred and seventy full time Crown Counsel, the majority of whom are on contract and some of whom are career civil servants. As well, up to fifteen per cent of all prosecution activity is carried out by "ad hoc" prosecutors who are appointed by the case on an hourly fee basis. Those ad hoc prosecutors prosecute offences under the Criminal Code as well as Provincial Statute and Bylaw matters and they are not political appointments.

With this mix of Crown Counsel we strive to maintain a vital Branch with room for the exceptional to rise to the top, room for junior practitioners to serve the public and for a time to gain experience and then enter the private bar, and room for the private bar to participate. We want to avoid developing a solid

exclusive cadre` of prosecutors who see themselves as extensions of the police who, regardless of ongoing contribution enjoy a secure spot in the public service.

We have developed a relatively young dedicated and balanced group of lawyers who generate their security by solid performance on an annual basis and who are absolutely independent of "political influence" and, frankly, undue police influence. The ad hoc lawyer gives us manpower flexibility and helps us to avoid the development of an overly prosecutorial police-like profile. As well, the development of a confrontational atmosphere between the defence bar and the prosecutorial bar is less likely to occur.

Our disclosure policy is in writing and is quite simply that full, fair and frank disclosure of the Crown's total case must be given to defence counsel or the accused. More specifically we require that a copy of <u>any statement</u> given by the accused to a person in authority must be given to defence counsel or the accused. In connection with disclosure, we have a quality control system in which all charges recommended by the police are reviewed by Senior Crown Counsel and the police are required to report in writing on a Report to Crown Counsel form which includes a narrative statement, witness list and an evidence check sheet.

I attached, for your information, a copy of our Disclosure Policy.

Finally, I am not aware of any cases similar to the Donald Marshall case where in British Columbia someone has been convicted of criminal offences and exculpatory statements were not disclosed to defence counsel. We do not appear to have this type of problem in this province.

To summarize, I am proud of the fact that British Columbia has been a leader in developing a full disclosure policy. We have not waited for federal legislative initiatives to occur and, while the police were initially reluctant to embrace the policy, it now appears that there is very little concern by law

enforcement agencies. The law enforcement community's specific concerns about confidentiality are met by providing to them a special form for confidential remarks which is not provided to defence counsel or the accused. Thus we are practising a full disclosure policy which allows the parties to resolve non-contentious issues prior to the trial and which results in complete fairness to the accused without detracting from the ability of the Crown to prove its case.

I hope that this information will prove useful for the purposes of your inquiry.

Yours very truly,

Richard C. Isaac for

Ernie Quantz
Director of Operations
Criminal Justice Branch

Enclosure

B. CIRCUMSTANCES FOR DEFENSE

Introduction

The Ministry's policy is to fully disclose the Crown's case to the defence. The most efficient means of doing so is to provide defence with a copy of the narrative section of the RCC in addition to other pertinent documentation.

There are, however, cases where the investigator wishes to provide confidentially his/her comments and opinions concerning the investigation. It is in the Crown's interest to encourage the forwarding of such material. To release these comments and opinions except in extraordinary circumstances would discourage the investigator from providing them to Crown Counsel.

These comments are not released to defence unless counsel decides that the proper administration of justice requires it. They are to be released only after counsel has spoken with a police representative. In so doing, counsel is not seeking the police representative's permission to release such material, rather he/she is:

- Consulting with the police on the issue, and;
- Advising the police which "confidential material" in exercising his/her discretion, he/she has decided must be released.

If the procedures outlined above in paragraph C.4. under "Charge Approval" are followed, it will not be necessary to refer most files to counsel when a request for circumstances is made by

2. **Secretaries Responsibilities**

(a) Forward the narrative portion of the RCC to the defence excluding any areas deleted by the charge-approval officer.

(b) Forward other relevant documentation as noted by the charge-approval counsel.

(c) Note to whom circumstances have been given, the date and your own name in the above-mentioned stamped format.

The portion of the report under "REMARKS" (form PCR 220) is only to be given out by counsel or under the personal direction of counsel.

C. **REMAND COURT**

1. **Preparation**

Adoption of the procedures outlined above under "Quality Control of Charges" will significantly reduce the amount of preparation required prior to remand court. There are, however, two areas requiring mention. These are, firstly, the investigator's leave calendar; and secondly, the checklist of steps to be completed by the secretary the day previous to remand court.

Information of this nature should be included in the new form designed for this purpose - Form PCR 220, and should not be disclosed without prior consultation with the police or other investigative agency.

The material outlined above subject to full disclosure may not be exhaustive of the information to be provided to Defence Counsel or the accused. Additional information not identified may be subject to disclosure on a case by case basis.

It is expected that Crown Counsel will keep Defence Counsel or the accused apprised of any new information obtained relevant to the case between the time of initial disclosure and completion of the proceedings.

Province of British Columbia
Ministry of Attorney General

Criminal Justice Branch

CROWN COUNSEL HANDBOOK

TITLE	DATE	CANCELS	No
P O L I C Y	10-15-86		DIS 1
SUBJECT			REFERENCE
Disclosure - Particulars			CROSS-REFERENCE

Criminal Justice Branch policy confirms the practice of full, fair and frank disclosure of the nature and circumstances of the Crown's case to Defence Counsel or the accused. Accordingly, to facilitate achieving the objective of full disclosure, the following should be provided to Defence Counsel or the accused:

1. A copy of the narrative page (FORM PCR 201) of the Report to Crown Counsel;

2. a copy of any statement given by the accused to a person in authority;

3. a copy of the criminal record of the accused;

4. a copy of any professionally prepared reports (medical, financial, etc.);

5. access to any exhibits, and where applicable, copies of the exhibits;

6. a copy of the Information;

7. a copy of witness' statements subject to the discretion of Crown Counsel <u>not to release</u> witness' statements where exceptional or compelling circumstances exist; and

8. where possible, victim impact information intended to be submitted on sentence to be disclosed to the Defence prior to sentencing.

The police, and other investigative agencies, often provide Crown Counsel with confidential information and material which relate not only to the matter under investigation but also to investigative techniques, other individuals, names of informants and the like.

.../2

the defence subsequent to the charge-approval process.

1. **Delivery of Circumstances (Counsel's Responsibilities)**

(a) Determine how much of the circumstances will be released to the defence in accordance with Ministry Policy.

(b) Note the means by which the circumstances are to be released to the defence by using a stamped format such as that set out herewith on the front sheet of the RCC.

Circumstances requested - Date: _____ By: _____	
Circumstance given:	
Narrative	YES___NO___NA___
Accused statements	YES___NO___NA___
Accused criminal record	YES___NO___NA___
Professionally prepared documents	YES___NO___NA___
Witness statements	YES___NO___NA___
Other: _____	
Circumstances given by: _____	
Date: _____	

Alberta
ATTORNEY GENERAL

AUG 1 5 1988

Office of the Assistant Deputy Minister
(Criminal Justice)

9833 - 109 Street, Edmonton, Alberta, Canada T5K 2E8 403/427-9616 Telex 037-3019, TWX 610-831-1167

08 August 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 of Inquiry on the Prosecution of Donald Marshall, Jr.

I have been asked to respond to your letter of 20 May 1988 addressed to the Honourable Attorney General, James D. Horsman, Q.C.

I am attaching the Alberta response to the questionnaire.

I apologize for the delay in responding to this questionnaire, but should you have any questions please do not hesitate to contact me directly.

Yours sincerely,

Jane Baker
for Neil McCrank
Assistant Deputy Minister
(Criminal Justice)

/jlb

Attachment

0

QUESTIONNAIRE

1. Province Alberta

2. Number of Full Time Prosecutors Approximately 150

   Number of Part Time Prosecutors Approximately 100 - used sparingly

3. Do Part Time Prosecutors prosecute offenses under the Criminal Code of Canada? Yes but Ad Hoc Counsel are used sparingly

4. Are part-time Prosecutors political appointments? No

5. Are there any written guidelines to guide your prosecutorial staff on disclosure of facts or other information to defence counsel prior to trial? Yes
   During Trial? No
   Post-Trial and Pre-Appeal? No

6. Is your province in the process of adopting guidelines for disclosure for Crown counsel? We have adopted the guidelines from the 1985 Uniform Law Conference in Halifax.
   If so, how long has the issue of disclosure guidelines been under consideration?

   Less than a year? _____
   More than a year? _____
   More than two years? _____

7. Are there any Statutes in your jurisdiction requiring the disclosure of exculpatory statements to defence counsel or the accused prior to Trial? No

8. Is it the practice in your province of the Crown Prosecutors to volunteer the names of witnesses and/or statements to defence counsel prior to trial which are favourable to the accused? Yes

9. Do you use a form for collection of crown evidence known as a "Crown Sheet"? The police use a variety of forms as Crown confidential information.

10. Can you provide and attach as a schedule to this reply a sample of same? There is no standard form but rather they would be regarded merely as reports from the different pol: forc

11. Have the Uniform Law Conference Guidelines on Disclosure to Defence Counsel been adopted in your province? Yes

12. Are you aware of any cases similar to the Donald Marshall, Jr. prosecution where someone has been convicted of criminal offence and exculpatory statements were not disclosed to defence counsel either before the trial, during the trial or any time subsequent? No

    If so, please name the case and give appropriate citations.

13. Have individuals ever been charged in your province for failing to disclose exculpatory statements to defence counsel? No

    Details _____

14. Are you aware of any guidelines or laws in your province compelling the police to advise Crown Prosecutors of exculpatory statements? Nothing formal

Thank you for helping us. If you would like a copy of the brief, please advise.

Manitoba

The Attorney General

Room 104
Legislative Building
Winnipeg, Manitoba, CANADA
R3C 0V8

June 6, 1988

JUN 13 1988

Gordon F. Proudfoot
The Canadian Bar Association
Coyne Clarke
Suite 700, 33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

Thank you for your letter of May 20, 1988.

I agree that the work being conducted by the Nova Scotia Branch will be useful across the country. The questionnaire which accompanied your letter has been sent to Mr. John Guy, Q.C., Assistant Deputy Attorney General, Criminal Justice, and I have asked that he respond to you direct.

Yours sincerely,

Jim McCrae

Manitoba

Attorney General

Criminal Justice Division

5th Floor
Woodsworth Building
405 Broadway
Winnipeg, Manitoba, CANADA
R3C 3L6

(204) 945-0230

June 9, 1988

JUN 13 1988

Mr. Gordon F. Proudfoot
The Canadian Bar Association
Coyne Clarke
Suite 700, 33 Alderney Drive
P. O. Box 876
DARTMOUTH, Nova Scotia
B2Y 3Z5

Dear Sir:

This is further to your letter dated May 20, 1988, addressed to the Honourable Attorney General.

I enclose herewith the following:

1. Completed Questionnaire.

2. Copy of "Manitoba Policy on Disclosure by the Crown".

I trust this information is satisfactory. However, if you require further information/material, please do not hesitate to contact the writer.

Yours truly,

John P. Guy, Q.C.
Assistant Deputy
Attorney General

JPG/ljb/encl

cc: The Honourable Jim McCrae, Attorney General

QUESTIONNAIRE

1. Province Manitoba

2. Number of Full Time Prosecutors Fifty

   Number of Part Time Prosecutors none

3. Do Part Time Prosecutors prosecute offenses under the Criminal Code of Canada? No

4. Are part-time Prosecutors political appointments? No

5. Are there any written guidelines to guide your prosecutorial staff on disclosure of facts or other information to defence counsel prior to trial? See No. 11
   During Trial?
   Post-Trial and Pre-Appeal?

6. Is your province in the process of adopting guidelines for disclosure for Crown counsel? See no. 11

   If so, how long has the issue of disclosure guidelines been under consideration?

   Less than a year?
   More than a year?
   More than two years? X

7. Are there any Statutes in your jurisdiction requiring the disclosure of exculpatory statements to defence counsel or the accused prior to Trial? No

8. Is it the practice in your province of the Crown Prosecutors to volunteer the names of witnesses and/or statements to defence counsel prior to trial which are favourable to the accused? Discretionary, but if favourable to accused, informati concerning evidence should be provided

9. Do you use a form for collection of crown evidence known as a "Crown Sheet"? No - Use entire police report and summary of facts of case.

10. Can you provide and attach as a schedule to this reply a sample of same? -

11. Have the Uniform Law Conference Guidelines on Disclosure to Defence Counsel been adopted in your province? Yes

12. Are you aware of any cases similar to the Donald Marshall, Jr. prosecution where someone has been convicted of criminal offence and exculpatory statements were not disclosed to defence counsel either before the trial, during the trial or any time subsequent? No

If so, please name the case and give appropriate citations.

13. Have individuals ever been charged in your province for failing to disclose exculpatory statements to defence counsel? No

Details _____

14. Are you aware of any guidelines or laws in your province compelling the police to advise Crown Prosecutors of exculpatory statements? No

Thank you for helping us. If you would like a copy of the brief, please advise.

Yes. Please forward to me at:

John P. Guy, Q.C.
Assistant Deputy Minister
Criminal Justice
500-405 Broadway
WINNIPEG, Manitoba
R3C 3L6
(204) 945-0230

Manitoba
Attorney General
Prosecutions

GUIDELINE NO: 36

DATE EFFECTIVE:

GUIDELINE

SUBJECT: **MANITOBA POLICY ON DISCLOSURE BY THE CROWN**

It is recognized that there is a general duty upon Crown counsel to disclose the essence of the prosecution case to counsel for the accused, and to make defence counsel aware of the existence of other relevant evidence which may be helpful to the defence, but which the Crown does not intend to call in support of its case. The purpose of disclosure by the Crown of the case against the accused is three-fold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of their client;

(b) to resolve non-contentious and time consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(c) to encourage the entrance of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution against abuse or misuse of information.

Pursuant to this duty, it is the policy of the Attorney General's Department to ensure full disclosure of the case for the Crown, and in this context full disclosure shall mean the provision to counsel for the accused of the following information:

(a) a summary of the circumstances of the offence.

This summary will usually be taken from the court brief or police summary provided to the Crown by

the investigating police agency, but does not include the police investigation report. If the summaries are to be copied from police reports, prior authorization must be obtained from the police agency.

(b) a copy of any statement made by the accused to persons in authority, which the Crown intends to tender as part of its case, and in the case of verbal statements, a verbatim account of the statement.

(c) a copy of the accused's criminal record.

(d) copies of forensic and scientific reports as soon as same become available.

(e) copies of medical or autopsy reports as soon as same become available.

(f) access, upon request, to any exhibits, including photographs, films and other documents intended to be entered. Where preparation, resources and the nature of the exhibits permit, it will be reasonable for the Crown to provide copies of such exhibits, but, in other cases, an opportunity to inspect will be sufficient.

(g) evidence which may assist the defence which the Crown is not intending to call as part of its case should be disclosed to the defence on a timely basis. This would include such matters as the identity of witnesses who fail to make an eye-witness identification or other witnesses whose evidence is generally favourable to the accused.

Additional disclosure beyond what is outlined above, is to be at the discretion of the Crown Attorney responsible for the prosecution. Such matters would include the following:

(a) copies of criminal records of witnesses - criminal records of witnesses are not to be routinely provided as part of the Crown's obligation to make disclosure,

Manitoba
Attorney General
Prosecutions

GUIDELINE NO: 36

DATE EFFECTIVE:

GUIDELINE

SUBJECT: **MANITOBA POLICY ON DISCLOSURE BY THE CROWN**

but may be provided upon request providing the record is such as to make it relevant to an issue in the case.

(b) witness statements, names and addresses - the production of this information is to be encouraged, but the final decision must remain with the Crown Attorney, who will be guided by the necessity of protection of witnesses form intimidation or harassment.

In cases where disclosure of witness statements or identities is refused, the Crown shall make available a summary of the expected testimony.

It is recognized that the precise mechanics or procedures for providing disclosure will vary from jurisdiction to jurisdiction throughout the province and will be, in large, determined by the local Crown Attorney in accordance with available resources and with the needs of the local defence bar.

The disclosure of evidence to an unrepresented accused shall remain in the discretion of Crown counsel.

Appendix A - 2

Saskatchewan
Attorney General

Public Prosecutions

No. 2.A.1

Date:
JANUARY 1982

POLICY DIRECTIVE

SUBJECT: DISCLOSURE

A. *Policy:*

a) *It is the Department's policy to make full disclosure of the Crown's case in all criminal and quasi-criminal prosecutions.*

b) *Full disclosure includes, at the prosecutors' discretion, either inspection and perusal of statements of all prospective Crown witnesses, or a summary of the contents of same, particulars of the criminal record of the accused, examination of the exhibits when possible and the disclosure of all relevant information gathered in any ongoing investigation.*

c) *Police reports and memoranda and informants' names cannot be divulged.*

B. Rationale:

a) The object is to make full disclosure to expedit the prosecution process. The Crown counsel should initate disclosur and this may result in admissions of fact, or guilty pleas.

b) Tendering copies of witness statements or names and addresses of potential witnesses is discretionary. Such discretion will take into consideration, inter alia potential abuse by defence, harm to the witness (i.e., from intimidation) or improper influence.

NOTE:

See: Attached letter from The Honourable Roy J. Romanow, Q.C

Saskatchewan

Attorney General
of Saskatchewan

Legislative Building
Regina, Canada
S4S 0B3

December 17, 1980.

TO ALL MEMBERS OF THE LAW SOCIETY OF SASKATCHEWAN.

Re: The Administration of Justice in Criminal Matters
Resolution #3, 1980 Law Society Annual Meeting

You may recall that at the Annual Meeting in Saskatoon last May a resolution, emanating from the Regina Bar Association, containing a number of complaints about policies and practices of prosecution counsel in this Province, was put to the general membership. There was some discussion on the resolution, including a presentation by Mr. Del Perras, Q.C., the Director of Public Prosecutions, of the Department's position. While the resolution itself was ruled out of order, the matters referred to in it are important to the administration of justice and deserve comment.

As Attorney General, I consider it of vital importance that the administration of justice have the full confidence of the public and the legal profession. I am writing you as I believe it will be of value to set out in some detail what are our policies and practices with respect to the matters at which the resolution was directed. I would hope that this will be of benefit not only to those who were not present at the annual meeting, but to those who participated in or listened to the discussion that took place.

If you have any criticisms to make of Crown prosecution policies and practices, I would like to hear what you have to say and I can assure you that your views will be given careful consideration. In the event that you believe a particular prosecutor is not conducting himself in accordance with our policies and practices, I would ask you to draw the matter to the attention of the Director of Public Prosecutions, Mr. Perras, my Deputy, Dr. Richard Gosse, Q.C., or, if necessary, myself.

There were seven matters dealt with in the resolution. My comments on each are set out below.

1. Multiple Counts

One of the matters raised was the laying of multiple counts against an accused arising out of a single incident or series of incidents. Our general practice is to lay the single most suitable charge, in the sense of the most descriptive of the incident that occurred, even though there may be others that are available. However, not every incident can be adequately dealt with by the laying of a single charge. But our practice is not to create the illusion of several offences when in actuality only one incident is involved. For example, a person who commits armed robbery almost inevitably commits a number of offences ranging from the armed robbery, through possession of a weapon, theft, wearing a disguise with intent, down to common assault. We would, in that situation, merely charge armed robbery, with the knowledge, of course, that there may be included offences of which the accused could be convicted in the event of an acquittal on the main charge. There are, however, many situations where it is desirable that more than one charge be laid. If the incident involves two distinct transactions, each involving distinct offences, it is in the interest of the public and of the victim that the accused be tried for both offences. For example, if the accused attempts to rob a bank and takes a hostage we would in all likelihood lay charges relating to the robbery and to the hostage-taking. This is not creating the illusion of two offences arising out of one incident, but the recognition that there are two distinct chapters to the single episode, each involving quite separate offences. They are, however, related in time and circumstance and thus would be properly included in a single indictment. With respect to the hostage-taking, it may well be that separate counts of kidnapping and assault causing grievous bodily harm may be appropriate if the hostage has been harmed. In addition, of course, the Code now provides that where a firearm is used in the commission of an offence, an additional charge is warranted in order to attract the additional consecutive sentence now made mandatory.

You will appreciate that it is not this Department's policy to harrass an accused. Multiple charges are generally laid only where the facts disclose two or more distinct transactions arising out of the one episode, or where firearms are involved, or where alternative counts are indicated in order to resolve an issue once and for all in a single trial thus preventing the necessity of putting the accused on trial twice for one incident or forcing the victim to repeat his or her testimony. In my opinion, these are all cases where this practice best serves the interest of the accused, the victim and the public.

2. Disclosure

On the matter of disclosure, while, subject to certain

statutory exceptions, disclosure is in principle in the discretion of the Crown, it is the Department's general policy to make full disclosure of the Crown's case in all criminal and quasi-criminal cases over which the Department has control. Section 531 of the Code gives the accused rights of inspection after an indictment is found in respect of a number of matters, including any statements that the accused had made to the police, whether or not the prosecution will seek to introduce them in evidence. Over and above those matters which the accused may see as of right, the prosecutor will afford the accused or his counsel access (i) either to examination of the statements of all prospective Crown witnesses (even if not produced in evidence at the preliminary), or to a summary of their contents; (ii) to particulars of the criminal record of the accused; (iii) to an examination of the exhibits, over and above section 533, whenever this is possible and practicable, and (iv) any other additional relevant information. Internal police reports themselves or the names of police informers are not, as a matter of public policy and privilege, disclosed. I would remind defence counsel that they always have the right to ask the court at trial to order the production of the statements of any witness that for some reason have not been disclosed and that the court, in its discretion, may order such production.

3. Stay of Proceedings

Another matter that was raised was that of the use of the "stay of proceedings". It is necessary to distinguish between "withdraw" and "stay". Legally, it is clear that the Crown has the unfettered right to order the entry of a stay both of an indictment (section 508) and of an information (section 732.1).

Neither a withdrawal nor a stay legally prevents a reactivation of the prosecution and it is recognised that some potential for abuse does arise. It is the policy of this Department that neither procedure should be used to harrass an accused by, for examples, delaying the trial in the hope of finding more evidence to bolster a weak prosecution case, or in order to circumvent what is perceived to be an unfavourable ruling. Such procedures are to be used only when the interest of the public indicates that the option of the Crown to continue or reactivate at a later stage should be preserved. It is not possible to delineate all the factual circumstances in which this might arise, but factors that will influence the prosecutor will include,

(i) the gravity of the offence,

(ii) the strength of the Crown's case,

(iii) the date of the commission of the offence

in relation to the proceedings, and

(iv) any unfair prejudice to the accused, such as detention in custody pending trial or the like.

A situation that arises from time to time is that of the witness who cannot be located or is unavailable at the time of the trial. Prosecutors are asked to weigh carefully the factors set out above. If they are satisfied that the interest of the public in the proper administration of justice, given these factors, would justify a withdrawal or the entry of a stay, then such a step would be proper, instead of asking for an adjournment. Cases involving particular difficulties should be referred by Crown prosecutors to the Director of Public Prosecutions for his consideration.

4. Overzealous Prosecutors

It is my view that the prosecutor is obligated to be objective in reviewing evidence and to be fair in the conduct of the proceedings. Where the prosecutor has assumed the responsibility of proceeding with a prosecution, he is under an obligation to the public to prepare, present and argue that case as well as he can.

5. Basis for Appeals

Another matter that was raised in the resolution was that of appealing from convictions where no important point of law is in issue. It is possible that this was directed to appeals to the District Court by the "de novo" procedure, and particularly so in the area of the drinking and driving offences. It is not necessary to have an important point of law to appeal to the District Court on a de novo matter. Throughout the Province there are, from time to time, defences that arise in drinking/driving prosecutions that we consider are not well founded in law (either as question of pure law or as a question of mixed law and fact). We attempt to appeal those to the District Court as quickly as possible. In view of the number of cases in this area, the Department has developed this practice in order to ensure that the evolving law is consistent. While the points of law in each case may not be in themselves of great importance, it is my view that the public interest in the area of drinking/driving offences requires that the relevant body of law be coherent and consistent. This should be an advantage to defence counsel who will be able to advise their clients as to what the law is. Insofar as appeals to the Saskatchewan Court of Appeal are concerned, the Crown must have a point of law. Those cases that are appealed to the District Court or to the Court of

24

Queen's Bench by stated case are checked in head office of the Director of Public Prosecutions, to ensure that an appeal is appropriate.

6. Review of Charges Laid by the Police

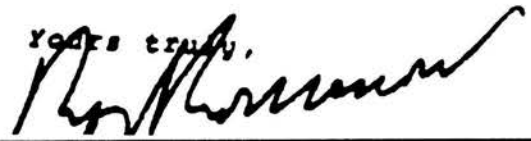
With respect to the prosecutor reviewing charges laid by the police, it is the Department's practice, and it is a public duty, that the Crown will proceed, of course, only if there is a prima facie case. The Public Prosecutions Branch reviews all charges laid by the police in cases referred to the Branch for prosecution. Those that are not prima facie are withdrawn or stayed. There will be occasions when the Crown considers it has a prima facie case and that the defence considers it has a valid defence. This is an area that is most difficult. The disagreement may be over law or fact, and include questions of credibility. Certain issues obviously have to be left to the court. Nevertheless there are occasions when it becomes apparent to the Crown before trial that the defence is sound, and in those situations it is our general practice to give effect to that defence by staying or withdrawing the charge, or in appropriate cases substituting a lesser charge.

7. Use of Unreported Cases

If a prosecutor intends to refer to an unreported case, we would expect him to make available a copy of the decision to the court and to defence counsel, in the interests of fairness and efficiency, as well as a matter of etiquette.

In conclusion, I would point out that some 8,000 cases a year are referred to the Public Prosecutions Branch, and we have thirty full-time prosecutors on staff and utilise as well some fifty prosecutors on a fee-for-service basis. These numbers will increase as the Department assumes responsibility in the next year for prosecutions (of Criminal Code and provincial statute offences) from those municipalities, such as Regina and Saskatoon, which are still conducting prosecutions. I am anxious that the Department have adequate policies and practices, and that all prosecutors should comply with them. As I indicated earlier in this letter if you have any complaints, or if you have any views you would care to express on this subject, I or my officials would be pleased to hear from you.

Yours truly,



Minister of Justice
and Attorney General

SASKATCHEWAN

Legislative Building
Regina, Saskatchewan S4S 0B3

JUL 13 1988

June 29, 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
Barristers and 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 of Inquiry on the Prosecution of Donald Marshall, Jr.

Your brief being prepared on "Role of the Crown Prosecutor", is certainly of interest to the Department of Justice in this province.

The questionnaire which you forwarded to me has been completed and is enclosed for your consideration. I trust this will be of some assistance.

Yours truly,

Bob Andrew
Minister of Justice and
Attorney General

Enclosure

QUESTIONNAIRE

1. Province Saskatchewan

2. Number of Full Time Prosecutors 44

   Number of Part Time Prosecutors 40

3. Do Part Time Prosecutors prosecute offenses under the Criminal Code of Canada? yes

4. Are part-time Prosecutors political appointments? _____

5. Are there any written guidelines to guide your prosecutorial staff on disclosure of facts or other information to defence counsel prior to trial? Yes
   During Trial? No
   Post-Trial and Pre-Appeal? No

6. Is your province in the process of adopting guidelines for disclosure for Crown counsel? No

   If so, how long has the issue of disclosure guidelines been under consideration?

   Less than a year? _____
   More than a year? _____
   More than two years? _____

7. Are there any Statutes in your jurisdiction requiring the disclosure of exculpatory statements to defence counsel or the accused prior to Trial? No

8. Is it the practice in your province of the Crown Prosecutors to volunteer the names of witnesses and/or statements to defence counsel prior to trial which are favourable to the accused? Yes

9. Do you use a form for collection of crown evidence known as a "Crown Sheet"? No

10. Can you provide and attach as a schedule to this reply a sample of same? _____

11. Have the Uniform Law Conference Guidelines on Disclosure to Defence Counsel been adopted in your province? Basically

12. Are you aware of any cases similar to the Donald Marshall, Jr. prosecution where someone has been convicted of criminal offence and exculpatory statements were not disclosed to defence counsel either before the trial, during the trial or any time subsequent? No

If so, please name the case and give appropriate citations.

13. Have individuals ever been charged in your province for failing to disclose exculpatory statements to defence counsel? No

Details _____

14. Are you aware of any guidelines or laws in your province compelling the police to advise Crown Prosecutors of exculpatory statements? No

Thank you for helping us. If you would like a copy of the brief, please advise.

8

Ontario

JUN 2 1 1988

Ministry of the Attorney General

Ministère du Procureur général

Office of the Director of Crown Attorneys

Bureau du Directeur des Procureurs de la Couronne

2nd Floor
18 King Street East
Toronto, Ontario
M5C 1C5

2e étage
18, rue King, est
Toronto, Ontario
M5C 1C5

416/965-3912

June 13, 1988

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

Dear Mr. Proudfoot:

Further to your letter of May 11, 1988 addressed to the Honourable Ian Scott, Attorney General, please find enclosed a copy of the current guidelines for Ontario Crown Attorneys in regard to disclosure of the Crown's case. I am not aware of any research papers which may have been prepared prior to the guidelines being reduced to writing. The present guidelines are in essentially the same form as they appeared in 1981.

Please do not hesitate to contact me if you feel there is further information which might be of assistance to you in regard to the Marshall Inquiry.

Yours truly,

Alasdair McDonald
Counsel

/11

Ontario

Ministry of the
Attorney
General

DISCLOSURE

Introduction

1. It is recognized that generally there is a duty on the Crown Attorney:

   a) to disclose the Crown's case;

and

   b) to make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the Crown may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be as formalized as with other indictable offences.

First Appearance Disclosure

5. a) Where resources and personnel permit, the accused should be provided at the time of his or her first appearance with a document

similar in nature to Appendix "A" to these guidelines.

b) Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his or her counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date [which in some jurisdictions is referred to as an assignment court date], the Crown, at the request in writing of counsel for the accused or counsel's agent, should provide the following:

a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial, or an undertaking to provide when available;

b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce when available;

c) disclosure of the accused's criminal record and, where in the Crown counsel's view relevant, the criminal record of any witness;

d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge[s] or an undertaking to produce when available;

e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; an oral outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be; if a written outline or synopsis is available at this early stage, it may be provided in lieu of an oral outline or synopsis;

g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the defence and that it is up to the witness to decide, if he or she wishes to be interviewed.

<u>Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial</u>

7. a) Fulfill any undertakings made pursuant to paragraphs 6[a], [b], [d] and [e] above.

b) In summary conviction and hybrid matters the oral outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6[f] above together with the disclosure provided pursuant to paragraph 5 shall, as a general rule, be sufficient if defence counsel has been sufficiently informed in that manner prior to the setting of the date to proceed.

c) In indictable [non-hybrid] matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure, copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his or her discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although defence counsel will use discretion as to what portion of the content of written disclosure will be communicated to the client, it is expected that he or she will refrain from providing such written disclosure or copies thereof to the client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

a) defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s.10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and

b) if counsel chooses to cross-examine on the content of the document, he or she will refrain from doing so without first applying to the Court to have the jury excluded for the purpose of determining whether the "Will Say" statement is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness's present testimony so as to permit cross-examination pursuant to s.11 of the Canada Evidence Act.

11. In indictable [non-hybrid] matters it is expected that after receiving the disclosure referred to above, defence counsel will advise the Court and the Crown, prior to the date set to proceed, the forum in which his or her client elects to be tried.

CRIMINAL LAW DIVISION GUIDELINE #D2

JANUARY 1, 1988

APPENDIX "A"

NOTICE OF ALLEGED OFFENCE(S)

TAKE NOTICE THAT you are hereby provided with a brief summary of the facts disclosed at this time by the police investigation without prejudice to the Crown subsequently in these proceedings. This summary is prepared by the police and shall not be considered as particulars or disclosure of the Crown's Case.

SUMMARY OF ALLEGED FACTS

AND FURTHER TAKE NOTICE THAT disclosure of the Crown's case be obtained by your counsel, if any, upon his attendance by appointment with the DUTY CROWN COUNSEL during normal office hours at 1911 Eglinton Avenue East, Scarborough. (Telephone 757-2886)

You are advised to deliver this notice forthwith to your counsel.

Crown Attorney's Office

Ontario

Ministry of the Attorney General

Ministère du Procureur général

Office of the Minister

Bureau du Ministre

18 King Street East
Toronto, Ontario
M5C 1C5

18 rue King, est
Toronto, Ontario
M5C 1C5

416/965-1664

JUN 2 2 1988

Ref. #25244

June 17, 1988

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

Dear Mr. Proudfoot:

Thank you for your letter of May 11, 1988 in regard to disclosure in criminal cases.

I have referred your request for a copy of the "1981 Guidelines for Disclosure by Crown Counsel to Defence" to the Director of Crown Attorneys who will be contacting you directly.

If I may be of further assistance, please do not hesitate to contact me.

Yours very truly,

IAN SCOTT
Attorney General

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ATTORNEY GENERAL OF NEW BRUNSWICK PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK

July 7, 1988

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

JUL 15 1988

Dear Mr. Proudfoot:

I acknowledge receipt of your letter dated May 20, 1988, regarding the Canadian Bar Submission brief on the "Role of the Crown Prosecutor" to be submitted to the Donald Marshall Inquiry.

Enclosed for your information is the Attorney General's policy on pre-trial disclosure which is contained in the Public Prosecutions Branch Operations Manual. We view this Manual as a living document which requires policy changes over time as dictated by experience. In fact, the policy on pre-trial disclosure was the subject of discussion at a recent Crown Prosecutors Meeting. As a result, we intend revising and updating our policy, particularly with regard to witness statements. Until now the policy has been to provide defence with copies of witness' statements only when ordered to do so by the trial Judge or where the witness had given contradictory statements. The reasons for this policy were:

(i) to encourage complete candour by witnesses;

(ii) to recognize the fact that often the statement was not written by the witness, but rather by the police and therefore not a precisely accurate account of events;

(iii) to prevent defence counsel from using these statements to confront the witness during cross-examination with any discrepancy no matter how slight.

We now believe this policy is in need of refinement, and I have requested the Director of Public Prosecutions to prepare a revised policy for my consideration after consulting with senior Crown Prosecutors.

I trust this information is sufficient for your purposes, and I accept your offer to provide me with a copy of the Canadian Bar Submission to the Royal Commission.

Yours truly,

James E. Lockyer, Q.C.
ATTORNEY GENERAL

/dp

Enc.

QUESTIONNAIRE

1. Province New Brunswick

2. Number of Full Time Prosecutors 40

   Number of Part Time Prosecutors varies 6-12/month

3. Do Part Time Prosecutors prosecute offenses under the Criminal Code of Canada? Yes, mainly in Provincial Court

4. Are part-time Prosecutors political appointments? There is a list ~~which is rev~~ised periodically.

5. Are there any written guidelines to guide your prosecutorial staff on disclosure of facts or other information to defence counsel prior to trial? Yes
   During Trial? Yes
   Post-Trial and Pre-Appeal? _____

6. Is your province in the process of adopting guidelines for disclosure for Crown counsel? Policy and guidelines have existed for several years re Disclosure

   If so, how long has the issue of disclosure guidelines been under consideration?

   Less than a year? _____
   More than a year? _____
   More than two years? _____

7. Are there any Statutes in your jurisdiction requiring the disclosure of exculpatory statements to defence counsel or the accused prior to Trial? No, only s.531 Criminal Code

8. Is it the practice in your province of the Crown Prosecutors to volunteer the names of witnesses and/or statements to defence counsel prior to trial which are favourable to the accused? See policy attached

9. Do you use a form for collection of crown evidence known as a "Crown Sheet"? Yes

10. Can you provide and attach as a schedule to this reply a sample of same? See attached schedule

11. Have the Uniform Law Conference Guidelines on Disclosure to Defence Counsel been adopted in your province? _____
    Our policy was in place before these guidelines were developed.

12. Are you aware of any cases similar to the Donald Marshall, Jr. prosecution where someone has been convicted of criminal offence and exculpatory statements were not disclosed to defence counsel either before the trial, during the trial or any time subsequent? No

    If so, please name the case and give appropriate citations.

13. Have individuals ever been charged in your province for failing to disclose exculpatory statements to defence counsel? No

    Details _____

14. Are you aware of any guidelines or laws in your province compelling the police to advise Crown Prosecutors of exculpatory statements? No

Thank you for helping us. If you would like a copy of the brief, please advise.

TOPIC 240

PRE-TRIAL DISCLOSURE

(1) Policy

1. It is recognized that there is a general duty upon the Crown to disclose the prosecution's case to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

2. The purpose of disclosure by the Crown of the case against the accused is three-fold:

a) to ensure the defence is aware of the case which must be met, and is not taken by surprise;

b) to resolve non-contentious and time consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

c) to allow for the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

3. Pursuant to this duty upon request, the accused is entitled to full disclosure of the prosecution's case and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to trial of the following information:

RUBRIQUE 240

COMMUNICATION DE LA PREUVE AVANT LE PROCÈS

(1) Principes

1. Il est accepté que la Couronne a une obligation générale de communiquer son dossier à l'avocat de l'accusé et de l'informer de tous les éléments de preuve pertinents. Il est donc important pour le procureur de la Couronne d'examiner les éléments d'information reçus avant de les communiquer à la défense. Les opinions exprimées ou renseignements qui pourraient léser les intérêts de l'État ou d'un particulier pour des motifs d'ordre public devraient être examinés très attentivement.

2. La communication de la preuve à l'accusé a un triple objet:

a) faire en sorte que la défense connaisse les allégations auxquelles elle doit répondre et ne soit pas surprise;

b) résoudre avant le procès les questions non-contentieuses qui prennent du temps afin d'assurer une meilleure utilisation du temps des tribunaux;

c) permettre l'enregistrement de plaidoyers de culpabilité au début de la procédure.

Le principe de base devrait toujours être la communication complète et loyale de la preuve à l'accusé, avec comme seule limitation le besoin manifeste de protéger l'intégrité de la poursuite.

3. En conséquence, l'accusé a donc le droit, sur simple demande, d'obtenir la communication complète du dossier de la poursuite. Par communication complète, il faut entendre la communication à l'avocat de l'accusé, dès que cela est raisonnablement possible mais avant le début du procès en tout cas, des éléments d'information qui suivent:

a) The circumstances of the offence. The method of providing the circumstances may include the provision of the contents of the court brief, the provision of a summary prepared by the investigating police agency of the case as a whole, the provision of a summary of witnesses' statements or the contents of witnesses' statements. The Crown may provide either a resumé of lay witness' statements to the defence or allow defence counsel to read such statements in Crown counsel's presence, but not to copy. The general rule is that copies of the court brief and witness statements are not to be given to the defence in the interest of encouraging complete candour with the Crown by both police and private citizens.

b) When a court brief, contains "confidential information" the report should not be made available for defence counsel to read. Under no conditions should copies be made for anybody.

c) "Confidential information" includes:

(i) any opinion expressed by an investigator.

(ii) any reference to other ongoing investigations.

(iii) any reference to a criminal record of a witness. (See paragraph no. 4)

(iv) any information that could lead to the identity of an informant.

(v) any reference to an authorization for the interception of a private communication. Where the report does contain confidential information a verbal precis outlining the Crown's case including all relevant credible evidence will be given to the defence upon request.

d) a copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.

a) Les circonstances de l'infraction. La communication de ces renseignements peut inclure la communication du contenu du dossier d'audience, d'un résumé de l'ensemble de la cause établi par le service d'enquête policier, un résumé ou le contenu des dépositions des témoins. Le procureur peut fournir un résumé des dépositions des témoins profanes à l'avocat de la défense ou lui permettre de les lire en sa présence, sans pouvoir en prendre copie. La règle de base est de ne pas remettre à la défense une copie du dossier d'audience et des dépositions des témoins afin d'encourager un climat de franchise totale entre les procureurs de la Couronne et la police et les citoyens.

b) Le dossier d'audience qui contient des "renseignements confidentiels" ne devrait pas être communiqué à l'avocat de la défense pour qu'il puisse le lire. Il ne devrait jamais en être fait de photocopie pour personne.

c) L'expression "renseignements confidentiels" vise notamment:

(i) Les avis exprimés par un enquêteur.

(ii) Les observations relatives à d'autres enquêtes en cours.

(iii) La mention du casier criminel d'un témoin (voir le paragraphe 4).

(iv) Tous renseignements qui permettraient d'identifier un informateur.

(v) La mention d'une autorisation d'interception de communications privées. Lorsque le rapport contient des renseignements confidentiels, on donnera verbalement à la défense, sur demande, un résumé du dossier du ministère public avec indication de tous les éléments de preuve pertinents dignes de foi.

d) une photocopie des déclarations faites le cas échéant par l'accusé à des personnes en situation d'autorité et, dans le cas de déclarations verbales, un compte rendu in extenso de celles-ci.

e) a copy of the accused's criminal record.

f) copies of medical and laboratory reports.

g) access to any exhibits intended to be introduced and where applicable, copies of such exhibits.

h) a copy of the information.

4. Additional disclosure beyond what is outlined above is to be at the discretion of the Crown Prosecutor responsible for the prosecution balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include the following:

a) copies of the criminal records of witnesses
b) names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

5. Where an accused is not represented by counsel it is recognized that in order to maintain a proper arms-length relationship with an accused, the method of disclosure of evidence must remain in the discretion of the Crown Prosecutor responsible for the prosecution.

6. It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

e) une photocopie du casier criminel de l'accusé.

f) des photocopies des rapports médicaux ou de laboratoire.

g) la possibilité d'examiner les pièces à conviction qui seront utilisées et, le cas échéant, la remise d'une photocopie de ces pièces.

h) Une photocopie de la dénonciation.

4. La communication d'autres éléments d'information que ceux qui sont énumérés ci-dessus est laissée à la discrétion du procureur de la Couronne chargé de la poursuite qui devra concilier le principe d'une communicaton complète et loyale de la preuve avec l'impératif de protéger la vie et la sécurité des témoins ou d'empêcher toute entrave à la bonne administration de la justice. Ces renseignements complémentaires pourraient inclure:

a) une copie des casiers criminels des témoins
b) les noms et adresses des témoins éventuels tout en tenant compte du besoin possible de les protéger contre les actes d'intimidation ou de harcèlement.

5. Si l'accusé n'est pas représenté par un avocat, il est entendu que les modalités de communication de la preuve seront laissées à la discrétion du procureur responsable de la poursuite afin de permettre à celui-ci de garder ses distances à l'égard de l'accusé.

6. Il est également entendu que le ministère public a l'obligation de divulguer tout nouvel élément de preuve pertinent qui parvient à sa connaissance sans qu'il soit nécessaire de faire une nouvelle demande de communication.

PRE-TRIAL DISCLOSURE

(II) Guidelines

1. There is a duty on prosecuting counsel to advise the defence in a timely manner of the existence of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The Prosecutor has a duty to see that all available legal proof is fairly presented. (See Cunliffe v Law Soc. of B.C., (1984) 40 C.R.(3d) 67 B.C.C.A.)

2. There is no absolute duty on prosecuting counsel to give the defence statements of witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. Crown counsel must have some discretion. (See Cunliffe v Law Soc. of B.C., (1984) 40 C.R.(3d) 67 B.C.C.A.)

3. There is no duty on prosecuting counsel to call witnesses whose evidence is deemed to be adverse to the prosecution or supportive of the defence. The prosecution has a discretion as to which witnesses it will call, and the court will not interfere with the exercise of its discretion unless it can be shown that the prosecution has been influenced by some oblique motive. (See Cunliffe v Law Soc. of B.C., (1984) 40 C.R.(3d) 67 B.C.C.A.).

COMMUNICATION DE LA PREUVE AVANT LE PROCÈS

(II) Lignes directrices

1. Le procureur de la Couronne est tenu d'aviser la défense en temps utile de l'existence de témoignages qui sont jugés contraires à la position de la poursuite ou favorables à la thèse de la défense. Il a l'obligation de veiller à ce que tous les éléments de preuve disponibles et juridiquement admissibles soient présentés de façon loyale (Voir Cunliffe v Law Soc. of B.C.(1984), 40 C.R. (3d) 67 (C.A.C.-B.))

2. Le procureur n'est pas tenu d'une obligation absolue de donner à la défense les déclarations des témoins dont le témoignage est jugé contraire à la position de la poursuite ou favorable à la thèse de la défense. Il doit nécessairement disposer d'une certaine discrétion (Voir Cunliffe v Law Soc. of B.C.(1984), 40 C.R. (3d) 67 (C.A.C.-B.)).

3. Le procureur de la Couronne n'est pas tenu d'appeler les témoins dont les déclarations sont jugées contraires à la position de la poursuite ou favorables à la thèse de la défense. La Couronne est libre de choisir les témoins qu'elle fera entendre. Le tribunal n'interviendra pas dans l'exercice de cette discrétion à moins qu'il ne soit démontré que ce choix était dicté par des motifs malhonnêtes. (Voir Cunliffe v. Law Soc. of B.C.(1984), 40 C.R. (3d) 67 (C.A.C.-B.)).

PROSECUTOR'S INFORMATION SHEET
DEPARTMENT OF JUSTICE

FICHE DE RENSEIGNEMENTS À L'USAGE DU PROCUREUR
MINISTÈRE DE LA JUSTICE

46-3661 (11/87)

1. OFFENCE(S) / DÉLIT(S)

Occurrence No. / N° d'incident	Date M D/J Y/A	Place / Lieu	Time / Heure

Offence(s) / Délits	1	Section and Act / Article et loi	2	Section and Act / Article et loi	3	Section and Act / Article et loi

2. POLICE OFFICER / AGENT DE POLICE

Det. Office No. / Dét. Bureau n°	Investigating Member(s) / Enquêteur(s)	I.D.N. / N.D.I.

3. DEFENDANT ☐ Young Offender / Jeune contrevenant ☐ Adult / Adulte

Surname / Nom de famille	GI / PI	GP / PI	Alias

Sex / Sexe	D.O.B. / Date de naiss. M D/J Y/A	Age / Âge	P.O.B. / L.D.N.	Parent's Name and Phone No. / Nom des parents et n° de téléphone

Address / Adresse	☐ Parents' Same Address / Même adresse des parents	☐ Different Address / Adresse différente

4. LICENSE / LICENCE

Driver's Licence No. / Permis de conduire n°	Prov.	Vehicle Owner / Prop. véhicule (Surname / Nom de famille)	GI / PI	GP / PI

Address / Adresse	V.I.N. / N.I.V.

5. COMPLETE THE FOLLOWING FOR ALL CRIMINAL CODE OFFENCES / RÉPONDRE AUX QUESTIONS SUIVANTES POUR TOUTE INFRACTION AU CODE CRIMINEL

Is there a victim? / Est-ce qu'il y a eu victime? ☐ Yes / Oui ☐ No / Non — If yes indicate one of the following / Si oui, cochez l'encadré approprié

- ☐ F1 Wife of accused (include common law) / L'épouse de l'accusé (y compris l'épouse de fait)
- ☐ F2 Husband of accused (include common law) / L'époux de l'accusée (y compris l'époux de fait)
- ☐ F3 Child of accused (include adopted, under 19) / L'enfant de l'accusé (y compris un enfant adopté de moins de 19 ans)
- ☐ F4 Other Family member (living in same household) / Un autre membre de la famille (vivant sous le même toit que l'accusé)
- ☐ F5 Any child under 19 not child of accused / Tout enfant de moins de 19 ans qui n'est pas celui de l'accusé
- ☐ F6 Other relation (not living in same household) / Un membre de la parenté (ne vivant pas sous le même toit que l'accusé)
- ☐ F7 No relation to accused / Une personne sans lien de parenté avec l'accusé

If CCC 745 (Peace Bond) requested, indicate one of the following / S'il y a eu demande d'engagement de ne pas troubler l'ordre public (formule CCC 745), indiquez par qui: ☐ F1 by wife / l'épouse ☐ F2 by husband / l'époux ☐ F7 by other complainant / par autre plaignant(e)

PARTICULARS OF OFFENCE(S) (INCLUDE ANY "ET ALS", ADDITIONAL CHARGES) / DÉTAILS DU (DES) DÉLIT(S) (INCLURE TOUT COMPLICE ET AUTRES ACCUSATIONS)

Diversion Recommended / Déjudiciarisation recommandée ☐ Yes / oui ☐ No / Non

Member's Signature / Signature du membre _____ Date _____

Victim - Witnesses (Including Police) / Victime - témoins (y compris les agents de la paix)

Name / Nom	Address / Adresse

Court Information / Renseignement judiciaires

Traffic and Weather Conditions / État des routes et conditions météorologiques	C.P.I.C. Check / Vérification auprès du C.I.P.C.	Value of Property Involved / Valeur des biens en cause

Drinking Driving Offences, Driver Record Check / Infractions de conduite avec facultés affaiblies Vérification de dossier du conducteur	Name of Prosecutor / Nom du procureur
☐ Prior Record / Dossier antérieur ☐ No Prior Record / Aucun dossier antérieur	

Crown Recommendation / Recommendation de la couronne

Adjudication / Jugement

Remands / Renvois	Member Witnessing Conviction / Témoins de la condamnation
Prosecutor / Procureur	Defence Counsel / Avocat de la défense

Date of Trial / Date du procès	Place of Trial / Lieu du procès		
Plea / Avec ☐ Guilty / De culpabilité ☐ Not Guilty / D'innocence	Fine / Amende	Costs / Frais	In Default / Non-comparution
Time to Pay / Délai de paiement	License Suspended / Permis de conduire suspendu ☐ Yes / Oui ☐ No / Non	Conditions	

White – Crown Prosecutor
Blanc – Procureur de la couronne
Blue – Court
Bleu – Cour
Pink – Police
Rose – Police
Canary – Diversion
Canari – Déjudiciarisation

Nova Scotia

Department of Attorney General

Office of the Minister

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Halifax, Nova Scotia
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AUG 10 1988

File Number 02-88-0036-15

August 8, 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
P. O. Box 876
DARTMOUTH, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

This will acknowledge receipt of your letter, of August 2, 1988, respecting the brief being prepared by the Canadian Bar, Nova Scotia Branch.

In reply to your request, enclosed please find a copy of the "Disclosure Guidelines" directive together with a copy of my July 22nd news release respecting up-coming changes in the Department of the Attorney General.

I trust this will be of assistance to you.

Yours very truly,

Terry Donahoe

Terence R. B. Donahoe, Q.C.

Enclosure

Nova Scotia

Attorney General

Memorandum

From: Hon. Terence R.B. Donahoe, Q.C.
Attorney General

Our File Reference:

To: Prosecuting Officers and
Assistant Prosecuting Officers

Your File Reference:

Subject: **DISCLOSURE GUIDELINES**

Date: July 18, 1988

It is recognized that there is a general duty upon the Crown to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of their client;

(b) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(c) to allow for the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

.. .. / 2

Pursuant to this duty, and bearing in mind the above principles, upon request, the accused is entitled to full disclosure of the case in chief for tne Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary inquiry or trial, as the case may be, of the following information:

(a) The circumstances of the offence. This will usually be disclosed by means of the provision of a summary prepared by the investigating police agency of the case as a whole.

(b) Copies of all written statements made by witnesses.

(c) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.

(d) A copy of the accused's criminal record.

(e) Copies of medical and laboratory reports.

(f) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.

(g) A copy of the wording of the charge.

Additional disclosure beyond what is outlined above is to be at the discretion of the prosecutor balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

Where an accused is not represented by counsel it is recognized that in order to maintain a proper arms-length relationship with an accused, the method of disclosure of evidence must remain in the discretion of the prosecutor responsible for the prosecution.

.. .. / 3

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

Terence R. B. Donahoe

STATEMENT BY THE ATTORNEY GENERAL

July 22, 1988

HALIFAX - Attorney General Terry Donahoe today announced changes in the process by which Crown Prosecutors in the Province are to be appointed and the establishment of a Victims of Crime Services Division of the Department of the Attorney General.

Appointment of Crown Prosecutors

Crown Prosecutor positions from now on will be advertised through the Province's Civil Service Commission, fully opening the process to all prospective candidates who will make application for selection, and be processed according the Civil Service guidelines", Mr. Donahoe said.

"The changes in the process by which Crown Prosecutors will be appointed will ensure the broadest access possible to all candidates of merit who may wish to serve the Province as Crown Prosecutors", added Mr. Donahoe.

Victims of Crime Services Division

In announcing the establishment of the Victims of Crime Services Division, the Attorney General stated "we have become a more humane and sensitive

society, but more has yet to be accomplished. Appearing in court can be a very traumatic experience for many and greater attention must be given to the needs of victms of crime and those who are called upon to be witnesses in our courts".

"Among the immediate needs to be addressed by this new division of the department are:

- Familiarization of victims and witnesses with court procedures they might experience;
- Better and more timely advice to victims and witnesses regarding the progress of cases through the courts;
- Assistance in the preparation of victim impact statements whereby the courts are made aware of the effect of the offence upon victims of crime;
- Assistance in the preparation of applications to the Criminal Injuries Compensation Board; and
- Assistance to victims to secure restitution from offenders in appropriate cases."

Mr. Donahoe said "the Victims of Crime Services

Division will have immediate responsibility for the development of a fine surcharge program. The proceeds of this fine surcharge will be used to enable the Attorney General's Department to provide additional programs to assist victims and witnesses".

Disclosure Directive to Prosecutors

To ensure consistency and fairness in the prosecution process, Mr. Donahoe also announced the issuance of a new disclosure directive to the prosecutors of the Province.

That directive, containing a statement of principles to be issued to all prosecutors and assistant prosecuting officers this week, will broaden the scope and guidelines issued to prosecutors of the Province in 1986.

Mr. Donahoe said "the administration of justice in Nova Scotia must evolve just as the community and its dynamics and needs are changing - our law, its system and its administration must stay abreast of change".

Under the changes prosecutors will provide, prior to a preliminary inquiry or trial, the following

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information:

- Circumstances of the offence. This would usually be disclosed by means of the provision of a summary prepared by the investigating police agency of the case as a whole.
- Copies of all written statements made by witnesses.
- A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statements.
- A copy of the accused's criminal record.
- Copies of medical and laboratory reports.
- Access to any exhibits intended to be introduced, and where applicable, copies of such exhibits.
- A copy of the wording of the charge.

Prosecutors are further being told by the Attorney General "it is understood there is a continuing obligation on the prosecutor to disclose new and additional evidence that may become known to the prosecutor".

A directive has also been sent to prosecutors in

the Province regarding summaries to Supreme Court Trial Judges.

It is customary that prosecutors provide summaries to facilitate conduct of trials in the Supreme Court. Such summaries contain a general review of the facts to be provided or proved, and may include an indication of legal issues to be discussed, thus allowing the Court to better prepare for the trial. The new directive from the Attorney General will ensure uniform practise whereby these summaries are to be provided to defence counsel.

Policy and Planning Division

The Attorney General also indicated that in order to keep abreast of further change, he is establishing a Policy and Planning Division within the Department of the Attorney General "to look at current legislation to determine what changes are required and to determine future program and legislative needs in an ever changing society".

"I just

AG unveils justice system changes

July 23 '88

By Tim Arsenault
STAFF REPORTER

A new method of selecting Crown prosecutors was one of four changes in the administration of justice in Nova Scotia announced Friday by the Attorney General's Department.

Attorney General Terry Donahoe announced that Crown prosecutor positions will be advertised through the province's Civil Service Commission so candidates can apply for selection according to civil service guidelines.

"The changes in the process by which Crown prosecutors will be appointed will ensure the broadest access possible to all candidates of merit who may wish to serve the province as Crown prosecutors," Mr. Donahoe said in a news release.

A former Crown prosecu-

■ See AG page 2

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AG unveils

■ continued from page 1

who did not want to be named, said criticism of prosecutors being appointed in the past by order-in-council with inflated salaries may have contributed to the change in policy.

"It creates an appearance of fairness. Whether or not there will be any greater fairness in the process remains to be seen," he said.

A disclosure directive will also be issued to prosecutors in the province. The release said the directive would be issued this week and will expand on guidelines issued in 1986.

The announcement said prosecutors will provide to defence lawyers a summary of the case prepared by the investigating police agency, verbatim accounts of verbal statements, and copies of exhibits.

"It is understood there is a continuing obligation on the prosecutor to disclose new and additional evidence that may become known to the prosecutor," Mr. Donahoe said.

Evidence presented at the Marshall inquiry into the province's justice system showed a witness came forward who could have cleared Donald Marshall, Jr. of murder in 1971, but his lawyers were never told of the new evidence.

Felix Cacchione, now a county court judge, also told the inquiry that the evidence prosecutors disclosed to defence lawyers varied from case to case depending on personal rapport.

But Mr. Donahoe said in a telephone interview that none of the new policies could be directly attributed to the Marshall inquiry.

The department also announced the establishment of a victims of crime services division. It is to have responsibility for the development of a fine surcharge program that would help fund assistance to crime victims and witnesses.

Department of Justice Canada
Ministère de la Justice Canada

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Northwest Territories
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Our file YK

Your file

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.

JUN 20 1988

Dear Mr Proudfoot:

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

Your letter of May 20, 1988 addressed to Mr. G. Bickert, Deputy Minister of Justice, Government of the Northwest Territories, has been forwarded to me for response. The administration of justice continues to be a federal responsibility in the Northwest Territories. As such, the prosecution of all criminal offences is conducted by counsel employed at the Yellowknife Regional Office of the Department of Justice.

It is the policy of this office to provide disclosure of all materials in our possession with the exception of witness statements. While witness statements are not generally provided to defence counsel, we often permit defence counsel to review such statements in our possession. Indeed, in appropriate cases, a copy of a witness statement will be provided to the defence. A summary or "can-say" statement relating to all Crown witnesses is disclosed in all cases. All statements made by accused persons, whether inculpatory or exculpatory, are always provided to counsel.

11th Floor Precambrian Bldg.
(403) 920-8564

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Canada

I am enclosing a completed copy of your questionnaire.

Yours very truly,

M. David Gates
Regional Director

QUESTIONNAIRE

1. Province _____

2. Number of Full Time Prosecutors _____

   Number of Part Time Prosecutors _____

3. Do Part Time Prosecutors prosecute offenses under the Criminal Code of Canada? _____

4. Are part-time Prosecutors political appointments? _____

5. Are there any written guidelines to guide your prosecutorial staff on disclosure of facts or other information to defence counsel prior to trial? _____
   During Trial? _____
   Post-Trial and Pre-Appeal? _____

6. Is your province in the process of adopting guidelines for disclosure for Crown counsel? _____

   If so, how long has the issue of disclosure guidelines been under consideration?

   Less than a year? _____
   More than a year? _____
   More than two years? _____

7. Are there any Statutes in your jurisdiction requiring the disclosure of exculpatory statements to defence counsel or the accused prior to Trial? _____

8. Is it the practice in your province of the Crown Prosecutors to volunteer the names of witnesses and/or statements to defence counsel prior to trial which are favourable to the accused? _____

9. Do you use a form for collection of crown evidence known as a "Crown Sheet"? _____

10. Can you provide and attach as a schedule to this reply a sample of same? _____

11. Have the Uniform Law Conference Guidelines on Disclosure to Defence Counsel been adopted in your province? _____

12. Are you aware of any cases similar to the Donald Marshall, Jr. prosecution where someone has been convicted of criminal offence and exculpatory statements were not disclosed to defence counsel either before the trial, during the trial or any time subsequent? No

    If so, please name the case and give appropriate citations.

13. Have individuals ever been charged in your province for failing to disclose exculpatory statements to defence counsel? No

    Details _____

14. Are you aware of any guidelines or laws in your province compelling the police to advise Crown Prosecutors of exculpatory statements? [illegible]

Thank you for helping us. If you would like a copy of the brief, please advise.

M. David Gates
Regional Director,
Department Of Justice
P.O. Box 8
Yellowknife, N.W.T.
X1A 2N1

APPENDIX B:

Response to United States Survey

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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 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

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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]

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[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

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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

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[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

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[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

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[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.

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[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

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[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

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[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]

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[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

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[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

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[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 (1977) (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.

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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.

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SEP 15 1988

September 8, 1988

SEP 15 1988

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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/m

SAMUEL A. PERRONI

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

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(1977); Pridgeon v.
428, 559 S.W.2d 4
Osborn, 263 Ark. 554,
(1978); Mize v. State,
90 S.W.2d 75 (1979);
, 267 Ark. 1121, 593
); Price v. State, 267
W.2d 394 (1980); State
. 191, 613 S.W.2d 382
v. Housewright, 692
1982); Ellis v. State, 4
28 S.W.2d 871 (1982);
6 Ark. App. 51, 637
); Clines v. State, 280
2d 684 (1983); Hall v.
d 165 (8th Cir. 1986);
, 291 Ark. 98, 722
; Watson v. State, 291
V.2d 478 (1987).

DISCOVERY

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Rule
19. Regulation of Discovery
19.1. Investigation not to be impeded
19.2. Continuing duty to disclose
19.3. Custody of materials
19.4. Protective orders
19.5. Excision
19.6. In camera proceedings
19.7. Failure to comply: sanctions
20. Procedure Before Trial: Omnibus Hearing
20.1. General procedural requirements: policy statement
20.2. Setting of omnibus hearing
20.3. Omnibus hearing
20.4. Pretrial conference

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.*

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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

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Failure to Disclose.

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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 21 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.

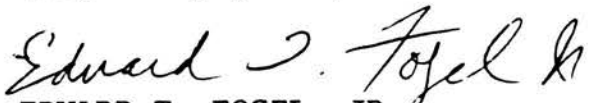
Under the Constitution of the United States, all government prosecutors, state and federal, must disclose to criminal defendants, even in the absence of a specific request, all exculpatory evidence which raises a reasonable doubt about the defendant's guilt. Additionally, a defendant has the constitutionally 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.
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.

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[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."

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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

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[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.

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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).

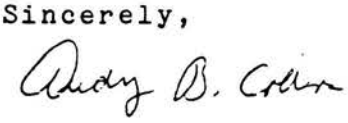
See also Penal Code Section 859 (attached) which provides that the prosecutor shall deliver to the defendant or counsel copies of the police, arrest, or crime reports, upon the first court appearance of course or, if unavailable, within two calendar days.

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
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c: Janet Carver

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September 2, 1988

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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; [illegible] 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) conflicts with provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested 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 ribunal 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 r

(b) fail to disclose a material f 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.

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

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).

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 1 9 1988

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September 9, 1988

Gordon F. Proudfoot, Esquire
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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.

Philip A. Lacovara
President
Charles F.C. Ruff
President-Elect
Mary Coster Williams
Secretary
Frank R. Goldstein
Treasurer

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Katherine A. Mazzaferri
Executive Director
Charles E. Lorenzetti
Assistant Executive
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and Finance
H.A. Cramer
Director, Public
Service Activities

(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.

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JUN 15 1988

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

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RULES OF COURT

STATE

1987

[illegible] Pamphlet

[illegible] Pamphlet Index

[illegible] COMPANY

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

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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

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 ~~of~~ 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.

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.

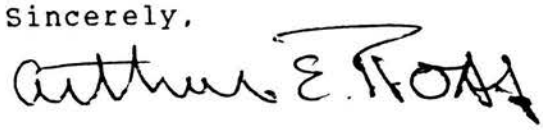
Lafave and Israel, Criminal Procedure, Vol. 2, §§ 19.5(e) and (f) at 545-547 (fns. omitted in § (f)) (1984).

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
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-

JUL 14 1988

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JEFFREY W. WILLIAMS
DIRECTOR OF SECTION PROGRAM

July 8, 1988

Gordon F. Proudfoot, Esq.
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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-

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Indiana State Bar Association

PRESIDENT-ELECT
Jeanne S. Miller
407 Broadway
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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.

POLK COUNTY ATTORNEY
JAMES A. SMITH

SEP 07 1988

August 31, 1988

Mr. Gordon F. Proudfoot
BOYNE CLARKE
Barristers & Solicitors
Suite 700, Belmont House
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Dartmouth, Nova Scotia B2Y 3Z5

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

Dear Mr. Proudfoot:

David Funkhouser, President of the Iowa State Bar Association, has directed me to answer your inquiries concerning exculpatory statements in criminal prosecutions. I am the chairman of the Criminal Law Committee for the Iowa State Bar Association and a prosecutor.

Iowa follows the standard set forth in United States v. Bagley, 473 U.S. 667 (1985), which holds that "undisclosed evidence is material for (suppression) purposes only if the defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different." See State v. Anderson, 410 N.W.2d 231 (Iowa 1987) and State v. Schatz, 414 N.W.2d 840 (Iowa App. 1987). The defense attorney has the burden to show that the trial would have turned out differently for the defendant if the prosecutor had produced the exculpatory evidence. A prosecutor's failure to turn over the exculpatory evidence alone is not enough to reverse a verdict, suppress evidence or grant a new trial.

I have enclosed a copy of the Bagley, Schatz, and Anderson decisions as well as a copy of Brady v. Maryland, another case often cited by the courts.

Additionally, I have enclosed select pages from our prosecutor's handbook which should give you a cursory understanding of the law on exculpatory evidence from 1983 to 1988 in Iowa. All of the attorneys in Iowa are governed by the Code of Professional Responsibility and that is also enclosed.

408 POLK COUNTY COURTHOUSE • 5TH & MULBERRY •DES MOINES, IOWA 50309 •PHONE 515 286-3737

Please feel free to call me if you have any further questions.
Best wishes with your research project.

Sincerely,

JAMES A. SMITH
POLK COUNTY ATTORNEY

By Nan M. Horvat
NAN M. HORVAT
Assistant Polk County Attorney

NMH/tg
enclosure

Iowa Code of Professional Responsibility for Lawyers

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:
(1) 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.
(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by section 622.10, The Code. If he is barred from doing so by section 622.10, he shall immediately withdraw from representation of the client unless the client fully discloses the fraud to the person or tribunal.
(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. [Court Order January 21, 1980]

Referred to in DR 7-101

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
(2) Give advice to a person who is not represented by a lawyer, 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.

§ 2672(a) DISCOVERY--NONCOMPLIANCE WITH DISCOVERY RULES OR ORDER--SANCTIONS. See § 3237(d), infra.

V. EXCULPATORY EVIDENCE.

§ 2681(b) EQUAL ACCESS BY PROSECUTION AND DEFENSE. When defendant has been offered complete access to the State's files, evidence contained in the file has not been withheld for purposes of due process. State v. Schatz, 414 N.W.2d 840 (Iowa App. 1987).

PRACTICE AID: It is not necessary for the State to point out to the defense precisely what evidence might be exculpatory if the State allows the defense access to its files. See State v. Todden, 364 N.W.2d 195 (Iowa 1985).

CHAPTER FOUR

Trial

I. PROCEDURE.

A. Jury Selection.

§ 3032(d) VOIR DIRE--REPORT OF PROCEEDINGS. A defendant's request that voir dire be reported must be granted, but failure to do so is not per se reversible. Defendant must demonstrate prejudice from the lack of a record. Prejudice is shown when the absence of a verbatim record precludes the appellate court from reviewing the claimed error in jury selection. State v. Woodyard, 414 N.W.2d 654 (Iowa App. 1987) (reversal ordered because claims of error during voir dire could not be resolved without a record of process).

PRACTICE AID: The Court distinguished State v. Oshinbanjo, 361 N.W.2d 318 (Iowa App. 1984), and State v. Newman, 326 N.W.2d 796 (1982), on the basis that the records in those cases, although not verbatim, allowed the appellate court to identify and address the challenged error.

B. Final Argument.

§ 3125(b) COMMENT ON FAILURE TO TESTIFY. Prosecutor's comment that nontestifying defendant "could have taken the stand and explained it to you" was proper rebuttal to defense counsel's argument that the government had not allowed defendant to explain his side of the story, and thus the comment did not violate defendant's right against self-incrimination. United States v. Robinson, 99 L. Ed. 2d 23 (1988).

submitted in support of defendant's motion for change of venue, not obtained by an independent scientific survey, were "neither helpful nor persuasive" in determining the general public's exposure to the publicity.

§ 2529(d) APPELLATE REVIEW--WAIVER. A defendant alleging actual jury prejudice is required to provide the reviewing court with a record disclosing such prejudice. State v. Misner, 410 N.W.2d 216 (Iowa 1987) (defendant's failure to have voir dire reported waived actual prejudice claim based on comments allegedly made there).

V. DISCOVERY.

A. SPECIFIC SUBJECTS.

1. Depositions.

§ 2664 SPECIAL CIRCUMSTANCES (IOWA R. CR. P. 12(2)). A defendant has no right to depose prospective witnesses who are not listed as witnesses for the State unless necessity is established; i.e., that the evidence hoped to be obtained will be material and favorable to the defense, and not merely cumulative of other testimony. State v. Wagner, 410 N.W.2d 207 (Iowa 1987) (here, defendant failed to demonstrate need to depose individuals not listed as prosecution witnesses, which included some of the victims of a group kidnapping).

PRACTICE AID. The proper standard of review of discovery issues is abuse of the trial court's discretion. To the extent that the issue raises a constitutional compulsory process claim, review is de novo.

VI. EXCULPATORY EVIDENCE.

A. MATERIALITY.

§ 2676 STANDARD APPLICABLE. Iowa expressly adopts the materiality standard proposed by the plurality decision in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), holding that "undisclosed evidence is material for Brady purposes only if the defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different." State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. This standard is anologous to the ineffective assistance of counsel standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

§ 2676(c) BURDEN OF PROOF. A defendant claiming a Brady violation bears the burden of proving materiality. State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. Defendant must "make a threshold showing of how the withheld evidence would have affected his case."

§ 2677(c) DEFENDANT'S RIGHT TO DISCLOSURE--CONFIDENTIAL RECORDS. A defendant is not entitled to disclosure of the full criminal history records, or "rap sheets," of the State's witnesses. State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. Criminal history data is deemed confidential by statute, and a defendant is not entitled to disclosure.

CHAPTER FOUR--TRIAL

I. PROCEDURE.

A. JURY SELECTION.

§ 3032(c) VOIR DIRE--CHALLENGE FOR CAUSE--EMPLOYMENT BY THE STATE. State employee is not subject to cause strike merely by virtue of employment with the State. State v. Deierling, 406 N.W.2d 793 (Iowa 1987) (Court declines to construe Iowa R. App. P. 17 (5)(e) as implying or presuming bias of all State employees).

B. PRETRIAL MOTIONS.

§ 3069(d) MOTION TO STRIKE/CURATIVE INSTRUCTION. Witness' testimony that defendant had refused to take polygraph examination did not require mistrial where the court (1) sustained defendant's objection to the testimony, (2) struck the objectionable answer, and (3) admonished the jury to disregard it. Evidence regarding defendant's refusal to submit to polygraph is not necessarily "so prejudicial that the jury could not heed the court's admonition to disregard it." State v. Mayberry, ___ N.W.2d ___ (Iowa 7/22/87) (Sup. Ct. No. 85-1879) (Distinguishing State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963), on the ground that reversal was based on other errors as well).

PRACTICE AID. Only in "extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained" is a curative instruction and admonition insufficient. See State v. McGonigle, 401 N.W.2d 39, 43 (Iowa 1987); State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986); State v. Hamilton, 335 N.W.2d 154, 160 (Iowa 1983); State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971).

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JUN 29 1988

June 21, 1988

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

Dear Mr. Proudfoot:

Pursuant to your request, I am enclosing several documents that may assist you in this matter. Attached are the ABA Standards of Discovery, the Federal Rules of Discovery, Inspection and Disclosure, and the Kentucky Rules of Civil Procedure regarding discovery and inspection along with a treatise under §21.36 which deals with disclosure of exculpatory material.

I hope you find these items helpful and wish you the best in instituting guidelines that will help to keep any innocent person from going to prison due to the withholding of exculpatory information. If I can be of any further assistance to you, please feel free to contact me.

Very truly yours,

George E. Long II

GEL/sf
Encs.
G-22

mation to make an informal plea and/or prepare for trial, and promotion of procedural efficiency underlie the Discovery Standards.[11]

The ABA Discovery Standards impose a broad obligation upon the prosecutor to provide pretrial discovery to defense counsel.[12] Standard

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[11] ABA DISCOVERY STANDARDS, 11-1.1 states:

Standard 11-1.1. Procedural needs prior to trial

(a) Procedures prior to trial should:

(i) promote an expeditious as well as a fair disposition of the charges, whether by diversion, plea or trial;

(ii) provide the accused with sufficient information to make an informed plea;

(iii) permit thorough preparation for trial and minimize surprise at trial;

(iv) reduce interruptions and complications during trial and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;

(v) eliminate as much as possible the procedural and substantive inequities among similarly situated defendants; and

(vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings.

(b) These needs can be served by:

(i) full and free discovery;

(ii) simpler and more efficient procedures; and

(iii) procedural pressures for expediting the processing of cases.

[12] ABA DISCOVERY STANDARD 11-2.1 provides for prosecutorial disclosure:

(a) Upon the request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control including but not limited to:

(i) the names and addresses of witnesses, together with their relevant written or recorded statements;

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

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses;

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

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

(vi) any record of prior criminal convictions of the defendant or of any codefendant.

11–2.1 provides that, upon request, the prosecutor should provide open file disclosure to the defense and lists those items to be provided, items which are routinely disclosed by the prosecution.[13] The ABA Discovery Standards also impose an ethical obligation on the prosecutor to disclose information relevant to possible pretrial motions by the defense, such as the existence of grand jury testimony which was recorded but was not transcribed,[14] the existence of wiretap or electronic surveillance evidence,[15] and the possibility of scientific tests, experiments, or comparisons to be performed which may destroy physical evidence.[16]

The major contribution of the ABA Discovery Standards is its provision that the prosecution shall disclose to the defense upon request "all of the material and information within the prosecutor's possession and control."[17] The ABA Discovery Standards also support disclosure or dis-

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* * *

(c) The prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

(d) The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office.

[13] *Id*. (a). *See also* ABA DISCOVERY STANDARDS, std. 11–2.1, commentary (Supp. 1982).

[14] *Id*. (b)(i).

[15] *Id*. (b)(ii).

[16] *Id*. (b)(iii).

[17] *Id*. (a). The Standard's shift to open file discovery is a major substantive change from the original standard; a result, in part, of changing attitudes toward discovery. For example, discovery was traditionally restricted due to fear that disclosure would lead to abuse of witnesses and victims, or destruction of important evidence. However, thorough analysis of the effect of broad discovery in practice suggests that such disclosure does not ordinarily create such problems, and protective orders can effectively deal with the exceptional case in which the integrity of the case *will* be adversely affected. *See* HOUSE COMMITTEE ON THE JUDICIARY, COMMENTS OF THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT, H.R. REP. NO. 94–247, 94th Cong., 1st Sess. 12, 14 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674, 686.

The open file rule also facilitates processing cases to comply with the speedy trial requirements, minimizing the need for judicial supervision of basic discovery, mitigating delays, and assisting in the dissemination of relevant information thereby contributing to

by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdi-

vision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief 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.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement 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.

(2) Failure To Comply With a Request. 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, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, § 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F.2d 74, C.C.A.2d, certiorari denied, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed.Supp. 523, 534, E.D.Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

1966 AMENDMENT

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash.U.L.Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb.L.Rev. 127 (1962); Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Calif. L.Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand.L.Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant? 51 A.B.A.J. 64 (1965); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (1953) and *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); cf. *State* v. *Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); *State* v. *Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand

RULE 7.24 DISCOVERY AND INSPECTION

(1) On motion of a defendant the court may order the attorney for the commonwealth to disclose the substance of any oral incriminating statement known by the attorney for the commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody, or control of the commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody or control of the commonwealth.

(2) On motion of a defendant the court may order the attorney for the commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This provision does not authorize pretrial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).

(3) [*Effective until January 1, 1988. See also amended text following this paragraph.*] If the court grants relief sought by the defendant under this rule it may condition its order by requiring that the defendant permit the commonwealth to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects which the defendant intends to produce at the trial and are in his possession, custody or control.

(3) [*Effective January 1, 1988. See also former text preceding this paragraph.*] (A) If the defendant requests disclosure under Rule 7.24, upon compliance to such request by the commonwealth, and upon motion of the commonwealth, the court may order that the defendant permit the commonwealth to inspect, copy, or photograph:

(i) books, papers, documents or tangible objects which the defendant intends to introduce into evidence and which are in the defendant's possession, custody, or control;

(ii) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defen-

dant intends to call at trial when the results or reports relate to the witness's testimony.

(B) (i) If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, at least 20 days prior to trial, or at such later time as the court may direct, notify the attorney for the commonwealth in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(ii) When a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may, upon motion of the attorney for the commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony.

(C) If there is a failure to give notice when required by this rule or to submit to an examination ordered by the court under this rule, the court may exclude such evidence or the testimony of any expert witness offered by the defendant on the issue of his guilt.

(D) Evidence of an intention as to which notice was given pursuant to this rule, but later withdrawn, shall not be admissible, in any civil or criminal proceeding, against the person who gave said notice.

(4) If the case has been set for trial, a request for relief under this rule shall be made a reasonable time in advance of the trial date, and the granting of a continuance by reason of such request shall lie within the sound discretion of the court.

(5) An order granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(6) On a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. On motion the court may permit the commonwealth to make such showing, in whole or part, in the form of a written statement to be inspected by the court privately; and if the court thereupon grants relief following such private inspection the entire text of the commonwealth's statement 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 by the defendant.

(7) One (1) motion shall exhaust the relief available to the movant under this rule, except that a subsequent motion may be sustained on a showing of just cause.

(8) If subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney, or the court, of the existence thereof.

(9) 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 direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

[Adopted effective January 1, 1965; amended effective January 1, 1986; January 1, 1987; January 1, 1988.]

RULE 7.26 DEMANDS FOR PRODUCTION OF STATEMENT AND REPORTS OF WITNESSES

(1) Before a witness called by the Commonwealth testifies, the attorney for the commonwealth shall produce any statement of the witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by him or (b) is or purports to be a substantially verbatim statement made by him. Such statement shall be made available for examination and use by the defendant.

(2) If the Commonwealth claims that a statement to be produced under this Rule 7.26 does not relate to the subject-matter of the witness's testimony, the court shall examine the statement privately and, before making it available for examination and use by the defendant, excise the portions that do not so relate. The entire text of the statement 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 by the defendant.

[Adopted effective January 1, 1965; amended effective September 1, 1981; January 1, 1986.]

VIII. ARRAIGNMENT AND PLEADINGS

RULE 8.01 INITIAL APPEARANCE AFTER INDICTMENT OR INFORMATION

Upon the appearance of a defendant the judge shall proceed as provided in Rule 3.05 and shall also proceed with or set a time for arraignment.

[Adopted effective September 1, 1981.]

of the Commonwealth to produce a requested report until trial may not be reversible error.[7]

§ 21.33 Reports of Examinations and Tests—Form

[9.] That the defendant, through his attorney, be allowed to inspect and/or copy any results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with this case, or copies thereof, which are within the possession, custody or control of the Commonwealth. RCr 7.24(1).

§ 21.34 Notification of Persons Present at Time of Offense—Informants

The Commonwealth may refuse to disclose its knowledge of informants based on the privilege to conceal their identity. This privilege is counterbalanced by the right of the defendant to have notice of a material witness to the crime.[1]

§ 21.35 Notification of Persons Present at Time of Offense—Informants—Form

[10.] That the defendant, through his attorney, be furnished the names and addresses of all persons known to the Commonwealth's Attorney or other law enforcement officers to have participated in or been present at the time and place of the alleged offense. See Burks v. Commonwealth, 471 S.W.2d 298 (Ky.1971).

§ 21.36 Disclosure of Exculpatory Material

The Commonwealth has a constitutional obligation to disclose evidence which is exculpatory in nature, either as to guilt or as to punishment.[1] Under the authority of United States v. Agurs,[2] the degree of relief for failure to disclose information was highly dependent on whether there had been a request for exculpatory information and the degree of specificity of the request. If there was no request or only a general "boiler plate" request, a reversal for nondisclosure would occur only if the omitted evidence created a reasonable doubt that did not otherwise exist. A specific re-

7. Spencer v. Commonwealth, 554 S.W.2d 355 (Ky.1977) (test results inconclusive and prosecutor unaware of test results' existence).

§ 21.34

1. See § 18.28.

§ 21.36

1. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

2. 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

quest, on the other hand, was of value if nondisclosure might have affected the outcome of the trial.[3]

In 1985, the United States Supreme Court decided the case of United States v. Bagley,[4] which altered the scope and nature of the earlier tests. First, the Court stated that impeachment evidence as well as exculpatory evidence is part of a prosecutor's constitutional duty to disclose.[5] Second, a reversal for failure to disclose is to be determined by one standard regardless of whether there is no request, a general request, or a specific request for information: whether there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[6] Despite the comprehensive nature of the new standards, it is probably just as important under *Bagley* as it was under *Agurs* to make the request for information as specific as possible. *Bagley* noted the greater potential for prejudice in a specific request case, wherein an incomplete response by the prosecution might cause the defense to abandon lines of investigation, defenses or trial strategies that it otherwise would have pursued.[7]

The failure to disclose evidence, with or without a court order, is reversible error when it could have completely discredited the prosecution's key evidence.[8] However, if the value of the withheld evidence is cumulative of what the defendant proved, the failure to disclose is harmless.[9] If the Commonwealth refuses an order to provide potentially exculpatory evidence in an unauthenticated form, the defendant is entitled to a recess to subpoena the necessary witnesses and documents to prove the matter properly.[10]

3. Id. These standards apply regardless of the prosecutor's good faith. See Timmons v. Commonwealth, 555 S.W.2d 234 (Ky.1977).

4. 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

5. Id. See Williams v. Commonwealth, 569 S.W.2d 139 (1978) (although the Court classified the failure to disclose as perjury, it could have been characterized as the failure to disclose impeachment evidence).

6. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

7. Id. Nevertheless, defense counsel is precluded from searching the prosecutor's files for exculpatory evidence or framing a specific request. See Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972). Nor is the court required to examine records where the existence of exculpatory evidence is mere conjecture. Commonwealth v. Key, 633 S.W.2d 55 (Ky.1982).

8. See Rolli v. Commonwealth, 678 S.W.2d 800 (Ky.App.1984).

9. Cope v. Commonwealth, 645 S.W.2d 703 (Ky.1983).

10. Pennington v. Commonwealth, 577 S.W.2d 19 (Ky.App.1978); see Romans v. Commonwealth, 547 S.W.2d 128 (Ky.1977).

The disclosure of exculpatory evidence must be made to the defendant in time for a due investigation to be made.[11] However, the trial court may conduct an in camera review of the materials to determine the materiality and confidentiality of the information.[12]

The Commonwealth has no constitutional duty to preserve evidence which possesses no immediately apparent exculpatory value and when comparable evidence can be obtained by the defendant by other reasonable means.[13]

§ 21.37 Disclosure of Exculpatory Material—Form

[11.] Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the defendant requests any and all evidence in possession of the Commonwealth or in the possession of any governmental agency that might fairly be termed "favorable," whether that evidence either be completely exculpatory in nature or simply tends to reduce the degree of offense or punishment therefor, or whether that evidence might be termed "favorable" in the sense that it might be fairly used by the defendant to impeach the credibility of any witness the government intends to call in this matter. See generally, Williams v. Dutton, 400 F.2d 797 (5th Cir.1968), cert. denied 393 U.S. 1105, 89 S.Ct. 908, 21 L.Ed.2d 799 (1969). Specifically, the defendant seeks, but does not limit, his request to the following:

a. The nature and substance of any agreement, immunity promise or understanding between the government or any agent thereof, and any witness, relating to the witness' expected testimony, including but not limited to, understandings or agreements, relating to pending or potential prosecutions. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

b. The nature and substance of any preferential treatment given at any time by any Commonwealth agent, whether or not in connection with this case, to any potential witness, including, but not limited to, letters from Commonwealth's Attorneys or other law enforcement personnel to governmental agencies, state agencies, creditors, etc. setting out that witness' cooperation or status with the Commonwealth, and which letter or communication

11. Silverburg v. Commonwealth, 587 S.W.2d 241 (Ky.1979).

12. Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

13. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

might fairly be said to have been an attempt to provide some benefit or help to the witness.

c. Any money or other remuneration paid to any witness by the Commonwealth, including but not limited to, rewards, subsistence payments, expenses or other payments made for specific information supplied to the Commonwealth.

d. Any and all information in the possession of the Commonwealth regarding the mental condition of the Commonwealth's witnesses which would reflect or bring into question the witnesses' credibility.

e. The original statement and any amendment thereto, of any individuals who have provided the government with a statement inculpating the defendant, who later retracted all or any portions of that statement where such retraction would raise a conflict in the evidence which the Commonwealth intends to introduce. See United States v. Enright, 579 F.2d 980 (6th Cir. 1978).

f. Any and all interview memoranda or reports which contain any information, whatever the sources, which might fairly be said to contradict or be inconsistent with any evidence which the Commonwealth intends to adduce in this matter. See United States v. Enright, supra.

g. The names and addresses of any witnesses whom the Commonwealth believes would give testimony favorable to the defendant in regard to the matters alleged in the indictment, even though the Commonwealth may not be in possession of a statement of this witness and regardless of whether the Commonwealth intends to call this witness. See United States v. Eley, 335 F.Supp. 353 (N.D.Ga.1972).

h. The results of any scientific test or analysis done on any person or object in connection with this case where the result of that test or analysis did not implicate, or was neutral to the defendant. See Barbee v. Warden of Maryland Penitentiary, 331 F.2d 842 (4th Cir.1964); Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976).

i. Any documentary evidence in the possession of the Commonwealth which contradicts or is inconsistent with any testimony the Commonwealth intends to introduce in this cause.

j. The statement of any individual who has given a description to any person of any individual involved in the perpetration of the charged offense, which person the Commonwealth alleges to be the defendant, where such description might fairly be said not to match the defendant in characteristics such as height, weight,

body build, color of hair, etc. See Jackson v. Wainwright, 390 F.2d 288 (5th Cir.1968).

k. The name and address of any individual who has been requested to make an identification of the defendant in connection with this case, and failed to make such identification. Grant v. Alldredge, 498 F.2d 376 (2d Cir.1974).

§ 21.38 Disclosure of Juror Information

Some Commonwealth's Attorneys compile information about prospective jurors in serious cases. There is some precedent in other jurisdictions that jury information should be disclosed to the opposing party.[1] Giving such information may avoid challenge to individual jurors after the verdict.

§ 21.39 Disclosure of Juror Information—Form

[12.] That the Commonwealth's Attorney disclose any information compiled as to any prospective juror, including but not limited to arrest or conviction records, or whether the prospective juror was ever a witness.

§ 21.40 Disclosure of Identification Procedure

Normally, disclosure of physical evidence will indicate from whom it was obtained so that an appropriate suppression motion can be filed. However, where there have been identification procedures, this fact may not be readily apparent. Consequently, discovery should seek notification of any identification procedures.[1]

§ 21.41 Disclosure of Identification Procedure—Form

[13.] That in the event the Commonwealth intends to offer any "eyewitness identification testimony," the defendant through his attorney, be informed as to whether any such witness has at any time been asked to make any pretrial, extrajudicial identification of the defendant, whether by means of a live lineup, a photographic spread, or other type of confrontation; in the event such an extrajudicial identification has taken place, the defendant further requests the date of such identifications, and the names of all persons at the identification. If such identification occurred as

§ 21.38

1. See 86 A.L.R.3d 571.

§ 21.40

1. United States v. Cranson, 453 F.2d 123, 126 n. 6 (4th Cir.1971), cert. denied 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972). But see Silverburg v. Commonwealth, 587 S.W.2d 241 (1979).

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August 3, 1988

AUG 16 1988

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

Dear Mr. Proudfoot,

I am in receipt of your letter of June 10, 1988 directed to Mr. Wood Brown, III, as President of the Louisiana State Bar Association. You will note by letter of June 28, 1988, Mr. Thomas Collins, Executive Counsel for the Bar Association, forwarded your letter to me for reply. I am the President of the Louisiana Association of Criminal Defense Lawyers.

Your inquiry as to whether the State of Louisiana has any laws, guidelines, or ethical codifications requiring that exculpatory statements in criminal prosecutions be delivered to defense counsel "at the earliest moment". There is no statutory requirement in the State of Louisiana requiring a prosecutor to make available to defense counsel exculpatory information, but our prosecutors are bound by the United States Supreme Court decision in the case of Brady v. Maryland which held that under the United States Constitution prosecutors were required to supply such information if timely requested by the defense.

The timing as to when the prosecutor is required to give such information depends upon the circumstances of each case. There is certainly no requirement that the prosecutor make it available "at the earliest moment" but it does have to be given far enough in advance to allow the defense to develop the information so that it can be effectively used at trial. Generally speaking if the prosecutor is going to bring out the exculpatory evidence himself during the course of the trial that would satisfy his requirement under the Brady decision and its progeny.

I attach for your consideration a sample copy of a typical motion and memorandum which a defense attorney in this State would ordinarly file to assure that the prosecutor supplies him

with any exculpatory information which he might possess.

If any further information is desired do not hesitate to contact me. I remain with best wishes

Very truly yours,

MURRAY, BRADEN, GONZALEZ & RICHARDSON

J R Murray Jr.

JULIAN R. MURRAY, JR.

JRMjr/db

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. [redacted]
VERSUS	*	SECTION "~~F~~" 15
[redacted]	*	VIOLATIONS: [redacted]
	*	

MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE
AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

NOW INTO COURT, through undersigned counsel, comes defendant, [redacted] and pursuant to Rule 12 (b) of the Federal Code of Criminal Procedure, and the decisions of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83(1963), Giglio v. U.S., 405 U.S. 150(1972), and United States v. Agurs, 427 U.S. 97(1976), moves for the disclosure and production by the Federal Government, in advance of trial, of all evidence in its possession favorable to the accused, either as direct or impeaching evidence, including but not limited to such evidence contained in:

A. Any documents in the possession of the government which would indicate that [redacted] is not guilty of the alleged offenses including, but not limited to:

1. any written statements, or memoranda and notes thereof, or notes of oral statements of interviews with any person questioned concerning any tests or examinations performed in conjunction with this case;

DOCUMENT NO. 7

2. any and all results or reports, or portions thereof, concerning any tests or examinations performed in conjunction with this case;

B. Any report prepared by agents of any investigative or prosecutorial agency of the government, whether such report was prepared in connection with the investigation or prosecution of the instant case;

C. Statements of any witnesses or other persons interviewed which tend to demonstrate that defendant, [redacted] is not guilty of the charged offenses, regardless of whether the government intends to call them as witnesses at the trial;

D. The memoranda or summaries of any oral statement made to an agent of the government by any person in connection with the subject matter of this case, whether or not;

1. the statement, if in writing, has been signed, or approved by the witness, or;
2. the statement relates to the proposed subject matter of the direct testimony of the witness at trial.

E. The stenographic recording or transcription of any oral statement made by any person to an agent of the government, or in the hearing of such agent, in connection with the subject matter of this case, whether or not:

1. the stenographic recording or transcription is a substantially verbatim recital of the statement, or;
2. the statement was recorded contemporaneously with its making, or;

3. the statement relates to the proposed subject matter of the direct testimony of the witness at trial.

F. Statements of persons or memoranda or recordings or any oral statements of any person in possession of the government, whether or not made to an agent of the government;

G. Any memoranda, documents, or statements used by the government in the investigation of this case, whether or not it was prepared by the government;

H. All reports or memoranda prepared on behalf of the government in connection with the investigation of this case.

I. Any memoranda, reports or documents prepared in connection with the grant of immunity to any person interviewed in the course of the investigation in this case, and any document reflecting the grant of immunity to any such person;

J. Any and all personal or business records prepared by or belonging to the defendant or any other party, or copies thereof, in the custody of the government;

K. All records and information revealing prior felony convictions or guilty verdicts or juvenile adjudications attributed to each witness called by the government, including but not limited to relevant "rap sheets";

L. All records and information revealing prior misconduct or bad acts attributed to each witness;

M. Any and all consideration or promises of consideration given to or on behalf of the witness or expected or hoped

for by the witness. By consideration, defendant refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or concern to the witness, including but not limited to, formal or informal, direct or indirect consideration; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative or other disputes with the government, with any authority or any other parties; criminal, civil or tax immunity grants; relief from forfeiture, payments of money, rewards or fees, witness fees, and special witness fees, provisions of food, clothing, shelter, transportation, legal services, or any other benefits; placement in a "witness protection program" and former status of a witness; and anything else which arguably could reveal an interest, motive, or bias of the witness in favor of the government or against the defense, or act as an inducement to testify or to color testimony.

N. All threats, expressed or implied, direct or indirect, or other coercion made or directed against the witness; criminal prosecution, investigations, or potential prosecution pending but which could be brought against the witness; any probationary, parole, deferred prosecution or custodial status of the witness, in any civil, tax court, court of claims, administrative, or other pending

or potential legal disputes with the government or over which the government has real, apparent or perceived influence;

O. The existence and identification of each occasion in which any prospective witness has testified before any court, grand jury, tribunal or other hearing body with respect to the defendant, the subject of this investigation, the facts of this case or any related case;

P. The existence and identification of each occasion in which each witness who was or is an informer, accomplice, co-conspirator, or expert has testified before any court, grand jury, or other tribunal body. Please annex transcripts from all said appearances;

Q. All statements made by each witness who is an informer made to any government agent during the investigation culminating in the instant charge, including notes, memoranda, recordings, and other written or recorded results of interviews with said witnesses;

R. All financial records, or documents filed with a federal or state agency, filed by any witness or informer, wherein said documents contain exculpatory evidence, regardless of whether the state intends to use these documents at trial, or to call the informer as a witness at this trial;

S. All of the records and/or information which arguably could be helpful or useful to the defense in impeaching or

otherwise detracting from the probative force of the government's evidence or which arguably could lead to such records or information;

T. The same records and information requested in items K-S above with respect to each non-witness declarant whose statements are to be offered as evidence.

Respectfully submitted:

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, BRADEN & GONZALEZ
612 Gravier Street
New Orleans, Louisiana 70130
(504) 581-3141
Attorney for Defendant

NOTICE OF HEARING ON THE
MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE
AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

PLEASE TAKE NOTICE, upon the indictment herein and upon all pleadings and proceedings had herein, the undersigned will move this court, on the 28th day of August, 1985, at 11 o'clock A.m., for an order directing disclosure of evidence, and for such other relief as the court may deem just and proper.

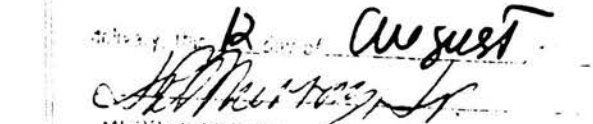
New Orleans, Louisiana, this _____ day of _____, 1985.

JULIAN R. MURRAY, JR.

CERTIFICATE

I hereby certify that a copy of the [illegible] motion [illegible] has been served on all [illegible] counsel of record [illegible] this date

[illegible] 12 day of August



MURRAY, MURRAY, BRADEN & [illegible]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. [redacted]
VERSUS	*	SECTION "F"
[redacted]	*	VIOLATIONS: 18 U.S.C. §1014 18 U.S.C. §1341 18 U.S.C. §2314
	*	

MEMORANDUM IN SUPPORT OF EXCULPATORY EVIDENCE
AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

MAY IT PLEASE THE COURT:

The United States Supreme Court cases of Brady v. Maryland, 83 S.Ct. 1194, 373 U.S. 83(1963) and United States v. Agurs, 962 S.Ct. 2392, 427 U.S. 97(1976) set forth the principle that the government has a duty to furnish the defendant with all exculpatory material. These decisions are grounded upon the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution.

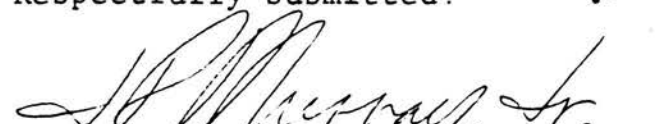
It is of no moment that the exculpatory evidence would be inadmissible on the defendant's behalf at trial. Giles v. Maryland, S.Ct. 386 U.S. 66(1967). It is sufficient that the "favorable evidence" might be beneficial in obtaining further evidence. Giles v. Maryland, supra.

The evidence sought includes evidence which might impeach the testimony or credibility of a government witness or which might be used as direct evidence. Williams v. Dutton, 400 F.2nd. 797 (5th Cir., 968). See also: Giglio v. United States, 92 S.Ct. 763, 405 U.S. 150(1972).

Accordingly, the defendant respectfully represents that he is entitled to receive the production of any papers, documents, records, statements, photographs and objects in the possession of the government which are favorable to the defendant.

It is further represented that should any question arise as to the exculpatory nature of the requested materials, that this Honorable Court has the authority to make an in camera inspection and determine the issue. Jackson v. Denno, 84 S.Ct. 1774, 378 U.S. 368(1964); Williams v. Dutton, supra.

Respectfully submitted:



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MURRAY, MURRAY, BRADEN & GONZALEZ
612 Gravier Street
New Orleans, Louisiana 70130
(504) 581-3141
Attorney for Defendant

NOTICE OF 3.11 CONFERENCE

I HEREBY CERTIFY, that a 3.11 conference was held pursuant to the local rules of the United State District Court for the Eastern District of Louisiana and that counsel have met and conferred for purposes of amicably resolving the issues.

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, BRADEN & GONZALES
612 Gravier
New Orleans, La. 70130

Attorney for defendant

STINSON, LUPTON & WEISS, P.A.
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JUN 27 1988

June 17, 1988

Gordon F. Proudfoot, Esq.
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
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:

In response to your letter of June 10, 1988 regarding the above referenced Canadian Bar Submission of a Brief on the "Role of the Crown Prosecutor," I am happy to provide you with a copy of the applicable disclosure rule which we use in the State of Maine. I have copied Rule 16 of the Maine Rules of Criminal Procedure which discuss the duty of the State's attorney to reveal the existence of exculpatory statements. I hope this is of some assistance to you.

Sincerely,

STINSON, LUPTON & WEISS, P. A.

David R. Weiss

David R. Weiss
President-Elect
Maine State Bar Association

DRW/bw
Enclosure

MAINE RULES OF COURT 1988 Edition

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tion, shall produce him at the examination and shall keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The court shall order the county in which the case is pending to pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

[Amended effective January 3, 1978.]

RULE 16. DISCOVERY BY THE DEFENDANT

(a) Automatic Discovery.

(1) *Duty of the Attorney for the State.* The attorney for the State shall furnish to the defendant within a reasonable time:

(A) A statement describing any testimony or other evidence intended to be used against the defendant which:

(i) Was obtained as a result of a search and seizure or the hearing or recording of a wire or oral communication;

(ii) Resulted from any confession, admission, or statement made by the defendant; or

(iii) Relates to a lineup, showup, picture, or voice identification of the defendant;

(B) Any written or recorded statements and the substance of any oral statements made by the defendant.

(C) A statement describing any matter or information known to the attorney for the State which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the offense charged.

(D) A statement describing the contents of any disclosure order issued pursuant to Rule 6(h) which pertains to the case against the defendant.

(2) *Continuing Duty to Disclose.* The attorney for the State shall have a continuing duty to disclose the matters specified in this subdivision.

(b) Discovery Upon Request.

(1) *Duty of the Attorney for the State.* Upon the defendant's written request, the attorney for the State, except as provided in subdivision (3), shall allow access at any reasonable time to those matters specified in subdivision (2) which are within the attorney for the State's possession or control. The attorney for the State's obligation extends to matters within the possession or control of any member of his staff and of any official or employee of this State or any political subdivision thereof who regularly reports or with reference to the particular case has

Stinson, Lurie & Wise P.A.

reported to his office. In affording this access, the attorney for the State shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

(2) *Scope of Discovery.* The following matters are discoverable:

(A) Any books, papers, documents, photographs (including motion pictures and video tapes), tangible objects, buildings or places, or copies or portions thereof, which are material to the preparation of the defense or which the attorney for the State intends to use as evidence in any proceeding or which were obtained from or belong to the defendant;

(B) Any 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.

(C) Expert Witnesses. The names and addresses of the expert witnesses whom the state intends to call in any proceeding.

(3) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the State or members of his legal staff.

(4) *Continuing Duty to Disclose.* If matter which would have been furnished to the defendant under this subdivision comes within the attorney for the State's possession or control after the defendant has had access to similar matter, the attorney for the State shall promptly so inform the defendant.

(c) Discovery Pursuant to Court Order.

(1) *Witnesses.* Upon timely motion of a defendant and upon a showing that the specific matter sought may be material to the preparation of his defense, that the informal discovery procedures of subdivisions (a) and (b) of this rule have been exhausted and that the request is reasonable, the court shall order the attorney for the State to permit the defendant access to any of the following matters:

(A) Names and addresses of witnesses;

(B) Written or recorded statements of witnesses and summaries of statements of witnesses contained in police reports or similar matter;

(C) Any record of prior criminal convictions of witnesses.

Access shall be according to the terms and conditions set forth in the court's order. A witness includes any person known to the State who has some knowledge of the circumstances of the alleged offense. The fact that a witness's name is on a list furnished under this subdivision and that he is not called shall not be commented upon at trial. The

attorney for the State shall have a continuing duty to disclose matters specified in this subdivision which come within his possession or control after the defendant has had access under this subdivision.

(2) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars if it is satisfied that counsel has exhausted his discovery remedies under this rule or it is satisfied that discovery would be ineffective to protect the rights of the defendant. The bill of particulars may be amended at any time subject to such conditions as justice requires.

(3) *Grand Jury Transcripts.* Discovery of transcripts of testimony of witnesses before a grand jury is governed by Rule 6.

(4) *Reports of Expert Witnesses.* If the expert witness whom the state intends to call in any proceeding has not prepared a report of examination or tests, the court may order that the expert prepare and the attorney for the state serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

(d) Sanctions for Noncompliance. If the attorney for the State fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the State to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 16A, prohibiting the attorney for the State from introducing specified evidence and dismissing charges with prejudice.

[Added effective January 3, 1978; Amended effective February 1, 1983; January 31, 1985; February 15, 1986; February 1, 1987; February 15, 1988.]

RULE 16A. DISCOVERY BY THE STATE

(a) The Person of the Defendant.

(1) Upon motion and notice the court may order a defendant to:

(A) Appear in a line-up;

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

(C) Be fingerprinted, palmprinted, or footprinted;

(D) Pose for photographs;

(E) Try on articles of clothing;

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

(G) Permit the taking of samples of his blood, hair, and other material of his body which involve no unreasonable intrusion thereof;

(H) Provide specimens of his handwriting; and

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

(2) Reasonable notice of the time and place of any personal appearance of the defendant required for the foregoing purposes shall be given by the attorney for the State to the defendant and his attorney. Provision may be made for appearances for such purposes in an order by the court admitting the defendant to bail or providing for his release.

(3) *Definition.* For purposes of this Rule, a defendant is a person against whom a criminal pleading has been filed.

(b) Notice of Alibi. No less than ten days before the date set for trial, the attorney for the State may serve upon the defendant or his attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the State proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served, and if the defendant intends to rely on the defense of alibi, not more than five days after service of such demand, he shall serve upon the attorney for the State and file a notice of alibi which states the place which the defendant claims to have been at the time stated in the demand and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Within five days thereafter, the attorney for the State shall file and serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the time and place stated in the demand.

If the defendant fails to serve and file a notice of alibi after service of a demand, the court may take appropriate action. If the attorney for the State fails to serve and file a notice of witnesses, the court shall order compliance pursuant to Rule 16(c)(1). The fact that a witness's name is on a notice furnished under this subdivision and that he is not called shall not be commented upon at trial.

(c) Reports of Examinations and Tests. Upon motion of the attorney for the State, the court may order a defendant to permit the attorney for the State to inspect and copy or photograph any reports or results of physical or mental examinations or of scientific tests, experiments, or comparisons, or any other reports or statements of experts which are within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding. In

ordering such discovery, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of defendant's attorney.

(d) Documents and Tangible Objects. Upon motion by the attorney for the State, the court may order a defendant to permit the attorney for the State to inspect and copy or photograph or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding.

(e) Expert Witnesses. Upon motion of the attorney for the State, the court may order a defendant to supply the names and addresses of the expert witnesses whom the defendant intends to call in any proceeding. If the expert witness has not prepared a report of examination or tests, the court may order that the expert prepare and the defendant serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

[Added effective January 3, 1978; amended effective February 1, 1983; February 15, 1986.]

RULE 17. SUBPOENA

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court or by a member of the Maine Bar. 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 place and during the time period specified therein. The time period shall not exceed the period covered by the trial list scheduling the case. The attorney for the subpoenaing party shall make arrangements to minimize the burden on the subpoenaed person. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a member of the bar requesting it, who shall fill in the blanks before it is served.

(b) Indigent Defendants. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to subpoena an in-state witness without payment of the witness fee, mileage and cost of service of the subpoena. Such fees and costs shall be paid out of Judicial Department funds. A request to the Sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

A defendant who is financially unable to pay the fees and costs to subpoena an out-of-state witness may move ex parte for an order dispensing with payment of fees and costs. The court shall grant the

AUG 23 1988

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August 22, 1988

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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 President Titus of our Bar Association regarding the above matter, was forwarded to me for handling as Chairman of our Criminal Law Section Council.

As I understand your inquiry, I enclose herewith certain materials which should prove very interesting to you, specifically the decision of Brady v. Maryland which we now refer to as Brady Material, seems to be applicable to your particular question as well as the Jencks Act Materials, which statute was precipitated after the famous Jencks Decision and the materials that are included with this letter, spell out the various things that the goverment is required to do and when.

Further, our Court of Appeals has recently adopted rules which set forth various discovery required in criminal proceedings both in our District Court, and in our Circuit Court, which require certain disclosure by the State both without request and upon request; a copy of those rules and materials are attached hereto for your advisement.

I trust the enclosed documentation satisfies your inquiry and if you need anything further, please do not hesitate to contact me.

Very truly yours,

J. Harrison Phillips, III
Chairman

JHP,III/sds
Enclosures

cc: Roger W. Titus, Esquire
President, Maryland State Bar Association

William C. Brennan, Jr., Esquire
Secretary, Criminal Law Section Council

(i) JOINT DEFENDANTS

When persons are jointly tried, the court, for good cause shown, may refuse to permit the use at trial of a deposition taken at the instance of one defendant over the objection of any other defendant.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former Rule 740 a and j.
Section (c) is derived from former Rule 740 c.
Section (d) is derived from former Rule 740 d.
Section (e) is derived from former Rule 740 e.
Section (f) is derived from former Rule 740 f.
Section (g) is derived from former Rule 740 g.
Section (h) is derived from former Rule 740 h.
Section (i) is derived from former Rule 740 i.

RULE 4-262. DISCOVERY IN DISTRICT COURT

(a) SCOPE

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and shall be as follows:

(1) The State's Attorney shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged.

(2) Upon request of the defendant and the State's Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at a hearing, other than a preliminary hearing, or trial, and (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

(3) Upon request of the State the defendant shall permit any discovery or inspection specified in subsection (d)(1) of Rule 4-263.

Committee note: This Rule is not intended to limit the constitutional requirement of disclosure by the State. See Brady v. State, *226 Md. 422, 174 A.2d 167 (1961), aff'd. 373 U.S. 83 (1963).*

(b) PROCEDURE

The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

(c) OBLIGATIONS OF THE STATE'S ATTORNEY

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

Source: This Rule is new.

RULE 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

(a) DISCLOSURE WITHOUT REQUEST

Without the necessity of a request, the State's Attorney shall furnish to the defendant:

(1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged;

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

(b) DISCLOSURE UPON REQUEST

Upon request of the defendant, the State's Attorney shall:

(1) Witnesses

Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;

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(2) Statements of the Defendant

As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(3) Statements of Codefendants

As to all statements made by a codefendant to a State agent which the State intends to use at a joint hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents, recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

(6) Property of the Defendant

Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

(c) MATTERS NOT SUBJECT TO DISCOVERY BY THE DEFENDANT

This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant and the State's Attorney does not intend to call the informant as a witness, or

(3) Any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.

(d) DISCOVERY BY THE STATE

Upon the Request of the State, the defendant shall:

(1) As to the Person of the Defendant

Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination;

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

Upon designation by the State of the time, place, and date of the alleged occurrence, furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

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(e) TIME FOR DISCOVERY

The State's Attorney shall make disclosure pursuant to section (a) of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

(f) MOTION TO COMPEL DISCOVERY

If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(g) OBLIGATIONS OF STATE'S ATTORNEY

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

(h) CONTINUING DUTY TO DISCLOSE

A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

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(i) PROTECTIVE ORDERS

On motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 741 a 1 and 2.
Section (b) is derived from former Rule 741 b.
Section (c) is derived from former Rule 741 c.
Section (d) is derived from former Rule 741 d.
Section (e) is derived from former Rule 741 e 1.
Section (f) is derived from former Rule 741 e 2.
Section (g) is derived from former Rule 741 a 3.
Section (h) is derived from former Rule 741 f.
Section (i) is derived from former Rule 741 g.

RULE 4-264. SUBPOENA FOR TANGIBLE EVIDENCE BEFORE TRIAL IN CIRCUIT COURT

On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. Any response to the motion shall be filed within five days.

Source: This Rule is derived from former Rule 742 a.

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MBA

20 WEST STREET
BOSTON, MASSACHUSETTS 02111
(617) 542-3602

Committee on Professional Ethics

217

July 13, 1988 JUL 15 1988

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

Dear Mr. Proudfoot:

As Staff Liaison to the Committee on Professional Ethics, I have been asked to respond to your letter of June 10, 1988 to Mr. Thomas E. Maffei. I apologize for the delay in responding. I hope that in sending this via Federal Express you will receive the imformation in time.

The ethics rules used in Massachusetts are referred to as Rule 3:07 or 3:08 (the latter pertains to prosecutorial functions) of the Supreme Judical Court. I've enclosed a copy of these rules. Kindly refer to Disciplinary Rule (DR) 7-103(B) on page 241. This rule appears directly on point. However there are other related, though less direct, rules such as DR 1-102 A(1) and (2); DR 1-103 (B); DR 7-101(A)(2); DR 7-102(A)(3) and (4) and (5) and (6).

The Massachusetts Bar Association is a voluntary association and does not have governmental authority to interpret or enforce these rules. This is a function of the Board of Bar Overseers. You may wish to speak to a member of its legal staff to see what if any related reported cases may be of assistance to you. The address and phone number is:

Board of Bar Overseers
11 Beacon Street
Boston, MA 02108
(617) 720-0700

I have researched the advisory opinions of the MBA's Committee on Professional Ethics. There are no opinions which are related to your inquiry. You may wish to research the rules and opinions of other jurisdictions in the United States. A helpful resource for this is the ABA/BNA's three volume set, "Lawyers Manual on Professional Conduct". The American Bar Association's (ABA) phone number is (312) 988-5000.

I hope this is helpful. Please contact me if I may be of further assistance.

Sincerely,

Dorothea M. Boniello

Dorothea M. Boniello, Esquire
Staff Liaison
Committee on Professional Ethics

DMB:eao

cc: Thomas Maffei, President- Elect
Kay Paine, Executive Director

rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(7) Nothing in this rule shall be deemed to modify, abrogate, or reduce the attorney-client privilege or any comparable privilege or relationship, whether statutory or deriving from the common law.

Amended, effective Jan. 29, 1987.

RULE 3:07. CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW

(1) The practice of law by members of the Massachusetts Bar shall be regulated by the Canons of Ethics and Disciplinary Rules attached hereto and incorporated by reference herein.

(2) The Ethical Considerations as appearing in the American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics" (1970) are not adopted as a rule of this court, but those Ethical Considerations form a body of principles upon which the Canons of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted.*

(3) This rule shall take effect on October 2, 1972, and shall apply only to matters which occur on or after said date.

* The within canons and rules are based on but are not identical to the American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics" (1970).

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

DISCIPLINARY RULES

DR 1-101. Maintaining Integrity and Competence of the Legal Profession

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Reserved for future use.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103. Disclosure of Information to Authorities

(A) Reserved for future use.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

DISCIPLINARY RULES

DR 2-101. Publicity and Advertising

(A) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, knowingly use or participate in the use of any form of public communication containing a deceptive statement or claim.

(B) Any public communication for the purpose of publicity or advertising shall contain the name of the lawyer, law firm, law partnership, professional corporation, or group of lawyers responsible for the communication.

Amended March 24, 1983, effective July 1, 1983.

ANNOUNCEMENT CONCERNING 1983 AMENDMENT OF SUPREME JUDICIAL COURT RULE 3:07, DR 2-101 ON LAWYER ADVERTISING

On June 21, 1982, the Massachusetts Bar Association filed a petition to amend Supreme Judicial Court Rule 3:07, Disciplinary Rule 2-101 concerning lawyer advertising. In the August 2, 1982 issue of Lawyers Weekly, the Court invited comments, before October 1, 1982, by interested parties.

The Court received briefs and comments from various parties and organizations concerning the proposed amendments. The Justices express their appreciation for the efforts of the Massachusetts Bar Association Lawyer Advertising Task Force and to the various parties who have submitted their comments and briefs. The Justices have given careful consideration to the views expressed.

The Massachusetts Bar Association petition proposes adding new subsections (B), (C), (D), (E),

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

DISCIPLINARY RULES

DR 6-101. Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR 6-102. Limiting Liability to Client

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

DISCIPLINARY RULES

DR 7-101. Representing a Client Zealously

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client Within the Bounds of the Law

(A) In his representation of a client, a lawyer shall not:

(1) File 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.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation of preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104. Communicating with One of Adverse Interest

(A) During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, 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.

DR 7-105. Threatening Criminal Prosecution

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-106. Trial Conduct

(A) A lawyer shall not disregard or advise his client to 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.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar on a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107. Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall

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MASSACHUSETTS PRACTICE

Volume 30A

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Criminal Practice and Procedure

SECOND EDITION

1987 Pocket Part

By

KENT B. SMITH
Associate Justice, Massachusetts Appeals Court

Sections 1371 to End
TABLES–INDEX

Replacing prior Pocket Part in back of Volume

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1987

C. DISCOVERY OF EXCULPATORY EVIDENCE

1. INTRODUCTION

§ 1382. Introduction

1. United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal. Rptr. 637 (1985); Com. v. Wilder, 18 Mass. App.Ct. 782, 471 N.E.2d 118 (1984); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Cinelli, 389 Mass. 197, 449 N.E.2d 1207 (1983), certiorari denied 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983).

2. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

4. Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985).

§ 1383. Definition of Exculpatory Evidence

1. Com. v. Champagne, 399 Mass. 80, 503 N.E.2d 7 (1987); Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987).

2. Com. v. Walker, 392 Mass. 152, 466 N.E.2d 71 (1984). *Walker* points out that such evidence must be admissible. Also see Com. v. Cinelli, 389 Mass. 197, 449 N.E.2d 1207 (1983), certiorari denied 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983). In *Cinelli*, the Court held that an "anonymous tip" file is not admissible. Also see United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

3. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985). Com. v. Bryant, 390 Mass. 729, 459 N.E.2d 792 (1984).

4. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

§ 1384. Definition of Exculpatory Evidence—Nondisclosure of Impeaching Evidence

1. United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986).

§ 1385. The Prosecutor's Duty to Disclose

1. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

4. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986).

5. Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984).

§ 1386. The Prosecutor's Duty to Disclose—The Importance of a Specific Request

1. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.

1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

2. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir. 1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

3. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

4. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984).

5. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984). United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

6. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

2. THE RULE AND EXCULPATORY EVIDENCE

§ 1388. Evidence Must Be in Possession, Custody, or Control of Prosecutor

If the material is in the hands of the Federal authorities, the prosecutor may have the burden of securing Federal cooperation in order to have the defendant secure the material.[3,5]

Factors that are important in determining whether the prosecutor is obligated to seek requested exculpatory evidence from the Federal authorities include: the potential unfairness to the defendant, the defendant's lack of access to the evidence, the burden on the prosecutor of obtaining the evidence, and the degree of cooperation between the State and Federal authorities, both in general and in the particular case.[3,10]

Due process does not require the police to preserve breath samples of suspected drunk drivers in order for the results of the breath-analysis tests to be admissible in criminal prosecutions.[6]

1. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985); Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984).

2. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

3. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985); Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984).

3.5 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Liebman, 379 Mass. 671, 400 N.E.2d 842 (1980), appeal after remand 388 Mass. 483, 446 N.E.2d 714 (1983).

3.10 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986).

4. Com v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985).

6. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984). Also see Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984); Com. v. Nicholson, 20 Mass.App.Ct. 9, 477 N.E.2d 1038 (1985), review denied 481 N.E.2d 197 (1985).

3. *BRADY* SITUATIONS

§ 1389. Introduction

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

§ 1390. Loss or Destruction of Evidence is Not a *Brady* Situation

However, it has been held that the denial of the defendant's suppression motion was error where the Commonwealth's testing of the defendant's boots destroyed them so that the defendant's experts could not test them, and the defendant showed that he was prejudiced.[5]

1. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986).

2. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986).

3. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986); United States v. Kincaid, 712 F.2d 1 (1st Cir.1983).

4. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986); United States v. Kincaid, 712 F.2d 1 (1st Cir.1983); In Com. v. Gabbidon, 17 Mass.App.Ct. 525, 459 N.E.2d 1263 (1984), review denied 391 Mass. 1104, 462 N.E.2d 1374 (1984) the defendant failed to show that the Commonwealth was responsible for the loss.

5. Com. v. Gliniewicz, 398 Mass. 744, 500 N.E.2d 1324 (1986).

§ 1391. Knowingly Use of False Testimony

1. Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied ___ U.S. ___, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985). In *McLeod* the Court stated that simply because a witness alters some portion of his testimony at the time of trial is not a sufficient reason to conclude that the new testimony is false, or that the Commonwealth knew or had reason to know that it was false.

4. Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied ___ U.S. ___, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985).

§ 1392. Prosecution Must Reveal Any Agreements With Key Witness

1. Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. Fuller, 394 Mass. 251, 475 N.E.2d 381 (1985). United States v Drougas, 748 F.2d 8 (1st Cir.1984). In *Fuller*, the Court stated that evidence that money had been given to the defendant's mother by the Commonwealth to permit her to testify, and that other witnesses who feared retribution, were given money by the Commonwealth to fly to Florida after the trial, did not constitute exculpatory evidence.

2. Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985).

§ 1393. Standards of Materiality When Perjurious Testimony Is Used

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986). In *Bagley* the court stated that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

4. DELAYED DISCLOSURE DURING TRIAL

§ 1394. Delayed Disclosure of Exculpatory Evidence

1. Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Costello, 392 Mass. 393, 467 N.E.2d 811 (1984); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

2. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied ___ U.S. ___, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984).

3. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984).

4. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Cannavo, 16 Mass.App.Ct. 977, 452 N.E.2d 1175 (1983).

5. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985).

6. Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984); Com. v. Cannavo, 16 Mass.App.Ct. 977, 452 N.E.2d 1175 (1983).

7. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied ___ U.S. ___, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984). Also see United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

8. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied ___ U.S. ___, 106 S.Ct. 248, 88

L.Ed.2d 256 (1985); Com. v. Key, 19 Mass. App.Ct. 224, 457 N.E.2d 298 (1983); United States v. Drougas, 748 F.2d 8 (1st Cir.1984); United States v. Ayres, 725 F.2d 806 (1st Cir.1984), certiorari denied 469 U.S. 817, 105 S.Ct. 84, 83 L.Ed.2d 31 (1984).

5. VIOLATIONS OF *BRADY* AND THE REVIEWING COURT

§ 1395. Basic Criteria for a *Brady* Violation

On a motion for a new trial in regard to exculpatory evidence, it is inappropriate for a Judge to assume the role of counsel and to determine whether and to what use particular evidence should have been introduced.[4,5]

4. United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

4.5 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986).

§ 1396. Defendant Must Show That Evidence Was Suppressed or Prosecution Failed to Disclose It

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

2. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

§ 1397. Defendant Must Show Suppressed Evidence Was Exculpatory and Material

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Doherty, 394 Mass. 341, 476 N.E.2d 169 (1985); Com. v. Gabbidon, 17 Mass.App.Ct. 525, 459 N.E.2d 1263 (1984), review denied 391 Mass. 1104, 462 N.E.2d 1374 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); United States v. Drougas, 748 F.2d 8 (1st Cir.1984); United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

2. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

3. Com. v. Fuller, 394 Mass. 251, 475 N.E.2d 381 (1985); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

4. United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

§ 1398. The Different Levels of Materiality

1. Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984).

4. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

5. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

6. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983). Also see Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

8. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

9. Com. v. Doherty, 394 Mass. 341, 476 N.E.2d 169 (1985); Com. v. Soucy, 17 Mass. App.Ct. 471, 459 N.E.2d 827 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

D. DISCRETIONARY DISCOVERY

§ 1399. Introduction

1. Com. v. Cronk, 396 Mass. 194, 484 N.E.2d 1330 (1985).

§ 1400. Photographs

1. See Com. v. Farnkoff, 16 Mass. App.Ct. 433, 452 N.E.2d 249 (1983), review denied 393 Mass. 1103, 454 N.E.2d 1276 (1983) where the Court stated that the words "inventory of physical evidence" does not mean identification materials.

§ 1401. Photographs Used for Identification

1. Com. v. Purvis, 18 Mass.App.Ct. 933, 465 N.E.2d 1232 (1984), review denied 393 Mass. 1101, 469 N.E.2d 830 (1984).

§ 1402. Names and Addresses of Prospective Witnesses

1. Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986).

2. Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986).

4. Com. v. Gonsalves, 23 Mass.App.Ct. 184, 499 N.E.2d 1229 (1986); Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986); Com. v. Pope, 19 Mass.App.Ct. 627, 476 N.E.2d 969 (1985), review denied 480 N.E.2d 24 (1985).

§ 1405. Criminal Records of Prospective Witnesses

1. Com. v. Sullivan, 17 Mass.App.Ct. 981, 459 N.E.2d 117 (1984).

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RULE 13. PRETRIAL MOTIONS

(Applicable to District Court and Superior Court)

(a) In General

(1) *Requirement of Writing and Signature; Waiver.* A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule. Notwithstanding the foregoing, the failure of the defendant to file pretrial motions in a District Court jury-waived session, or if filed, the denial thereof, shall not constitute a waiver of the right to file such motions upon an appeal to a District Court jury session.

(2) *Grounds and Affidavit.* A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) *Service and Notice.* A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) *Memoranda of Law.* The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) *Renewal.* Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars

(1) *Motion.* Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the judge upon his own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) *Amendment.* If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing; Hearing on Motions

(1) *District Court*

(A) No Conference Ordered.

(i) Filing. A pretrial motion shall be filed and marked up for hearing not less than five days prior to trial or within such other time as the court may order. The judge for cause shown may entertain a pretrial motion at any time before trial.

(ii) Scheduling Hearings on Motions. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, the moving party may request that the clerk mark up the motion for hearing at that time. If so requested, the clerk shall mark up the motion for hearing at that time unless the judge otherwise orders.

(B) Conference Ordered. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. A pretrial motion shall be filed and heard at the time set by the judge pursuant to Rule 11(b)(2) for the filing of the conference report or at such other time as the judge may allow.

(C) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.

(2) *Superior Court; Jury Sessions in District Court*

(A) Filing; Hearing on Motions. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. A pretrial motion shall be filed within seven days after the date set for the filing of the pretrial conference report pursuant to Rule 11(a)(2) or at such other time as the judge or special magistrate may allow. Within seven days after a pretrial motion is filed, the clerk shall schedule a hearing thereon, but the judge or special magistrate for cause shown may entertain such motion at any time before trial.

(B) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.

Reporter's Notes

This rule establishes the form of, and manner for the presentation of, pretrial motions. Not every motion that is made in a pretrial posture comes within the scope of the rule. For example, discovery motions by the prosecution are governed by other time limits under Mass.R.Crim.P. 14(e). Where, however, no other rules or statutes provide otherwise, pretrial motions should be made in conformity with the provisions of this rule.

The primary sources of this rule are Rule 3.190 of the Florida Rules of Criminal Procedure (1974) and the existing statutory law of the Commonwealth. The rule has an abbreviated counterpart in Rule 47 of the Federal Rules of Criminal Procedure.

Subdivision (a). This subdivision is derived in large part from the Florida Rule, but essentially restates existing practice and is supported in large part by Rule 9 of the Superior Court Rules (1974). The references to pretrial motions are to include pleadings in response to a motion where such exist.

Subdivision (a)(1) recognizes that, under G.L. c. 218, § 26A (St.1978, c. 478, § 188) and § 27A (St. 1978, c. 478, § 189), the appeal from a conviction in a District Court jury-waived session to a jury session is "an unfettered and unqualified right," Costarelli v. Commonwealth, [374 Mass. 677, 373 N.E.2d 1183] (1978) and that "on the exercise of that right, the [first] District Court judgment is vacated." *Costarelli v. Commonwealth, supra*; Enbinder v. Commonwealth, 368 Mass. 214, 217-18, [330 N.E.2d 846] cert. denied, [96 S.Ct. 467] 423 U.S. 1024 [46 L.Ed.2d 398] (1975). Former G.L. c. 277, § 47A (as amended, St.1978, c. 478, § 298) provided that any motion filed in a jury-waived session could be filed in the jury session within ten days after the entry of the appeal; this subdivision specifies no time limit.

Subdivision (a)(2) is taken from Rules 9 and 61 of the Superior Court Rules (1974). The requirement of an affidavit in support of factual assertions is supported additionally by former G.L. c. 277, § 74. (R.S. [1836] c. 136, § 31).

The reference in subdivision (a)(3) to opposing affidavits is to apply only if there are opposing affidavits. It is not intended to be read to require them.

Subdivision (a)(4) is taken from Rule 9 of the Superior Court Rules (1974).

Subdivision (a)(5) provides that although a motion has been once heard and denied, it may be renewed if "substantial justice requires" that action. This is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed. See (a)(2), *supra*.

Subdivision (b). Former G.L. c. 277, § 40 (St. 1887, c. 436, § 2) permitted the court to require the prosecution to file particulars in order to more fully apprise the defendant or the court of the nature of the charges. This subdivision incorporates that practice into this rule.

The distinction which was drawn in the statute between particulars ordered by a court with jurisdiction over the offense charged and those ordered by a court without jurisdiction of the offense charged has not been retained in this rule. However, the judge may in his discretion order whatever particulars he deems necessary under the circumstances, and this would permit him to order a more complete statement of particulars where it is required in the interests of justice.

If the specifications supplied in conformity with the court's order are irrelevant or prejudicial, defense counsel must file a motion to strike those deemed improper. 30 MASS. PRACTICE SERIES (Smith) § 628 (1970).

Although the rule requires motions for bills of particulars to be made before trial, it is not intended to be construed so as to limit the inherent power of the court in an appropriate situation to order a bill at any time.

Subdivision (c). This is a restatement of former G.L. c. 277, § 47A (St.1965, c. 617, § 1). It should be noted that G.L. c. 277, § 47A abolished at least in name all the other pleas, demurrers, challenges, and motions to quash and effectively consolidated all of them under the general heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law of the Commonwealth governing such pleas. Section 47A (as amended) now provides for relief from the waiver of defenses not timely raised, upon a showing of cause:

> In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure. The failure to raise any such defense or objection by motion prior to trial shall constitute a waiver thereof, but a judge or special magistrate may, for cause shown, grant relief from such waiver. A defense or objection based upon a failure to show jurisdiction in the court or to charge an offense may be raised by motion to dismiss prior to trial, but shall be noticed by the court at any time.

"Cause" should be read to include grounds of which the moving party was not previously aware.

Subdivision (d). The time limits provided in this rule for the filing of pretrial motions are intended to set the norm. Ample opportunity is left for the court to exercise its discretion in the interest of justice, however, by the inclusion of the "for cause shown" provision in subdivisions (d)(1)(A)(i) and (d)(2)(A). "Interested persons," as used in this subdivision, is to include the parties, co-defendants, if any, and witnesses whose depositions are to be taken. Mass.R. Crim.P. 2(b)(8).

Subdivisions (d)(1)(B) and (d)(2)(A) make explicit what is already implicit in Mass.R.Crim.P. 11, namely, that the only pretrial motions which may be filed are those as to the substance of which counsel were unable to agree at the pretrial conference. By requiring that the substance of any pretrial motions a party intends to file be discussed with the adverse party at the pretrial conference, these subdivisions institute a

rule of judicial economy. It is contemplated that having parties compare all the motions they intend to file before trial at the pretrial conference will make the conference more productive in terms of eliminating many of the "boiler plate" motions presently filed in criminal actions, and, therefore, lead to a more productive utilization of the court's time.

If a conflict between this subdivision and the general filing and service of papers provisions of Rule 32 should arise, this subdivision is controlling as to motions to which it is applicable.

Cross References

Controlled substances, prosecutions, bill of particulars, see M.G.L.A. c. 277, § 38.
Defenses or objections, defects in institution of prosecution or in indictment or complaint, see M.G.L.A. c. 277, § 47A.
Dismissal of indictment based upon secondary evidence, see Rule 4.
Double jeopardy, see M.G.L.A. c. 263, § 7.
Immaterial defects in indictment, see M.G.L.A. c. 277, § 34.
Interlocutory appeals, dismissal of indictment or suppression of evidence, see M.G.L.A. c. 278, § 28E.
Special magistrates, see Rule 47.
Sufficiency of indictment, see M.G.L.A. c. 277, § 34.

Library References

Criminal Law ⟹632.
Indictment and Information ⟹121.1 to 121.5, 136 et seq.
C.J.S. Criminal Law § 929.
C.J.S. Indictments and Informations §§ 156, 195.
30 Mass.Prac. Series (Smith) § 1271 et seq.

RULE 14. PRETRIAL DISCOVERY

(Applicable to Trials in the District Court and Superior Court)

(a) Procedures for Discovery

(1) *Mandatory Discovery for the Defendant.* Upon motion of a defendant made pursuant to Rule 13, the judge shall issue an order of discovery when the requested information is relevant and consists of:

(A) any written or recorded statements made by the defendant within the possession, custody, or control of the prosecutor, or

(B) the written or recorded statements of a person who has testified before a grand jury; or

(C) any facts of an exculpatory nature within the possession, custody, or control of the prosecutor.

The discovery of any grand jury minutes ordered pursuant to this subdivision shall be limited to those which have been recorded and stenographically transcribed. The judge may in his discretion order grand jury minutes to be transcribed.

(2) *Discretionary Discovery.* Upon motion of a defendant made pursuant to Rule 13, the judge may issue an order of discovery requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control. The judge may also order the production by the Commonwealth of the names and addresses of its prospective witnesses and the production by the probation department of the record of prior convictions of any such witness.

(3) *Reciprocal Discovery*

(A) If the judge grants discovery or inspection to a defendant pursuant to subdivision (a)(2) of this rule, the judge may upon motion by the Commonwealth condition his order by requiring the defendant to permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(2) which the defendant intends to use at trial, including the names, addresses, and statements of those persons whom the defendant intends to use as witnesses at trial.

(B) Notwithstanding the defendant's failure to file a motion for discretionary discovery under subdivision (a)(2) of this rule, the Commonwealth may within the time allowed by subdivision (e) of this rule file a motion for delivery of those materials discoverable pursuant to subdivision (a)(3)(A) of this rule. The judge shall condition his order by requiring that the Commonwealth make those materials discoverable under subdivision (a)(2) of this rule available for inspection and copying by the defendant.

(4) *Continuing Duty.* If either party subsequently learns of additional material which he would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, he shall promptly notify the other party of his acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) *Work Product.* This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or his attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or his legal staff.

(6) *Protective Orders.* Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant.

(7) *Amendment of Discovery Orders.* Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(b) Special Procedures

(1) *Notice of Alibi*

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (e) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within the time allowed by subdivision (e) of this rule, the Commonwealth shall serve upon the defendant or his attorney a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or his attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) *Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect*

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions by Rule 13 or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his mental condition at the time of the alleged crime or as to his criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his mental condition at the time of or as to his criminal responsibility for the alleged crime will be relied upon by expert witnesses of the defendant, the judge, upon his own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecutor or anyone acting on his behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, informa-

tion, or evidence which is based upon statements of the defendant as to his mental condition at the time of or his criminal responsibility for the alleged crime or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify in his own behalf or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his mental condition at the time of or as to his criminal responsibility for the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the judge may, if feasible at such time as he deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the judge may prescribe such remedies as he deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defendant on the issue of his mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) *Notice of Other Defenses.* If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, he shall, within the time provided for the filing of pretrial motions by Rule 13 or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued pursuant to this rule, the judge may make a further order for discovery, grant a continuance, or enter such other order as he deems just under the circumstances.

(2) *Exclusion of Evidence.* The judge may in his discretion exclude evidence for noncompliance with a discovery order issued pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this ule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, signed or otherwise adopted or approved by such person; or

(2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

(e) Time Requirements

(1) *District Court*

(A) Discovery by the Prosecution. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (a)(3)(B) of this rule shall be filed and heard at a time set by the judge. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.

(B) Discovery of Alibi Defense. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be filed and heard at a time set by the judge, that time to be not less than five days before trial. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.

The notice filed by the defendant in response to the motion shall be served upon the Commonwealth not more than two days after motion or at such later time as the judge may allow.

(2) *Superior Court*

(A) Discovery by the Prosecution. The Commonwealth may, within seven days after the expiration of the time allowed for the filing of pretrial motions under Rule 13 or within such other time as the judge may allow, make a motion for discovery under subdivision (a)(3)(B) of this rule.

(B) Discovery of Alibi Defense. The motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be made not less than twenty-one days prior to trial or within such other time as the judge may allow. The notice filed by the defendant in response shall be served upon the Commonwealth not more than seven days after filing of the motion or at such other time as the judge may allow. The notice by the Commonwealth in response to the defendant's notice shall be served upon the defendant within seven days after receipt of the defendant's notice or within such other time as the judge may allow.

Reporter's Notes

The substance of this rule is drawn from Fed.R. Crim.P. 12.1, 12.2 and 16; N.J.R.Crim.P. 3:13-3 (1972); and Fla.R.Crim.P. 3.220 (1975). See ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970); Rules of Criminal Procedure (U.L.A.) rules 421-23, 434-38 (1974); National Advisory Commission on Criminal Justice Standards & Goals, *Courts*, Standard 4.9 (1973); President's Commission on Law Enforcement & Administration of Justice, Task Force Report: *The Courts*, 41-44 (1967).

This rule is based on the concept of reciprocity and has as its aim full pretrial disclosure of items normally within the range of discovery. With the exceptions of mandatory discovery and those cases where a protective order is appropriate, discovery by one side will open the door to full discovery by the other side. It is emphasized, however, that the formal provisions of this rule are brought into effect only when discovery is initiated through a motion filed under this rule for court-ordered disclosure. The promulgation of this rule is not intended to discourage those disclosures which may take place at a pretrial conference under Mass.R.Crim.P. 11 or whatever other informal discovery may be agreed upon by the parties.

Subdivision (a). This owes some allegiance to Federal Rule 16 but differs in that much of what is mandatory under 16(a) is discretionary under this rule. Subdivision (a)(1)(A) has a counterpart in both the federal rule and New Jersey Rule 3:13-3 (1972). Subdivision (a)(1)(B) creates a discovery classification not covered specifically by Fed.R.Crim.P. 16. Federal rule 16 provides only for a disclosure of the recorded testimony of the defendant before a grand jury, whereas (1)(B) provides that the court shall order the disclosure of the testimony of any witness before a grand jury, where such testimony is relevant.

Subdivisions (a)(1) and (a)(2) of this rule are concerned with the defendant's discovery rights. To a very large extent, the scope of disclosure called for by these subdivisions is a codification of prior Massachusetts practice. The defendant's discovery rights are considered under two categories: mandatory, (a)(1), and discretionary, (a)(2). Neither category grants the defendant an absolute right to the materials contained therein, but the former creates a presumption in favor of the discovery of certain information. The material specified in the mandatory category is, upon the defendant's motion, to be produced unless the prosecutor can persuade the court that disclosure is not in the interest of justice and that a protective order should be granted. Those items which, in the interests of fairness to the defendant, are usually disclosed in the normal course of the proceedings have been included in the category of mandatory discovery. All other discovery is within the discretion of the court.

The purpose in having these categories is twofold. First and most importantly, full pretrial discovery is encouraged. The defendant is given as of right only those materials that either the Constitution or fairness demands. In order for the defendant to secure other information or materials from the prosecution, he must be willing, under the principle of reciprocity established by subdivision (a)(3), to divulge information contained in his files. To expand the scope of mandatory discovery for the defense would be to remove the impetus for full reciprocal discovery. The intent is not to limit what is obtainable by the defendant, but to increase what will be discovered by both sides. Secondly, this rule promotes judicial efficiency since the need for hearings upon motions for mandatory discovery will be dispensed with except in unusual circumstances where a protective order is sought.

(a)(1)(A). This section expands to a limited degree the scope of discovery available to the defendant under prior Massachusetts law. While under former practice, statements made by a defendant were usually disclosed to that defendant by the prosecution, 30 MASS. PRACTICE SERIES (Smith) § 613 (1970, Supp.1978), this was not a required procedure. Commonwealth v. Chapin, 333 Mass. 610 [132 N.E.2d 404] (1956). However, the United States Supreme Court, in Cicenia v. LaGay, [78 S.Ct. 1297] 357 U.S. 504 [2 L.Ed.2d 1523] (1958), stated that granting the defendant discovery of his own statements was the better practice even though this could not be found to be a constitutional mandate. While the defendant has no absolute right to discover his own statements, this rule is in conformity with the general practice in Massachusetts, the federal system, and other states. Disclosure is generally compelled only as to those statements of a defendant which have been reduced to writing. *See* Commonwealth v. Nichols, 4 Mass.App. [606, 356 N.E.2d 464] (1976); Commonwealth v. Clark, 3 Mass.App. 481, 485 [334 N.E.2d 68] (1975); Commonwealth v. Colella, 2 Mass.App. 706, 709 [319 N.E.2d 923] (1975).

(a)(1)(B). The rule had developed in both the Massachusetts and federal courts that pretrial discovery of grand jury minutes was to be allowed when the defendant showed a "particularized need" that the release of a part or all of the minutes would serve. Dennis v. United States, [86 S.Ct. 1840] 384 U.S. 855 [16 L.Ed.2d 973] (1966); Commonwealth v. Cook, 351 Mass. 231 [218 N.E.2d 393] (1966), cert. denied, [87 S.Ct. 529] 385 U.S. 981 [17 L.Ed.2d 443]. The Supreme Judicial Court in Commonwealth v. Stewart, 365 Mass. 99 [309 N.E.2d 470] (1974), announced a new rule mandating that on the defendant's motion, the court will routinely order the Commonwealth to supply defense counsel . . . with the grand jury testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial. The defense will not be required to show "particularized need."

Id. at 105-06. While the *Stewart* court spoke specifically to the issue of production of grand jury testimony for purposes of impeachment of witnesses at trial, see Mass.R.Crim.P. 23, the particularized need standard has since been eliminated as to other types of testimony and in other contexts. *E. g.*, Commonwealth v. Lewinsky, 367 Mass. 889, 901-03 [329 N.E.2d 738] (1975) (prior written statements of witnesses). *See* subdivision (a)(2), infra.

Superior Court Rule 63 (1974) mandates that stenographic notes of all testimony given before a grand jury shall be taken, but that transcripts thereof need

be furnished only as required by the prosecuting officer unless the court orders otherwise. It is within the judge's discretion under this subdivision to order the transcription of a stenographic record. *Compare* Commonwealth v. Pimental, 5 Mass.App. [463, 363 N.E.2d 1343] (1977) (no error in ordering trial to proceed despite Commonwealth's failure to comply with order to supply defendant with copy of grand jury minutes where minutes not transcribed).

Commonwealth v. Stewart, supra, required production of the grand jury testimony of "any person called as a Commonwealth witness." 365 Mass. 106. Thus the testimony of a grand jury witness who was not called as a witness at the trial was not subject to disclosure. Pursuant to this rule the court may compel production of the grand jury testimony of any person, whether or not the Commonwealth intends to call that person at trial. Further, delivery of the transcript of the grand jury witness' testimony—insofar as relevant—is to be in advance of trial within a time set by the judge, rather than "not later than the close of his direct testimony at trial" as required by *Stewart*. 365 Mass. at 106.

Although the relevant grand jury testimony should be routinely supplied by the Commonwealth when properly requested by the defendant, Commonwealth v. Shagoury, Mass.App.Adv.Sh. (1978) 927, 941 [6 Mass.App. 584, 380 N.E.2d 708] in order to obtain that testimony before trial the defendant must comply with the requirements of this rule. If he does not—or if the judge rules that the requested testimony is either not relevant or is to be the subject of a protective order—a motion for production under Mass.R.Crim.P. 23 must be made at the time the witness testifies on direct examination.

There is no requirement that the requested grand jury testimony have been given before the grand jury which returned the indictment against the defendant, Commonwealth v. Cavanaugh, 371 Mass. 46, 57-58 [353 N.E.2d 732] (1976), as long as that testimony is related to the witness' testimony (or prospective testimony) at trial. *See* Commonwealth v. Barnett, 371 Mass. 87, 94 [354 N.E.2d 879] (1976).

(a)(1)(C). This is an implementation of the constitutional requirement established in Brady v. Maryland, [83 S.Ct. 1194] 373 U.S. 83 [10 L.Ed.2d 215] (1963), 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 punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87. (emphasis supplied). *Accord* Moore v. Illinois, [98 S.Ct. 458] 408 U.S. 786, 794 [54 L.Ed.2d 424] (1972); Commonwealth v. Adrey, Mass.Adv.Sh. (1978) 3008, 3015 [376 Mass. 747, 383 N.E.2d 1110]; Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2094 [376 Mass. 1, 379 N.E.2d 560].

The term "exculpatory" within subdivision (a)(1)(C) is not intended to be technically construed as encompassing alibi or other complete proof of innocence, but as meaning evidence which tends to negate the guilt of the defendant or, stated affirmatively, supporting his innocence. Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977) cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977). *Accord* Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2095 n. 9 [376 Mass. 1, 379 N.E.2d 560]. The term thus comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's version of facts, calls into question a material (although not indispensable) element of the Commonwealth's version, or challenges the credibility of a key Commonwealth witness. *Commonwealth v. Ellison, supra*, at 2095.

To establish a violation of the rule of *Brady v. Maryland, supra*, as incorporated herein, the defendant must demonstrate upon review that evidence actually existed, Commonwealth v. Adams, Mass.Adv.Sh. (1978) 795, 807 [374 Mass. 733, 374 N.E.2d 576], that that evidence would have tended to exculpate him, Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977), cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977), and that the Commonwealth failed to disclose it upon proper request, Commonwealth v. Gilday, 367 Mass. 474, 487 [327 N.E.2d 851] (1975). *Accord* Commonwealth v. Adrey, Mass.Adv.Sh. (1978) 3008, 3015 [376 Mass. 747, 383 N.E.2d 1110].

It is preferred that a motion for disclosure under this subdivision be more than a general request for exculpatory evidence as the magnitude of the error in non-disclosure, is, in part, a function of the specificity of the motion. *Compare* Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2096-97 [376 Mass. 1, 379 N.E.2d 560] with Commonwealth v. Preston, 359 Mass. 368, 370-71 [268 N.E.2d 922] (1971) ("fishing expedition"); Commonwealth v. Meggs, 4 Mass.App. [773, 341 N.E.2d 699] (1976) (no pretrial motion); Commonwealth v. Clark, 3 Mass.App. 481, 485 [334 N.E.2d 68] (1975) ("general motion"); Commonwealth v. Colella, 2 Mass.App. 706, 708 [319 N.E.2d 923] (1974) ("very general motion"). In addition to preserving the issue of compliance with a disclosure order for appeal, specificity can operate to avoid appeals by directing the attention of the prosecutor to those particular materials which the defendant believes would be helpful. A prosecutor cannot be expected to appreciate the significance of every item of evidence in his possession to any possible defense which the defendant may assert. Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977) cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977). Assembly and disclosure of those materials—and thus the entire pretrial phase of the proceedings—is expedited by specific motions.

It should be noted that the Commonwealth should furnish the defendant with exculpatory evidence even absent a request if that evidence is highly material, in the sense that the evidence would raise a substantial probability that the result of the trial would be altered. *E.g.*, Commonwealth v. Stone, 366 Mass. 506, 510-11 [320 N.E.2d 888] (1974) and cases cited.

Subdivision (a)(2). This subdivision broadly parallels N.J.R. Crim.P. 3:13-3(a) (1972).

All discovery by the defendant not ordered pursuant to subdivision (a)(1) is discretionary with the trial

court in accordance with former Massachusetts practice. *E.g.*, Commonwealth v. Gibson, 357 Mass. 45, [255 N.E.2d 742] cert. denied, [91 S.Ct. 75] 400 U.S. 837 [27 L.Ed.2d 70] (1970) (no abuse of discretion in denying discovery of photographs used for identification procedures because defendant's request would have created an undue burden on the prosecution); Commonwealth v. Meggs, 4 Mass.App. [773, 341 N.E.2d 699] (1976); Commonwealth v. Clark, 3 Mass.App. 481, 484-85 [334 N.E.2d 68] (no record of preliminary view of photographs; no requirement to produce entire identification file). The difference from prior practice is that if the defendant's motion pursuant to this subdivision is granted, the prosecution will normally receive full discovery from the defendant. Subdivision (a)(3), *infra*.

There is no right to disclosure of a list of prospective Commonwealth witnesses except as to those who testified before a grand jury which returned an indictment charging a capital crime. Commonwealth v. Salerno, 356 Mass. 642, 648 [255 N.E.2d 318] (1970) and cases cited; Commonwealth v. Ventura, 294 Mass. 113, 119-20 [1 N.E.2d 30] (1936). Under this rule, the disclosure of witnesses' identities remains discretionary with the court, in consonance with prior Massachusetts practice. As along as the prosecution does not avail itself of discovery opportunities and does not bring into effect the reciprocal discovery provision of subdivision (a)(3), disclosure of witness' identities should be ordered only when the interests of justice are served. If a defendant has any connections with organized crime, or if for any other reason the court feels the defendant threatens a witness, disclosure should not be compelled. *See e.g.*, Commonwealth v. French, 357 Mass. 356, 399 [259 N.E.2d 195, 45 A.L.R.3d 1106] (1970). Similarly, if after a witness' identity has been disclosed, the court is advised that his safety is endangered, there is provision in Mass.R.Crim.P. 35 for the perpetuation of testimony. Once a witness' testimony is recorded, little reason remains for the defendant to attempt to intimidate him. Finally, subdivisions (a)(6) and (a)(7) provide specifically that the court can order information (including witnesses' names) to be disclosed only to defendant's counsel and not to the defendant himself. If, after an order or agreement to disclose the identity of witnesses has been entered or reached and the Commonwealth has complied therewith, it is determined that additional witnesses will be called, the defendant may, in the discretion of the court, be granted time within which to investigate and interview that witness. *See generally* Commonwealth v. Mains, [374 Mass. 733, 374 N.E.2d 576] (1978); Commonwealth v. Belmonte, 4 Mass.App. [506, 351 N.E.2d 559] (1976).

If a witness list is to be delivered to the defendant, the court may further order that the Commonwealth produce the records of prior convictions of those witnesses, under the direction of the court. Commonwealth v. Adams, [374 Mass. 722, 375 N.E.2d 681] (1978); Commonwealth v. Clark, 363 Mass. 467, 474 [295 N.E.2d 163] (1973). There is, however, no general pretrial entitlement to such records nor does the Commonwealth have an affirmative duty to collect and assemble them. Commonwealth v. Adams, *supra*; Commonwealth v. Clark, *supra*. *Accord* Commonwealth v. Pimental, 5 Mass.App. [463, 363 N.E.2d 1343] (1977); Commonwealth v. Colella, 2 Mass.App. 706, 708-09 [319 N.E.2d 923] (1974). Prior practice normally consisted of the Commonwealth's requesting copies of the witnesses' records of prior convictions from the State Department of Probation; under this rule, the judge may order the production of such records by that department. This may reveal with assurance only Massachusetts convictions; where known facts suggest that a witness has a record elsewhere, an inquiry as to out-of-state convictions may be a reasonable practice. Commonwealth v. Corradino, 368 Mass. 411, 422 [332 N.E.2d 907] (1975).

Although the Supreme Judicial Court intimates in Commonwealth v. Hall, 369 Mass. 715, 723-25, 728 [343 N.E.2d 388] (1976), that police reports are properly the object of pretrial disclosure, this rule intends that they are not generally discoverable in advance of trial, except to the extent that they contain "statements" of witnesses as defined in subdivision (d), *infra*. They are, of course, subject to disclosure under Mass.R.Crim.P. 23 if a police witness testifies therefrom. As to police reports in general, *see* Bougas v. Chief of Police of Lexington, 371 Mass. 59 [354 N.E.2d 872] (1976); Commonwealth v. Sheeran, 370 Mass. 82, 86 [345 N.E.2d 362] (1976) and cases cited; Commonwealth v. French, 357 Mass. 356, 399 [259 N.E.2d 195, 46 A.L.R.3d 1106] (1970) and cases cited.

Subdivision (a)(3). This subdivision derives from recent holdings of the Supreme Court relative to the rights of the prosecution to discover the defendant's case.

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either *by the prosecution* or by the defense.

United States v. Nixon, [94 S.Ct. 3090] 418 U.S. 683, 709 [41 L.Ed.2d 1039] (1973) (emphasis supplied). To this end, the prosecution can, in a proper case, call upon the power of the court to compel production of evidence which will facilitate full disclosure of all the relevant facts. United States v. Nobles, [95 S.Ct. 2160] 422 U.S. 225 [45 L.Ed.2d 141] (1975). *See* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]; Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191]; Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707 [372 Mass. 337, 361 N.E.2d 1289]; Commonwealth v. Lewinski, 367 Mass. 889, 903 n.10 [329 N.E.2d 738] (1975).

Subdivision (A) establishes the principle of reciprocity. If the defendant is granted discovery other than mandatory discovery, the court will usually require the defendant to make available from his files all constitutionally discoverable material. The primary constitutional restraint upon prosecutorial discovery is the fifth amendment which limits discovery from the defendant to evidence which he intends to introduce

at trial. Intention in this context is, of course, fluid as investigation and discovery progress and the defendant is subject to the continuing duty imposed by subdivision (a)(4), *infra*.

Subdivision (B) grants the prosecution the right to seek discovery without having to wait for the defendant first to move for discovery. The *Commonwealth's* motion is to be filed within such time as the court may allow in the District Court ([c][1][A], *infra*) and within 14 days after the conference report is filed in Superior Court ([c][2][A], *infra*), although the court may allow a later filing. *See generally* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647, 654-55 [377 Mass. 503, 386 N.E.2d 1262]. The last sentence gives effect to the constitutional mandate expressed in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973), that the defendant is to be given reciprocal discovery rights. This guarantees a defendant the right to full discovery (except in cases where a protective order is appropriate) whenever the Commonwealth is granted any discovery.

(a)(4). This is taken from Rule 3.220(f) of the Florida Rules of Criminal Procedure and has a counterpart in the Federal Rule, the New Jersey Rule and the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970).

(a)(5). Work product is protected under the federal rule and the ABA *Standards*, *supra*. The sanctity of a party's "work product" is a well recognized principle that was specifically approved by the Supreme Court relating to its application to discovery under the Federal Rules of Civil Procedure, Hickman v. Taylor, [67 S.Ct. 385] 329 U.S. 495 [91 L.Ed. 451] (1947). The principle has equal applicability to criminal discovery.

The definition of "work product" is drawn in part from Rules of Criminal Procedure (U.L.A.) rule 421(b)(1) (1974).

Subdivision (a)(6)-(7). All discovery under this rule is to some extent discretionary. If danger or abuse can be shown, discovery need not be granted. In some cases a court may require a defendant who wishes to avail himself of discovery to offer convincing proof that the discovery process will not be abused.

The power of the court to restrict the scope of otherwise permissible discovery is recognized in the Federal Rule, the New Jersey Rule, the Florida Rule, and the ABA *Standards*, *supra*.

Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person. The party or person opposing discovery has the burden of showing why the discovery of requested materials must be denied or granted subject to restriction. With respect to discretionary discovery, a protective order may be sought only to restrict (and not prevent completely) the scope of discovery, because if reasons exist to wholly deny discovery *ab initio*, it is within the discretion of the court to deny the discovery motion, without requiring the opponent to the motion to seek a protective order. As to both mandatory and discretionary discovery, if what is sought is the modification of the existing discovery order, rather than the denial or restriction of an initial discovery order, the following subdivision, (a)(7), provides the appropriate remedy.

The provisions of these subdivisions that the court may, in certain situations, grant discovery to a defendant on condition that the material to be discovered be available only to counsel for the defendant, does not appear in either Fed.R.Crim.P. 16(d) or ABA *Standards* § 4.4, *supra*. However, this is merely a corollary to that sentence of subdivision (a)(6) which gives the court the power, upon a sufficient showing, to deny, restrict, or defer discovery or inspection. Fed.R.Crim.P. 16(d) and ABA *Standards* § 4.4 give the judge this same power. The commentary accompanying the ABA standard indicates that this restriction on disclosure means "such adjustment of the time, place, *recipient*, and use of disclosures as may commend themselves in the particular case." ABA *Standards*, *supra*, comment at 102 (emphasis supplied).

Since it is not constitutionally impermissible to limit pretrial discovery in criminal cases, United States v. Randolph, 456 F.2d 132 (3rd Cir.1972), there should be no objection to the Commonwealth's giving material only to defendant's counsel in certain situations, which is preferable to denying discovery altogether.

It is contemplated that this provision of Rule 14 will sometimes be used to prevent a defendant from seeing his own psychiatric report. In some instances, the mental well-being of the defendant could be adversely affected if he has access to such a report. United States v. Moody, 490 F.2d 866 (5th Cir. 1974). Although the defendant in *Moody* had been convicted, the same rationale is applicable to the defendant awaiting trial.

Subdivision (b). The philosophy and provisions of this subdivision are drawn from Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707 [372 Mass. 337, 361 N.E.2d 1289]; Blaisdell v. Commonwealth, Mass. Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191]; and a number of other sources. *See* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]; Commonwealth v. Lewinsky, 367 Mass. 889, 902-03 and n.10 [329 N.E.2d 738] (1975); Fed.R.Crim.P. 12.1, 12.2; Fla.R. Crim.P. 3.200; Rules of Criminal Procedure (U.L.A.) rule 425(a)(1)-(2) (1974); National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, standard 4.9 (1973).

The Supreme Court in Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), held that a prosecutor could obtain discovery from a defendant by requesting information pertaining to evidence which the defendant intended to offer at trial without violating the fifth amendment privilege against self-incrimination. Although the defendant is compelled to make an accelerated determination of the evidence he is to introduce at trial, the nature of this compulsion is such that it is not unconstitutional. While the holding of the Supreme Court related only to the discovery of a defendant's prospective alibi defense, the decision indicates that the rule announced

is applicable to other forms of prosecutorial discovery as well. *See* Commonwealth v. Lewinsky, 367 Mass. 889, 903 n.10 [329 N.E.2d 738] (1975). The types of disclosures mandated by subdivision (b)(1)-(3) occur in those situations where in fairness the Commonwealth is entitled at least to notification.

(b)(1). Notice-of-alibi rules have been in existence at least since 1927 and as of 1978 at least half the states had such rules. See Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78, 81-82 [26 L.Ed.2d 446] (1970). The substance of this subdivision is taken from Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 714-16 [372 Mass. 337, 361 N.E.2d 1289].

In Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] 1971), the Supreme Judicial Court, mindful of the implications of the Supreme Court's decision in Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), held that discovery by the prosecution of the defendant's intent to interpose an alibi defense and of the names of any prospective witnesses in support of the alibi violated due process because in Massachusetts a defendant did not have an equal right to discovery from the prosecution. Nearly all a defendant's rights to discovery have been subject to judicial discretion under Massachusetts law. The Supreme Court in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973), specifically held that reciprocity in discovery rights was a constitutional prerequisite to the validity of prosecutorial discovery.

> [A] judge may constitutionally require disclosure to the prosecution of an alibi defense and the identity of alibi witnesses only so long as his order, taken in its entirety, is not fundamentally unfair to the defendant. . . . In all instances the discovery order 'must' be accompanied by a reciprocal order directing the prosecution to notify the defendant of the names and addresses of witnesses on whom it intends to rely to dispute the defendant's alibi.

Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647, 653 [377 Mass. 503, 386 N.E.2d 1262] *citing* Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 712, 715 [372 Mass. 337, 361 N.E.2d 1289]. That requirement is supplied by subdivisions (b)(1)(B)-(C).

The purpose of such a rule is two-fold. First, alibi defenses are the most frequently and easily fabricated defenses. See, for example, Commonwealth v. Harris, 364 Mass. 236, 238 [303 N.E.2d 115] (1973). By requiring the defendant to give the Commonwealth pretrial notice of his intent to interpose such a defense and a list of witnesses to be used in support of the alibi, the defendant is prevented from using an eleventh hour defense, and the Commonwealth is given to tools necessary to uncover fabrication. Fairness to the defendant is insured by granting him discovery of the identities of rebuttal witnesses. Secondly, the need to grant continuances on the basis of surprise at trial will no longer exist.

As the *Edgerly* court observes, if, in the judge's discretion, no other order is appropriate to serve the purposes of this rule, he may exclude the testimony of any undisclosed witness offered by either party as to the defendant's absence from, or presence at, the scene of the alleged offense. Mass.Adv.Sh. (1977) at 716 [372 Mass. 337]. *See* Commonwealth v. Blodgett, Mass.Adv.Sh. (1979) 636, 645 n. 9 [377 Mass. 494, 386 N.E.2d 1042]. If a defendant against whom a sanction is imposed is convicted, he may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right. *Commonwealth v. Edgerly*, *supra*. *See generally* Commonwealth v. Hanger, Mass.App.Adv.Sh. (1978) 633 [6 Mass.App. 407, 376 N.E.2d 877]. In *Hanger* the procedure authorized by this subdivision was substantially approved in the absence of any rule, even though the Commonwealth's motion was not presented until the second day of trial. On further appellate review, the Supreme Judicial Court ruled that the allowance of the belated motion was error, but harmless in that case. Commonwealth v. Hanger, Mass. Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]. As the court emphasized

> It is . . . critical . . . that discovery of this nature take place reasonably in advance of trial to permit investigation by the defendant of the witnesses the prosecution expects to call in rebuttal . . . .
>
> . . . It is manifest in this case, where the discovery motion was not made until after the trial had started, that the motion came too late . . . to permit the kind of investigation contemplated by . . . [Mass.R.Crim.P. 14].

Mass.Adv.Sh. (1979) at 654-55 and n. 5 [377 Mass. 503].

(b)(2). The subject matter of this subdivision was treated by the Supreme Judicial Court in Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191], and the procedures contained herein substantially restate those dictated by the court in that opinion.

Provisions requiring notice of an intent to rely upon a defense of lack of criminal responsibility have a different purpose than notice-of-alibi provisions. The latter, as noted above, are directed at preventing "eleventh-hour" or fabricated alibis. On the other hand, because rebuttal of an insanity defense requires a degree of expertise on the part of a cross-examiner that can only be gained through pretrial research, this subdivision is intended to meet the need of a prosecutor to familiarize himself with the complex nature of this type of defense.

The Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971), upheld an order to the defendant to disclose his intent with regard to the interposition of a defense of not guilty by reason of insanity despite the fact that the system of discovery then in effect was non-reciprocal. Implicit in the court's opinion is the fact that due process did not require reciprocation by the Commonwealth because only notice of intent to interpose the defense, and not the identity of the defendant's witnesses nor the evidence which he proposed to offer in support of that defense, was required. In short, the only response by the Commonwealth would be that opposition to that defense would be presented, which does not reasonably require notice.

As the court recognizes in *Blaisdell v. Commonwealth*, the privilege against self-incrimination is not

implicated by a mere notice requirement. Mass. Adv.Sh. (1978) at 1324 [372 Mass. 753]. Nor is there anything in that privilege which precludes

> an order requiring a defendant to reveal on motion of the prosecution the information of (a) whether a defendant pursuant to such defense intends to offer expert testimony thereon; (b) the names and addresses of such expert witnesses as the defense intends to call; (c) whether a defendant's experts intend to rely in whole or in part on statements of the defendant pertaining to his mental state at or about the time of the commission of the alleged crime or as it may be otherwise relevant to the issue of his mental responsibility therefor.

Id. That information is required by subdivisions (b)(2)(A)(i)-(iii) of this rule. If the defendant files the notice of intent, the Commonwealth is subject to the reciprocity requirements of this rule and as imposed by Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 715 [372 Mass. 337, 361 N.E.2d 1289]; Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1324 [372 Mass. 753, 364 N.E.2d 191].

If in answer to subdivision (b)(2)(A)(iii) the defendant responds that his expert witnesses intend to rely upon statements of the defendant as a foundation for their testimony, or if that fact becomes apparent from inquiry by the judge or developments in the case, the judge may order that the defendant submit to a psychiatric examination. (b)(2)(B).

> If . . . a defendant voluntarily submits to psychiatric interrogation as to his inner thoughts, the alleged crime and other relevant factors bearing on his mental responsibility and, on advice of counsel, voluntarily proffers such evidence to the jury, we feel that the offer of such expert testimony based in whole or in part on a defendant's testimonial statements constitutes a waiver of the privilege [against self-incrimination] for such purposes. . . . In short, by adopting this approach, a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself has testified. . . . Under such a view there would be no violation of his privilege should the court then order him under c. 123, § 15, to submit to psychiatric examination so that the jury may have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.

Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1322-23 [372 Mass. 753, 364 N.E.2d 191] (citations omitted). The privilege against self-incrimination does not bar the Commonwealth's use of evidence which incriminates the defendant, but rather the compelled production of such evidence by the defendant; yet it is clear that an examination pursuant to this subdivision constitutes compelled production. *Blaisdell v. Commonwealth, supra*, Mass. Adv.Sh. (1977) at 1313 [372 Mass. 753]. Therefore, if the psychiatric report contains evidence of a testimonial character, it is not to be made available to either party unless the defendant is to testify on his own behalf or is to offer expert testimony based on his statements ([b][2][B][iii][c]) or unless the defendant, by motion, requests that it be made available. ([b][2][B][iii][b]). Ordering the examination to be conducted prior to a defendant's formal waiver of the privilege against self-incrimination is justified on the basis that:

> To require the Commonwealth to wait may . . . well cause it to be disadvantaged in meeting the issues raised by a defendant's evidence by virtue of the fact that its expert witnesses will lack adequate time to examine properly a defendant and his evidence in order to prepare for trial. Alternatively, a continuance of the trial may cause needless expense to the Commonwealth, unnecessary inconvenience to the court and to the jurors, and disruption of the progress of the trial which may cause harm to either the prosecution or the defense. To require the Commonwealth to wait until such a waiver occurs at trial seems not only inexpedient and unwise but also unnecessary.

Blaisdell v. Commonwealth, supra, Mass.Adv.Sh. (1977) at 1323-24 [372 Mass. 753].

(b)(3). This subdivision is new to Massachusetts practice in its scope, if not its philosophy. See G.L. c. 278, § 7. It requires the defendant to furnish the prosecution with notice of his intent to rely upon a defense based upon a license, claim of authority or ownership, or exemption.

A "license" is defined as a right granted by the Commonwealth or other competent authority to do a particular act or carry on a particular business which, without such license, would be unlawful. A "claim of authority" is an assertion that the claimant has received an express or implied right to do an act from one lawfully empowered to grant such right. A "claim of ownership" is an assertion that the claimant has a right of possession enforceable in a court. An "exemption" is a release from a duty or obligation to which others are subject.

The requirement of disclosure in this subdivision is reasonable when considered in light of

> the proposition that the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.

Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470, 473 [37 L.Ed.2d 82] (1973).

The concept of mandating notice of criminal defenses other than alibi and insanity, subdivisions (b)(1)-(2) *supra*, was advocated by the American Bar Association in the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970)

> Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of *any* defense which defense counsel intends to use at trial . . . .

Id., § 3.3 (emphasis supplied).

Considerations of reciprocity, dealt with by the United States Supreme Court in connection with notice-of-alibi statutes in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973) and Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), and by the Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971), are inapposite to subdivision (b)(3). The *Williams-Wardius* cases hold that state statutes requiring notice to be given the prosecution that an alibi defense is to be raised at trial, with the names of witnesses to be called in support of the alibi, are constitutionally valid only if the defendant is allowed reciprocal rights to receive the names of governmental rebuttal witnesses. The statutes in those decisions, unlike Rule 14(b)(3), involved the furnishing of prosecutors with both notice of, *and information pertaining to*, the intended defense. See subdivisions (b)(1) and (b)(2), *supra*. It was to this information gathering aspect of the Oregon and Florida statutes that the Supreme Court addressed itself.

> It is fundamentally unfair to require the defendant to divulge *the details* of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius, supra at 476 (emphasis added).

Subdivision (b)(3) involves the giving only of notice. The defendant is not required to divulge the details of his intended defense. Mere notification of intent to raise a defense without more does not trigger considerations of reciprocity. *See* Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971); Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1324 [372 Mass. 753, 364 N.E.2d 191].

The sanction for failure to comply with the requirement of subsection (b)(3) is drawn from Fed.R. Crim.P. 12.1 and 12.2. See also ABA *Standards, supra*, § 4.7. The court may "for cause shown" ease or lift the requirements of this subdivision.

It is anticipated that utilization of this subdivision will be infrequent in those cases in which a pretrial conference is held. One of the recommended subjects for consideration at conference is the nature of defenses upon which the defendant intends to rely at trial. Mass.R.Crim.P. 11(a)(1)(C), (b)(1)(C).

Subdivision (c). The general sanction provision of subdivision (c)(1) is paralleled by Fed.R.Crim.P. 16(d)(2) and New Jersey R.Crim.P. 3:13-3(f). The power to exclude alibi evidence other than the defendant's testimony is recognized in Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 716 [372 Mass. 337, 361 N.E.2d 1289], and Commonwealth v. Blodgett, Mass.Adv.Sh. (1979), 636, 645 n.9 [377 Mass. 494, 386 N.E.2d 1042], and is expressed in subdivision (b)(1)(D), supra. See Federal Rule 12.1. See ABA *Standards Relating to Discovery and Procedure Before Trial* § 4.7(a) (Approved Draft, 1970). Subdivision (b)(2)(B)(iv), *supra*, provides the sanction for failure of the defendant to comply with a court-ordered psychiatric examination.

"Rights and duties are ephemeral indeed without remedies." ABA *Standards, supra*, comment at 107. Subdivision (c)(1) is intended to provide the general rule and is based on the assumption that the trial court is in the best situation to consider the opposing arguments concerning a failure to comply with a discovery order and to fashion an appropriate remedy. There is, it should be noted, statutory limitation on the court's power to grant a continuance without the defendant's consent. General Laws c. 276, § 35 provides a 10-day limit in such instances.

Although the court may exercise its general sanction power under subdivision (c)(1) to exclude other than alibi evidence, it is generally better to grant each party the freedom to present all relevant evidence at trial. However, in regard to alibi evidence, there is sufficient likelihood of abuse to require specifically empowering the court to exclude extrinsic alibi evidence. A court should only employ this sanction, however, when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth.

Subdivision (d). The definition of the term "statement" is drawn from 18 U.S.C. § 3500(e)(1)-(2) (1969, Supp.1976) and Commonwealth v. Lewinski, 367 Mass. 889 [329 N.E.2d 738] (1975).

Subdivision (e). The time limits established for the discovery of material under this rule are not intended to be inflexible, particularly in the District Court, even though such limits are to apply when the court specifies no other date for the completion of discovery. It is intended that courts will in many cases exercise the power expressly granted to modify the established time limits. In District Court proceedings, a lesser time than provided by the rule will frequently be ordered for the completion of discovery so that those proceedings retain their expeditious character.

Cross References

Criminal responsibility, examination, report, see M.G.L.A. c. 123, § 15.
Grand jury, see Rule 5.
Mental condition of defendant, transmittal of report, see Rule 3.
Post-conviction relief, discovery, see Rule 30.
Production of exculpatory evidence, constitutional guarantee, see Const. Pt. 1, Art. 12.
Witnesses,
Inspection of statements, see Rule 23.
Prior criminal record, credibility of witnesses, see M.G.L.A. c. 233, § 21.

Library References

Criminal Law ⟹624, 627.5, 627.10, 629.
C.J.S. Criminal Law §§ 940(7), 949 et seq., 955(1) et seq.
30A Mass.Prac. Series (Smith) § 1371 et seq.

RULE 15. INTERLOCUTORY APPEAL

(Applicable to District Court and Superior Court)

(a) District Court.

(1) *Right of Appeal Where Pretrial Motion to Dismiss Granted.* The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge granting a motion to dismiss a complaint or indictment made pursuant to the provisions of subdivision (c) of Rule 13.

(2) *Right of Appeal Where Motion to Suppress Evidence Granted.* The Commonwealth shall have the

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JUL 2 0 1988

July 12, 1988

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Dear Mr. Proudfoot:

Thank you for your recent inquiry concerning exculpatory statements in criminal prosecutions. Please be advised that although state practice may vary, most US jurisdictions (state courts) do require that statements made by the accused (whether inculpatory or exculpatory) be delivered up to defense counsel upon request. Discovery, however, of statements made by third persons which might bear upon the innocence or guilt of the defendant is not quite so easily addressed. Normally, the response to the belated discovery (after conviction) of information which might have proven beneficial to the defense, has been by the granting of a new trial--and is not necessarily governed by code, rule or other standard, except as judicially announced.

However, for approximately the past five years, a committee of our Michigan Supreme Court has been working upon the development of new rules of criminal procedure. These rules have been before our Michigan Supreme Court since October of 1985, and although no action has been taken by our Supreme Court in adopting these rules, it is my understanding they remain under active consideration. So that you can obtain some scope of the rules, I enclose herewith copies of Rule 6.202 through 6.212, all dealing with the issue of discovery. Again, I note that I do not specifically find a direct reference to a prosecutor's obligation to provide exculpatory statements, except as to how the provisions of Rule 6.202(3) (p 69) may be interpreted.

Finally, please note that the American Bar Association has a standing committee on criminal justice standards whose chairman is Mr. Albert J. Datz of the Jacksonville, Florida Bar. Although I am not familiar with whether or not that committee has prepared standards of discovery impacting upon your subject matter, I am sure that a communication directed to Mr. Datz would assist you in obtaining information. You may wish to call the ABA Information Service number (Chicago--312/988-5158, ABA No. 132).

I hope this communication has been of some assistance to you. Please feel free to call me if I can be of any further assistance.

Sincerely yours,

Donald L. Reisig,
President-Elect

DLR:cls

Enclosures

cc: Michael Franck (w/o enc)

disclosure on both parties. MCR 6.210 exempts certain information from discovery, while MCR 6.211 defines certain limits that may be imposed. MCR 6.212 details the sanctions that may be imposed on the parties for violating the requirements of these rules. MCR 6.213 contains a limited deposition requirement. MCR 6.214 governs the use of subpoenas by the parties for witnesses and documents. MCR 6.215 establishes a new judicial procedure, the omnibus hearing, to expedite the disposition of criminal cases. Finally, MCR 6.216 concerns mental competency hearings. The rules are both comprehensive in scope and obviously interrelated.

Rule 6.201 Informal Discovery

Before seeking a discovery order from the court, the parties shall attempt informally to resolve all discovery disputes and shall consider in good faith all discovery requests even when disclosure is not mandated by these rules. A court shall not grant a discovery order unless the party seeking the order alleges that an informal request for discovery has been refused by the other party.

Note

Efficiency in the system will not be promoted if trial and appellate courts frequently have to resolve discovery disputes. If such litigation is to be avoided, discovery must become a way of life in criminal cases. Subsequent rules attempt to promote this way of life by mandating broad discovery for both sides. MCR 6.201 attempts to promote this way of life by requiring the parties to resolve discovery disputes between themselves and by encouraging them to provide discovery even when these rules do not require it. MCR 6.201, therefore, sets a tone for this entire chapter, one favoring the broadest possible disclosure. It informs the parties to view these rules not as establishing limits on what must be disclosed but instead as defining minimum requirements.

By itself, of course, no rule can change the attitudes of litigants. To some extent, therefore, MCR 6.201 is hortatory. Nevertheless, the last sentence of the rule imposes a sanction on the failure to pursue informal discovery. A court is not permitted to grant a discovery order unless the party seeking the order first has attempted informally to obtain the desired information from the other party.

Rule 6.202 Mandatory Disclosure by the Prosecutor

Except as provided in MCR 6.210 and 6.211, the

prosecutor, upon request, shall disclose to the defendant's lawyer the following material and information within the prosecutor's possession or control (MCR 6.204[A]):

(1) Any written or recorded statements and the substance of any oral statements made by the defendant, a codefendant, or an accomplice together with the names and addresses of the witnesses to such statements;

(2) The names, addresses, reports, and statements of experts who examined the defendant or who conducted examinations, tests, experiments, or comparisons in connection with or relevant to the case;

(3) The names and last known addresses of all persons who have information that may be relevant to the offense charged, including a specification of those witnesses the prosecutor intends to call at trial, together with the written or recorded statements of all such persons and memoranda summarizing their oral statements;

(4) Any criminal record that the prosecutor intends to use at trial;

(5) Any reports or memoranda made by a police officer or investigator in connection with the investigation or prosecution of the case, but not including information about continuing or other police investigations;

(6) Any books, papers, documents, photographs, tangible objects, buildings, or places that the prosecutor intends to offer in evidence or to offer evidence about, or that were obtained from or belong to the defendant;

(7) The existence of any search, seizure, or electronic surveillance conducted in connection with the case, together with any affidavits, warrants, and returns pertaining to such activities; and

(8) Any plea agreements or grants of immunity made with or given to witnesses in connection with the defendant's case.

Note

In general. The first significant feature of MCR 6.202, which provides discovery to the defense, is that the rule is mandatory. The defendant, upon request, has a right to each of the enumerated items as long as they are within the prosecutor's possession or control as defined in MCR 6.204. The only exceptions are those provided in MCR

6.210 and 6.211. Second, the rule is intended to function without judicial involvement. The defendant does not have to file a discovery motion in court, but merely has to request the enumerated items from the prosecutor. Of course, if the prosecutor does not disclose enumerated information, the defendant may seek a discovery order from the court. (Under MCR 6.201, the defendant may not seek a discovery order until a request for disclosure has been made to the prosecutor.) Besides granting such an order, the court may impose sanctions on the prosecutor for wilful violations of this rule. See MCR 6.212.

MCR 6.202 does not address the manner in which the prosecutor must make disclosure. This is treated in MCR 6.204. Obviously, for example, objects such as buildings cannot be delivered to the defendant; such objects, however, may be made available for inspection and possibly for photographing. If the parties cannot agree on the prosecutor's manner of compliance, the court will have to resolve their disagreement under MCR 6.204.

The items enumerated in MCR 6.202 are typical of those found in discovery rules, see, *e.g.*, ABA Standards for Criminal Justice (2d ed), Discovery and Procedure Before Trial, § 11-2.1, although the number of included items makes MCR 6.202 more comprehensive than the corresponding rule in most jurisdictions. Indeed, the rule comes very close to mandating open file discovery. As discussed in the succeeding commentary, however, the rule is not intended to impose unnecessary burdens on the prosecutor. Thus, for example, if a police report contains a written statement from a witness summarizing a defendant's oral statement to that witness, the prosecutor would satisfy MCR 6.201(1), (3), and (5) simply by disclosing that portion of the police report. The rule does not require the prosecutor to make repetitive disclosures. Whether the prosecutor would satisfy MCR 6.202 merely by permitting inspection of the report or instead would have to permit duplication as well is governed by MCR 6.204.

1. Statements of defendants and codefendants. Not much controversy exists over the proposition that the defendant should have discovery of his own extrajudicial statements and some discovery of codefendants' statements. Jurisdictions vary, however, in defining the scope of such discovery. For example, FR Crim P 16(a)(1)(A) provides disclosure of the defendant's oral statements only if the prosecutor intends to offer them in evidence and only if they were made in response to interrogation by a government agent whom the defendant knew to be a government agent at the time the statement was made. The federal rules, however, make no provision at all for disclosure of codefendants' statements. Some states provide for discovery of codefendants' statements only if the codefendants and defendant are to be joined for trial. Fla R Crim P 3.220(a)(1)(iv). The rationale is that the defendant needs such statements in a joint trial to make timely severance motions when the codefendants' statements implicate the defendant in the crime. See *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). The original ABA standards imposed this limitation, but the new standards have removed it. ABA Standards for Criminal Justice (2d ed), § 11-2.1(a)(ii). The reason for removing the limitation was that "the contents of the codefendant's statement

may affect defense preparation of issues unrelated to severance. . . ." *Id.*, Commentary 11.21. A number of states take this more liberal approach. See, *e.g.*, Mo Sup Ct R 25.03(A)(2).

Consistent with the philosophy reflected throughout these rules, MCR 6.202 takes the most liberal approach. The defendant is entitled to his own written and oral statements and those of any codefendant or accomplice. No limitations, other than the general ones provided in MCR 6.210 and 6.211 are imposed.

The rule also entitles the defendant to the names and addresses of witnesses to such statements. If a police officer is a witness to such a statement, the officer's work address will suffice. Although the practice is not uniform, the requirement for providing names and addresses of witnesses can be found in a number of states. See, *e.g.*, the Missouri rule, *supra*.

2. Experts names and reports. This provision is fairly typical, although again some variation in scope exists. FR Crim P 16(a)(1)(D) covers tests that are "material" to defense preparation or that the government intends to offer in its case-in-chief. ABA Standard for Criminal Justice (2d ed), 11-2.1(a)(iv) covers reports of tests made "in connection with the particular case. . . ." (The ABA standards now provide for open file discovery. The enumeration of items in the standards is meant for illustrative purposes.) MCR 6.202 covers tests that are either relevant to the case or made in connection with it. Again, the preference was for a broad rather than a narrow rule.

Discovery in this area provokes little controversy because the standard fears of perjury and witness intimidation rarely are applicable.

3. Witness names and statements. Discovery in this area perhaps is most controversial. When the United States Supreme Court proposed an amendment to the federal rules that would have provided for disclosure of the names of witnesses, Congress rejected the amendment. See Conference Committee, Federal Rules of Criminal Procedure Act of 1975, H.R. Rep. No. 94-414, 94th Congress, 1st Sess. 11-12 (1975). At the opposite end of the spectrum, the ABA standards provide for the broad disclosure set forth in MCR 6.202(3). The states are divided. Some, like the federal rules, do not make any provision for disclosure of witnesses. A larger number require the prosecutor to disclose only the names of witnesses who will be called at trial. See, *e.g.*, Md R Crim P 728(a)(3). Only a few states go as far as the ABA standards. See, *e.g.*, Me R Crim P 16(c) (names and addresses of witnesses "material" to the preparation of the defense). See, also, Fla R Crim P 3.220(a)(1)(i) (witnesses with relevant information).

In Michigan, MCL 767.40; MSA 28.980 has required the prosecutor to endorse the names of known witnesses on the information. This requirement, which judicially has been interpreted as applying to res gestae witnesses, was abrogated in MCR 6.108(D). As indicated in the commentary to that rule, however, this requirement was deleted only because disclosure of the names of witnesses is a subject more properly relating to discovery than to the nature and contents of the information. Accordingly, MCR 6.202 provides for the disclosure that the information formerly provided. In fact, however, MCR 6.202 goes further, for the provision requires disclosure not only of res gestae

witnesses but of all witnesses who have information that may be relevant to the offense charged. In addition, the rule requires the prosecutor to specify those witnesses he or she intends to call at trial. MCR 6.202 thus adds Michigan to the distinct minority of states that have followed the ABA standards in providing for such liberal discovery in this area.

The major concern of those who oppose such broad disclosure is that of witness intimidation. This concern is addressed in MCR 6.211, which deals with protective orders. Once the names of witnesses are disclosed, however, little reason exists for not also disclosing the statements of such witnesses. Again, however, jurisdictions vary. A number of states follow the federal Jencks Act, which precludes disclosure of statements until the witness has testified at trial. See 18 USC 3500. A number provide for disclosure limited to those witnesses the prosecutor intends to call. A few (Florida, Maine, and New Jersey, for example), require disclosure of the statements of all witnesses. MCR 6.202 follows the lead of these few states and the ABA standards. Written statements and any memoranda summarizing the oral statements must be disclosed for all witnesses who have information relevant to the offense. Arguably, Michigan law already has moved in the direction of liberal discovery in this area. See *People v Peete*, 113 Mich App 510, 515; 317 NW2d 666 (1982); *People v Hayward*, 98 Mich App 332, 335-336; 296 NW2d 250 (1980); *People v Walton*, 71 Mich App 478; 247 NW2d 378 (1976).

Michigan law now provides for pretrial disclosure to the defendant of the testimony of grand jury witnesses. GCR 1963, 787. MCR 6.202 requires disclosure of the names and statements of all witnesses who have information that may be relevant to the offense. This obviously applies to grand jury witnesses. Because it would have been redundant, no rule specifically referring to grand jury witnesses is included in MCR 6.202.

Disclosure under this rule need not be duplicative. For example, both the names and statements of witnesses may be contained in police reports which the prosecutor has made available to the defense. See MCR 6.202(5). When this is so, the prosecutor need not make a separate list of witnesses nor separately duplicate their statements. MCR 6.202 enumerates the information that the prosecutor must make available, but it does not designate any particular manner of making it available, and it certainly does not require that information provided under one heading must again be provided if it also falls under another. Substance not form is required. It warrants emphasis, however, that complete disclosure must be provided. For example, disclosing a summary of a witness's oral statement is no substitute for disclosing a written statement also in the prosecutor's possession or control. In such a case, both statements must be disclosed.

On occasion, the prosecutor may know of a witness with relevant information but not know the witness's name. Under MCR 6.202, the defense must be told about this witness, and any statements from the witness must be disclosed.

4. Criminal records. Rules pertaining to the discovery of the criminal records of the defendant and of witnesses vary considerably. Under

FR Crim P 16(a)(1)(B), the defendant is entitled to a copy of his own prior record to the extent it "is within the possession, custody, or control of the government" and if its existence "is known, or by the exercise of due diligence may become known, to the attorney for the government." ABA standard § 11-2.1(a)(vi) provides the defendant a right to disclosure of his own criminal record and that of any codefendant. The Standard arguably goes further, however, because its enumeration of items that must be disclosed is only illustrative of the open file disclosure the prosecutor must make. Illinois gives the defendant a right to "any record of prior convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses. . . ." Ill S Ct R 412(a)(vi). Washington gives the defendant a right to "any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." Wash R 4.7(a)(1)(vi). Minnesota entitles the defendant to his own prior record to the extent it is "known" to the prosecutor, but only if the defendant "informs the prosecuting attorney of any such records known to the defendant." Minn R Crim P 9.01 Subd. 1(5). A number of states do not deal with the matter at all.

The requirement in some states that the record be "known" to the prosecutor reflects a concern about the scope of the prosecutor's obligation. Without such a limitation, the question arises whether the prosecutor is responsible for knowledge of convictions obtained in the county, throughout the state, in other states, in the federal courts, or in some combination of these. Moreover, even if the scope of the prosecutor's obligation is narrow, the problem of assuring accuracy even in this computer age has not been overcome. Indeed, both prosecutors and defense lawyers agree that the computers currently employed are notoriously inaccurate in producing criminal records of suspects and witnesses. The committee felt that any rule imposing an obligation on the prosecutor to discover criminal records would be unduly burdensome, ultimately unworkable, and a cause of litigation over inaccuracies.

The committee also felt, however, that the prosecutor should not be permitted to surprise the defendant at trial. Accordingly, the prosecutor is required to disclose any criminal record, pertaining to the defendant or a witness, that the prosecutor intends to use at trial. This does not rule out broader discovery, however. The defendant always can seek informally more than MCR 6.202 requires. See MCR 6.201 encouraging the parties to provide more discovery than these rules mandate. Second, the defendant always can seek an order for broader discovery under the discretionary provisions in MCR 6.203. Finally, the constitution in some instances may require broader discovery. See, *e.g.*, *People v Torrez*, 90 Mich App 120; 282 NW2d 252 (1979).

5. Police reports. Discovery of police reports is not treated by rule in most jurisdictions. But, see, Idaho Crim R 16(b)(7) ("Upon written request of the defendant the prosecuting attorney shall furnish to the defendant reports and memoranda in his possession which were made by a police officer or investigator in connection with the investigation or prosecution of the case."); NJ R 3:13-3(a)(9) (police reports in

prosecutor's control). Contra Minn R Crim P 9.01 Subd. 3(1)(b) (specifically exempting from discovery reports and memoranda made by "prosecution agents in connection with the investigation or prosecution of the case. . ."); Kan Code Crim P § 22-3212(2) (specifically exempting "reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case . . .").

Reflecting its commitment to broad discovery, the committee decided to follow the lead of states like Idaho and New Jersey in specifically making discovery of police reports available. See also *Bay County Prosecutor v Bay County Dist Judge*, 109 Mich App 476; 311 NW2d 399 (1981) (indicating that a policy of refusing to disclose police reports obstructs the pursuit of justice).

The word "memoranda" in this rule is meant to include an officer's field notes. *Cf. People v Florinchi*, 84 Mich App 128; 269 NW2d 500 (1978) ("police reports" should be viewed as including police "tip sheets"). Again, the philosophy underlying MCR 6.202 is one of broad disclosure. The rule, however, does not itself impose any obligation on the police to preserve field notes. Of course, if the prosecutor intends to offer a police report into evidence, the field notes or "fragmentary notes" used to prepare the report must be preserved. *People v Rosborough*, 387 Mich 183; 195 NW2d 255 (1972).

Under MCR 6.204, the prosecutor is responsible for disclosure of police reports that are in the possession of the police. This, of course, requires prosecutors to establish a procedure assuring full and open communication between the police and prosecutor's office. The committee considered and rejected objections that police departments sometimes are defiant of the prosecutor's requests. For purposes of a criminal prosecution, the police and the prosecutor's office must both be considered as representatives of the state.

MCR 6.202(5) does exempt from disclosure information in the police report that relates to continuing or other police investigations. This exemption and the provisions in MCR 6.210(B) and (C) and 6.211(A) and (B) adequately should protect legitimate law enforcement interests.

6. Tangible objects. This provision is fairly typical. See FR Crim P 16(a)(1)(C); ABA Standard for Criminal Justice (2d ed), 11-2.1(a)(v). The wording is taken from the latter. The manner of providing disclosure is governed by MCR 6.204. Protective orders, MCR 6.211(B), are available to minimize concerns about the security of evidence.

7. Searches and affidavits. For purposes of filing appropriate suppression motions, the defendant should be aware of the existence of any search, seizure, or electronic surveillance conducted in connection with his case. To some extent, this information would be made available by compliance with MCR 6.202(6), for that section requires disclosure of any items that were obtained from or belong to the defendant. This subrule makes clear, however, that the defendant should be informed of searches even when they are not productive. Moreover, the subrule makes clear that the defendant should be informed of any electronic surveillance conducted in connection with his case. See, *e.g.*, ABA Standard for Criminal Justice (2d ed), 11-2.1(b)(ii); Fla R Crim P 3.220(a)(1)(viii) and (ix).

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The defendant also should receive discovery of any documents relating to these activities. Accordingly, the rule states that the defendant has a right to "any affidavits, warrants, and returns" pertaining to them. Once again, however, it requires emphasis that the manner of providing disclosure is governed by MCR 6.204. For example, the prosecutor under MCR 6.204 could satisfy the mandate of MCR 6.202(7) by directing the defendant's lawyer to the court file containing the papers that must be disclosed.

8. Plea agreements and grants of immunity. Arguably the constitution requires disclosure of the information included in this subrule. See, *e.g.*, *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972). Whatever the scope of the constitutional rule, however, no reason exists for not informing the defendant of plea agreements or grants of immunity that witnesses have received.

Rule 6.203 Other Discovery

(A) Information in the Prosecutor's Control. Except as otherwise provided in MCR 6.210 and 6.211, the court, in its discretion, and on a showing of materiality to the preparation of the defense, may require the prosecutor to disclose information or evidence not covered by MCR 6.202.

(B) Orders to Conduct Tests. Except as provided in MCR 6.211, the court, on a showing of materiality to the preparation of the defense, may require tests, examinations, or other procedures to be performed.

(C) Physical and Mental Examinations of Witnesses. Absent compelling circumstances, the court shall not order the physical or mental examination of any witness including the complainant.

Note

Subrule (A). While MCR 6.202 is very broad, it does not require the prosecution simply to open its entire file to the defendant. Because of this, a provision is needed to assure disclosure, when appropriate, of information not covered by MCR 6.202. MCR 6.203(A) gives the court discretion to order further disclosure on a showing of materiality to the preparation of the defense. Of course, before seeking a court order, the defendant should informally seek the desired disclosure from the prosecutor. See MCR 6.201.

This subrule does not attempt to define the term "materiality." The meaning of this term must be provided in the context of specific fact situations. Because the governing standard, however, is materiality to the preparation of the defense, information may be disclosed under this subrule even if it is not admissible in evidence.

For similar provisions in other jurisdictions, see Fla R Crim P 3.220(a)(5) ("Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense coun-

sel as justice may require"); Minn R Crim P 9.01, Subd. 2 ("Upon motion of the defendant with notice to the prosecuting attorney, the trial court . . . may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged"). See also ABA Standard for Criminal Justice (2d ed), 11-2.5 ("Upon a showing that items not covered in standards 11-2.1, 11-2.3, or 11-2.4 are material to the preparation of the defense, the court may order disclosure to defense counsel of the specified material or information").

Subrule (B). MCR 6.202 and 6.203(A) are concerned with the disclosure to the defense of existing information. In some instances, however, the defendant may have a need for information that can be obtained only if certain tests or procedures are conducted. For example, a defendant may want a handkerchief tested for traces of blood or sperm. *Cf. People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970)(defendant charged with statutory rape, defendant's stained handkerchief introduced into evidence, state had not identified stains through scientific analysis). Similarly, a defendant may desire a line-up before trial to test the ability of eyewitnesses to identify him. In these situations, the defendant is requesting the prosecution to obtain information that it does not then possess.

No simple black-letter principle can cover the myriad situations that may arise. The need for a scientific test in a case like *Jordan, supra*, arguably is much greater than the need for pretrial line-ups in many cases. With respect to the latter, the general view is that the decision whether to order a pretrial line-up is left to the trial judge's discretion. See, *e.g., United States v Ravich*, 421 F2d 1196 (CA 2, 1970). On the other hand, the defendant's argument for a line-up before witnesses observe him in court is stronger when eyewitness identification evidence is crucial and contested. See *United States v Smith*, 154 US App DC 111; 473 F2d 1148 (1972); *Commonwealth v Sexton*, 246 Pa Super 30; 369 A2d 794 (1977). In some cases, procedures requested by the defense may be conducted easily and inexpensively; in others, the procedures may be burdensome. Obviously, the facts in each case must be considered and the legitimate interests of both sides balanced.

MCR 6.202(2) recognizes the judge's authority to order the prosecutor to conduct tests and procedures. The rule leaves the matter to the judge's discretion under a materiality standard. See ABA Standard for Criminal Justice (2d ed), 11-2.5(a), Commentary, p 11.37. The rule is subject to the limitation set forth in MCR 6.211. Requests for the examination of witnesses is governed by MCR 6.203(C).

Subrule (C). Requests for the physical or mental examinations of witnesses obviously involve more than the typical discovery concerns of possible perjury or witness intimidation. Such requests implicate the privacy and dignity interests of the affected individual. Accordingly, MCR 6.202(3) states that the trial judge shall not order such tests except in compelling circumstances. See, *e.g., People v Freeman*

(After Remand), 406 Mich 514; 280 NW2d 446 (1979) (absent showing of need, defendant charged with criminal sexual conduct has no right to have complaining witness examined by psychiatrist; in showing need, defendant must do more than make "amorphous contentions" about lack of corroboration for criminal charge or need to attack witness's credibility.) See also *People v Gerald Wells*, 102 Mich App 558, 563; 302 NW2d 232 (1980).

Rule 6.204 Performance and Scope of Prosecutor's Obligations

(A) Prosecutor's Possession or Control. Material and information is within the prosecutor's possession or control for purposes of MCR 6.202 if it is within the possession or control of the prosecutor, of members of the prosecutor's staff, or of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecutor's office.

(B) Time of Disclosure. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the prosecutor shall make disclosure as soon as practicable following the receipt of a discovery request or court order.

(C) Manner of Performance. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the prosecutor shall make disclosure in any manner mutually agreeable to the parties or by

(1) Notifying the defendant's lawyer that the requested information or material may be inspected, obtained, tested, or reproduced during specified reasonable times, and

(2) Making available to the defendant's lawyer at the time specified suitable facilities or other arrangements for inspecting, testing, and upon defense request, reproducing at actual cost such material and information.

Note

Subrule (A). The prosecutor's responsibility under MCR 6.202 is for enumerated information within his or her "possession or control." This subrule defines "possession or control." The prosecutor's responsibility clearly must extend beyond the office file on the defendant's case. Otherwise, information would be immunized from disclosure simply by being kept in a police file. On the other hand, some limit must be placed on the scope of the prosecutor's responsibility. Certainly, the prosecutor cannot be expected to disclose information that

is unknown even to those who have investigated or evaluated the defendant's case. Subrule (A) makes the prosecutor responsible for information within the possession or control of the prosecutor's office and within the possession or control of any agency that participated in the investigation of the case if (a) that agency, like the police department, regularly reports to the prosecutor's office, or (b) that agency has reported to the prosecutor's office with respect to the defendant's case.

Subrule (A) is taken almost verbatim from ABA Standard for Criminal Justice (2d ed), 11-2.1(d). See also Colo R Crim P 16(a)(4); Idaho Crim R 16(a); Minn R Crim P 9.01, Subd. 1(7). Obviously, this rule places a burden upon the prosecutor to assure that the police department or other investigative agency involved in the case makes full disclosure to the prosecutor's office. Some rules make this specific. See, *e.g.*, ABA Standard for Criminal Justice (2d ed), 11-2.2(c) ("The prosecutor shall ensure that a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged"); Ill Sup Ct R 412(f) (same). While the committee felt that such a provision should not be included, the scope of subrule (A) is sufficiently broad to place such a burden upon the prosecutor.

Subrule (B). This subrule is taken from ABA Standard for Criminal Justice (2d ed), 11-2.2. Both to promote plea discussions and to assure the defendant adequate time to prepare for pretrial hearings and for trial, the prosecutor should provide discovery as soon as possible following a defense request. MCR 6.208(B) subjects the defendant to the same time requirements. Of course, a court order for disclosure may specify whatever time limitations the judge thinks appropriate.

If the defendant believes the prosecutor is unreasonably delaying disclosure, the defendant can seek a court order and possibly even sanctions. MCR 6.212. If the prosecutor believes that early disclosure will jeopardize legitimate law enforcement interests or create an undue risk of harm to witnesses, the prosecutor can move for an order permitting delay in disclosure. MCR 6.211(B). In most cases, however, discovery should proceed expeditiously without court involvement.

Subrule (B) goes considerably further than the rules in many other jurisdictions. See, *e.g.*, Fla R Crim P 3.220(a)(1) (requiring disclosure "[a]fter the filing of the indictment or information, within fifteen days after written demand by the defendant, . . ."); Mo Sup Ct R 25.02 (permitting discovery to commence "whenever an indictment is found, or an information filed"). But see Ill Sup Ct R 412(d) (following the ABA approach).

Subrule (C). This subrule specifies that the manner of providing discovery is to be governed by mutual agreement of the parties. This is consistent with the underlying philosophy of these rules stressing informal discovery between the parties. In any event, unless a court order provides otherwise, the prosecutor can satisfy the obligations of MCR 6.202 and 6.203 by notifying defense counsel (or the defendant if he is proceeding pro se) and making suitable facilities available at a reasonable time for disclosure. For similar provisions, see ABA Standard for Criminal Justice (2d ed), 11-2.2(b); Ill Sup Ct R 412(e); Mo Sup Ct R 25.07.

The method of providing disclosure obviously will vary depending upon the type of information requested. A defendant may want to inspect a building or other physical facility. Sometimes he may want to photograph parts of the building. With respect to certain documents, reading and inspection may be adequate. The subrule requires the parties to work out the appropriate method of disclosure, but the court is available to resolve disputes when necessary. The subrule does specify, however, that the defendant is entitled to duplicate any material that can be duplicated, provided he pays the actual costs. The rule does not address those circumstances in which the constitution may require that duplication be provided free of charge for indigent defendants.

Rule 6.205 Mandatory Disclosure by the Defense

Except as provided in MCR 6.210 and 6.211, the defendant's lawyer, upon request, shall disclose to the prosecutor the following material and information within the lawyer's possession or control:

(1) The nature of any defense as to which the defendant intends to offer evidence at trial;

(2) The names and last known addresses of all witnesses other than the defendant whom the defendant intends to offer at trial together with their written or recorded statements and memoranda summarizing their oral statements;

(3) Any reports or statements by experts concerning mental or physical examinations, or tests, experiments, or comparisons

(a) that the defendant intends to offer in evidence, or

(b) that were prepared by a witness whom the defendant intends to call as a witness, provided that the report or statement relates to the testimony to be offered.

(4) Any books, papers, documents, photographs, or tangible objects that the defendant intends to offer in evidence or that relate to the testimony of a witness whom the defendant intends to call.

Note

In general. The first consideration that must be addressed in making discovery a two-way street is whether and to what extent the constitution, specifically the fifth amendment protection against compulsory self-incrimination, permits discovery from the defendant. In

recent years, it has become evident that the fifth amendment is not much of an impediment to such discovery.

Williams v Florida, 399 US 78; 90 S Ct 1893; 26 L Ed 2d 446 (1970) was the first significant case in this area. *Williams* upheld a Florida statute that requires the defendant to advise the prosecutor before trial of his intention to present an alibi defense and that also requires that he inform the prosecutor where he claims to have been and the witnesses who will support this defense at trial. See also MCL 768.20; MSA 28.1043. The reasoning in *Williams*, however, was more significant than the holding. Rejecting the defendant's fifth amendment argument, the Court said,

> Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. *At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial.* [399 US at 84-85 (emphasis added).]

The scope of this reasoning was not missed by dissenting Justice BLACK. As he stated, the Court's reasoning "goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial." *Id.*, 114 (BLACK and DOUGLAS, JJ., *dissenting*).

While *Williams* makes clear that the defendant can be required to disclose before trial information he intends to use at trial, other cases make clear that not all information in the defendant's possession is protected by the fifth amendment in any event. In *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966), the Supreme Court held that physical evidence, unlike testimonial or communicative evidence, simply is outside the scope of the fifth amendment's protection. *Schmerber* upheld the taking of blood from the defendant to test for intoxication. See also *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967) (defendant can be required to give a writing sample); *United States v Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973) (defendant can be subpoenaed by grand jury to provide a voice sample). The Court relied on these cases in *United States v Nobles*, 422 US 225; 95 S Ct 2160; 45 L Ed 2d 141 (1975), when it upheld a trial court order requiring a defense investigator to disclose statements he had obtained from witnesses.

In *Nobles*, the defense investigator interviewed two key prosecution witnesses before trial. At trial, the defense lawyer used this report to cross-examine the witnesses. When the defense called the investigator to impeach these witnesses further, the trial judge ordered the investigator to disclose to the prosecutor the full statements he had taken from the witnesses. When the defense refused to make disclosure, the trial judge refused to permit the investigator to testify. The Supreme Court upheld the trial court's actions. Although the disclosure was ordered at trial rather than before trial, nothing in the Court's fifth amendment discussion turned on this:

> The Court of Appeals concluded that the Fifth Amendment renders criminal discovery "basically a one-way street." Like many generalizations in constitutional law, this one is too broad.
>
> * * *
>
> In this instance disclosure of the relevant portions of the defense investigator's report would not

impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. *The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.*

We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. [422 US at 233-234 (emphasis added).]

Finally, *Fisher v United States*, 425 US 391; 96 S Ct 1569; 48 L Ed 2d 39 (1976), casts doubt even on whether the defendant's own written statements are protected by the Fifth Amendment. The Court first analogized written papers to physical objects that are not protected by the Fifth Amendment. *Id.*, at 409, citing *Schmerber*, *supra*. In a footnote, the Court added,

> The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege. And, unless the Government has compelled the subpoenaed person to write the document, the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. . . . In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. [425 US at 410 n 11 (citations omitted).]

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See also *United States v Doe*, —US —; 104 S Ct 1237; — L Ed 2d — (1984) (reaffirming *Fisher* and rejecting a narrow reading of that case).

Fisher's precise scope is not clear. First, the subpoenaed documents in that case were accountant's workpapers, not the defendant's private writings. Second, the Court suggested that turning over documents may implicitly convey information to the government, information that could be used to authenticate the documents at trial. To this extent, the Court suggested, the Fifth Amendment may provide a defense to disclosure. See, also, *United States v Doe, supra*, specifically holding that while the Fifth Amendment does not protect the contents of papers, it protects against self-incriminating testimonial acts of disclosure. Nevertheless, it should be seen that *Fisher's* potential reach is broad. In addition, when *Fisher* and *Williams* are read together, no doubt can exist that the defendant can be required to disclose papers *that he intends to use at trial.*

Once it is recognized that the constitution is not much of an obstacle to two-way discovery, the remaining consideration is whether policy reasons exist for not providing such discovery. The primary purpose of the criminal trial is the search for truth: the guilty should be convicted, the innocent acquitted. Because we consider it more serious to convict an innocent person than to acquit a guilty one, we have skewed our procedures to put the risk of error on the state. The high burden of proof in criminal cases is designed to protect the innocent even at the expense of acquitting some of the guilty. Nothing in discovery, of course, creates a risk to the innocent. Rather, the purpose of broad discovery is to facilitate the search for truth.

The criminal justice system has concerns other than the search for truth. To some extent, the criminal justice system must be concerned about control of official behavior. For example, uncontrolled, widespread wiretapping would ensnare the guilty without increas-

ing the risk of convicting the innocent, but we do not permit our criminal justice system to operate this way. Truth cannot be obtained at any cost, but only consistently with the values of privacy and liberty that a free society holds dear. To this extent, therefore, the criminal justice system must be concerned with controlling official misconduct. Discovery from the defense, however, does not involve this concern.

The only possible objection to discovery from the defendant is that somehow it is unfair. But unfair in what sense? Fairness requires that the defendant have every opportunity to present a full defense. This fairness concern lends support to broad discovery from the prosecutor. In addition, as noted above, fairness demands that the state not obtain a conviction, even if reliable, by engaging in serious misconduct. Beyond this, however, fairness does not impose obstacles in the path of accurate factfinding. It is not unfair to convict a guilty defendant, and certainly the criminal justice system should not have a goal of giving guilty defendants a sporting chance to escape conviction. Broad discovery from both sides facilitates the search for truth, and there is nothing unfair in truth being ascertained. In the committee's view, therefore, the argument is persuasive that discovery should be as broad as the constitution will permit.

In fact, however, the committee did not go as far as the constitution apparently permits. MCR 6.205 is drawn carefully to comply with *Williams*. It does not go beyond the *Williams* rationale, even though cases like *Nobles*, *Fisher*, and *Doe* would support broader discovery. Moreover, while it is arguable that the defendant could be required to provide "open file" discovery to the prosecutor as a condition for obtaining discovery, the committee elected not to go down this route. Thus, discovery under these rules remains slanted in the defendant's favor. Three considerations explain the committee's reluctance to draft a broader rule. First, the precise scope of constitutional allowance is not yet clearly defined. See *Doe*, *supra*. Second, broad discovery from the defendant is a new concept for Michigan, one that will require a period of adjustment. If the constitutional trend continues, and if discovery from the defendant works as well as the committee thinks it will, there will be time enough to go further. Third, broader discovery than that provided for in these rules would put Michigan ahead of other states in this area.

While broad discovery from the defendant is a new concept for Michigan, other states already have moved in this direction. Thus, by adopting such discovery rules, Michigan is following the lead of other states rather than charting new paths. See, *e.g.*, Ariz R Crim P 15.2(a)-(f) (requiring, among other things, defense disclosure of "all defenses as to which [the defendant] will introduce evidence at trial,. . ." witnesses who will be called, statements of such witnesses, and documents that will be introduced); Ark R Crim P 18.1-18.3 (similar); Colo R Crim P 16, Part II(c) (similar); Fla R Crim P 3.220(b)(4) (names and statements of witnesses to be called); Idaho Crim P 16(c) (names of witnesses to be called; documents the defense intends to offer); Ill Sup Ct R 413(d) (defense shall disclose "any defenses which he intends to make at a hearing or trial. . ."; witness names, addresses, and statements; documents intended to be used as evidence or for impeachment); Minn R Crim P 9.02 (same) (Minnesota also requires the defendant to disclose his known criminal record as a condition for obtaining his prior record from the prosecutor. *Id.*, 9.01); Mo Sup Ct R 25.05 (names and addresses of witnesses defense intends to call; statements of such witnesses; documents intended to be introduced, except portions containing the defendant's own statements). Some states, by contrast, still remain restrictive in this area. See, *e.g.*, *People v Collie*, 30 Cal 3d 43; 177 Cal Rptr 458; 634 P2d 534 (1981) (prohibiting trial courts from ordering discovery from defendant absent authorizing legislation; suggesting that such legislation might be unconstitutional under state constitution). See, also, ABA Standard for Criminal Justice (2d ed), 11-3.3 (taking a more restrictive approach to discovery from the defendant than that taken by the above cited states).

MCR 6.205 is a counterpart to MCR 6.202. Upon request, the defendant must comply with the requirements of this rule. If the prosecutor desires broader

disclosure, the discretionary provisions in MCR 6.207 are available.

1. Nature of defense. As the above commentary indicates, this requirement is consistent with *Williams* and with the rules adopted in a number of states. It goes further than present Michigan law, which requires notice only of alibi and mental illness defenses. MCL 768.20, 768.20(a); MSA 28.1043, 28.1043(1). This rule does not preclude the defendant from challenging at trial the prosecutor's proof as to the elements of the crime. The rule simply requires the defendant to advise the prosecutor, upon request, of any defenses as to which he will offer evidence at trial.

MCR 6.208 governs the manner of disclosure. Like the prosecutor, the defendant is required to make disclosure as soon as possible. In the early stages of the case, however, the defendant may not know the defense(s) he intends to make. It is obvious that disclosure cannot occur until such an intent is formed. The defendant and his lawyer are expected, however, to comply with this rule in good faith. A prosecutor who believes that the defense is procrastinating unduly can go to court for a discovery order and possibly even for sanctions. MCR 6.212. (It should be noted, however, that MCR 6.212 does not permit the judge to preclude the defendant from testifying in his own behalf. Nor does it rule out the possibility that the only sanction imposed will be a continuance.)

Throughout this rule, the term defendant's lawyer includes the defendant when he is representing himself.

2. Witness names and statements. The wording of this requirement parallels that in MCR 6.202(3), except that while the prosecutor is required to disclose all witnesses who have relevant information about the case, the defendant need only disclose those witnesses he intends to call at trial. See the introductory commentary to this rule.

3. Expert names and reports. This is not a controversial provision. It is common in most jurisdictions. *Cf.* FR Crim P 16(b)(1)(B). Again, this rule is fully consistent with the rationale in *Williams.* While a broader rule would be permissible under *Nobles,* the mandatory requirements of MCL 6.205 do not go as far as the constitution would permit.

4. Tangible objects. Cf. FR Crim P 16(b)(1)(A). While a broader rule would be constitutionally permissible, see, *e.g., Andresen v Maryland,* 427 US 463; 96 S Ct 2737; 49 L Ed 2d 627 (1976), broader disclosure than that provided in this section, which is mandatory, must be sought under the discretionary provisions in MCR 6.207.

Rule 6.206 Alibi and Mental Illness Defenses

Whether or not the prosecutor has made a request for disclosure, the defendant's lawyer shall inform the prosecutor of the defendant's intent to rely on an alibi, insanity, or mental illness defense.

(A) Alibi. If the defendant intends to rely on an alibi defense, the defendant's lawyer shall notify the prosecutor in writing of such intent not less than seven days before the date set for the omnibus hearing (MCR 6.215). Within fourteen days of the receipt of such notice or at the omnibus hearing, whichever is earlier, the prosecutor shall serve upon the defendant written notice of an intent to offer a rebuttal to the alibi defense.

(B) Insanity and Mental Illness Defenses. If the defendant intends to rely on an insanity defense, a defense of diminished capacity, or a defense of mental illness negating an element of the alleged offense, the defendant's lawyer shall notify both the court and the prosecutor in writing of such intent not less than seven days before the date set for the omnibus hearing (MCR 6.215).

(1) On receipt of such notice, or at the omnibus hearing, the court shall order the defendant to undergo an examination relating to his claim of insanity or

mental illness by personnel of the center for forensic psychiatry for a period not to exceed thirty days.

(2) Either party, on adequate notice to the other, may obtain an independent psychiatric evaluation of the defendant by a clinician of his or her choice. If the defendant is indigent, he shall obtain such an examination at the county's expense.

(3) Statements made by the defendant during an examination provided for in this rule are not admissible in evidence on any issue other than his mental illness or insanity at the time of the offense.

(4) Without request, each person who evaluates the defendant under this rule shall prepare a report and submit it to both parties.

(5) Within fourteen days after receipt of the report from the center for forensic psychiatry or within fourteen days after receipt of the report of an independent examiner secured by the prosecutor, whichever occurs later, but not later than fourteen days before trial, the prosecutor shall inform the defendant's lawyer of an intent to rebut a defense of insanity or mental illness.

(C) Time for Compliance. The court may modify the time periods set forth in this rule.

Note

Because MCR 6.205 entitles the prosecutor upon request to all defenses as to which the defendant intends to offer evidence at trial, the notice provisions of this rule arguably are unnecessary. They are included, however, for several reasons. First, the Legislature has singled out alibi and insanity defenses for special treatment concerning pretrial notice. MCL 768.20, 768.20a, 768.21; MSA 28.1043, 28.1043(1), 28.1044. Second, the Legislature provided that the defendant must provide notice of an intent to rely on these defenses without any request by the prosecutor. MCR 6.206 retains this requirement, while MCR 6.205 provides discovery to the prosecutor only upon request. Finally, the insanity defense requires special attention in any event because of the need to provide for psychiatric examination of the defendant.

Subrule (A). This subrule follows the statutory pattern except that the time periods for providing notice have been altered. The new time periods relate to the new omnibus hearing procedure established by these rules. See MCR 6.215. The intent of the omnibus hearing requirement is to provide a procedural mechanism for the resolution of all pretrial motions and issues on a date certain before trial. Under subrule (C), the court may modify the time periods established in this rule.

Because the disclosure of the names of witnesses is fully covered by MCR 6.202 and 6.205, that subject is not treated in this subrule. Under those rules, the defendant, upon request, must disclose the names of all witnesses he intends to call at trial, and the prosecutor, upon request, must disclose all witnesses with relevant information about the case. Those rules obviously encompass alibi and alibi rebuttal witnesses. Moreover, those rules also mandate disclosure of the statements of such witnesses.

Subrule (B). This subrule also follows the statutory pattern except that again the relevant time periods relate to the date set for the omnibus hearing.

Under MCL 768.20(a); MSA 28.1043(1), the defendant must provide notice of an intent "to offer in his or her defense testimony to establish his insanity. . . ." Nevertheless, the case law makes clear that "insanity" includes diminished capacity, or as it is sometimes called mental illness negating an element of the offense. See *People v Atkins*, 117 Mich App 430, 435-436; 324 NW2d 38 (1982); *People v Gilbert*, 101 Mich App 459, 470-471; 300 NW2d 604 (1980); *People v Mangiapane*, 85 Mich App 379; 271 NW2d 240 (1978). Of course, this subrule is intended neither to broaden nor to narrow the scope of permissible mental illness defenses. Thus, in using the terms "diminished capacity" and "mental illness negating an element of the alleged offense," terms which seem to be used interchangeably in the cases, the subrule intends only to assure that pretrial disclosure is made for any mental illness defense permitted by the substantive criminal law.

The provisions regarding the court ordered psychiatric examination of the defendant generally follow the present law. Again, time periods relate to the omnibus hearing procedure. The defendant may move for an independent psychiatric examination before the forensic center's examination is conducted.

Rule 6.207 Other Discovery

(A) Information in the Control of the Defendant's Lawyer. Except as provided in MCR 6.210 and 6.211, the court, in its discretion, and on a showing of materiality to the preparation of the prosecution, may require the defendant's lawyer to disclose information or evidence not covered by MCR 6.205 and MCR 6.206.

(B) Orders to Conduct Tests. Except as provided in MCR 6.211, the court, on a showing of materiality to the preparation of the prosecution, may require tests, examinations, or other procedures to be performed.

(C) Physical or Mental Examinations of Witnesses. Absent compelling circumstances, the court shall not order the physical or mental examination of any defense witness.

Note

This rule is a counterpart to MCR 6.203. Just as the defense may seek broader discovery than that provided in the mandatory sections of MCR 6.202, the prosecutor may seek broader discovery than that provided in the mandatory sections of MCR 6.205 and 6.206. Both 6.203 and 6.207 are discretionary. Both use the same materiality standard.

It should not require mention that the judge may not order any discovery under this rule that would violate the defendant's constitutional rights. Like all provisions in these rules, MCR 6.207 is subject to constitutional limitations.

Subrule (B) is meant to cover such things as an order to appear in a line-up, to speak for identification purposes, to submit to fingerprinting, to provide fingernail specimens, and to provide handwriting samples. These examples are merely illustrative. The reach of the subrule is as broad as the reach of MCR 6.203(B), subject of course to constitutional limitations.

Subrule (C) recognizes the same protection for the defendant's witnesses that MCR 6.203(C) recognizes for the prosecutor's witnesses.

Rule 6.208 Performance and Scope of Defense Obligations

(A) Defense Lawyer's Possession or Control. Material and information is within the possession or control of the defendant's lawyer for purposes of MCR 6.205 if it is within the possession or control of the lawyer, of members of the lawyer's staff, of the defendant, or of any other person who has participated in the investigation of the case on behalf of the defense.

(B) Time of Disclosure. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the defendant's lawyer shall make disclosure as soon as practicable following the receipt of a discovery request or court order.

(C) Manner of Performance. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the defendant's lawyer shall make disclosure in any manner mutually agreeable to the parties or by

(1) Notifying the prosecutor that the required information or material may be inspected, obtained, tested, or reproduced during specified reasonable times, and

(2) Making available to the prosecutor suitable facilities or other arrangements for inspecting, testing, and, upon the prosecutor's request, reproducing at actual cost, such material and information.

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Note

This rule is intended to be identical in scope to MCR 6.204. For explanation of the provisions, see the commentary to that rule.

Rule 6.209 Continuing Duty to Disclose

If, prior to or during trial, a party discovers additional information or material subject to disclosure under these rules, the party, without further request, shall promptly notify the other party.

Note

The rationale for this rule is obvious. A party should not escape responsibility under these rules simply because the discoverable information is not in the party's possession or control when a discovery request is made or a court order is issued. Rather, the party should have a continuing duty to provide the discoverable information as it comes within the party's possession or control. MCR 6.204, 6.208. No further request or court order is necessary to trigger this continuing duty to disclose. For similar provisions, see ABA Standard for Criminal Justice (2d ed), § 11-4.2, Fla R Crim P 3.220(f).

Of course, a party has a duty to disclose only if the information falls within the mandatory disclosure provisions of these rules or is covered by a judicial disclosure order. Unless and until a judicial order issues, a party does not have a *duty* to disclose information that is subject only to discretionary disclosure under these rules. See MCR 6.203, 6.207.

Rule 6.210 Material Not Subject to Disclosure

(A) Work Product. A party need not disclose legal research or records, correspondence, reports, or memoranda to the extent such items contain the opinions, theories, or conclusions of the lawyers or their legal or investigative staffs.

(B) Informants. The prosecutor need not disclose the identity of a confidential informant unless the prosecutor intends to call the informant as a witness or unless failure to disclose would violate the constitutional rights of the defendant.

(C) National Security. The prosecutor need not disclose material or information that, if disclosed, would present a substantial risk to the national security unless failure to disclose would violate the constitutional rights of the defendant or the prosecutor intends to introduce such material or information at trial.

(D) Defendant's Statements. Except as provided in MCR 6.206, the defendant's lawyer need not disclose

statements made by the defendant to the lawyer or to the lawyer's legal staff.

Note

In all jurisdictions, certain information is shielded from disclosure. Although the scope of the limitations may vary somewhat, little disagreement exists about the basic kinds of information that should be protected. See, *e.g.*, ABA standards, § 11-2.6, upon which MCR 6.210 is based.

The information described in this rule is protected against disclosure even pursuant to the discretionary discovery sections in these rules. See MCR 6.203, 6.207.

Subrule (A). The work product exemption is well established. As the commentary to the original ABA standards observed, "competition in the evaluation of facts and law has much greater value in the American system of justice than competition in the secret accumulation of facts. . . . To preserve the value engendered by the difference in perspective of opposing advocates, serious attention must be given to the dangers of dulling this perspective if the competitive spirit is dampened by knowledge that all ideas and notions which occur to the advocate must be shared, on a continuing basis, with opposing counsel." ABA Standards Relating to Discovery and Procedure Before Trial, Commentary at 89 (1970). Moreover, work product, which comprises merely the opinions or conclusions of the lawyers or their staffs, has only marginal value in assisting the parties to prepare for trial. ABA Standards for Criminal Justice (2d ed), § 11-2.6, Commentary at 11.40.

Subrule (A) narrowly defines the work product exemption. The subrule protects only the thought processes—the opinions, theories, or conclusions—of the lawyers and their staffs. For example, a statement that a lawyer obtains from a witness is *not* work product under this subrule. If the lawyer or investigator writes comments on the statement about the witness's usefulness, such opinion comments would be protected, but the witness's statement itself would be discoverable under the terms of MCR 6.202 and MCR 6.205. In such a case, the lawyer's comments could be excised from the statement under MCR 6.211. For similar definitions of work product, see Fla R Crim P 3.220(c)(1); Minn R Crim P 9.01 Subd. 3(1); Mo Sup Ct R 25.10(A).

Subrule (B). This subrule is based on ABA Standard for Criminal Justice (2d ed), § 11-2.6(b). The need to protect the identity of confidential informants is widely recognized. See, *e.g.*, Colo R Crim P 16(2); Fla R Crim P 3.220(c)(2); Idaho Crim R 16 Part I(f)(2); Ill Sup Ct R 412(j)(ii); Mo Sup Ct R 25.10(B).

Subrule (B) provides two exceptions to the protection afforded the identities of confidential informants. First, the prosecutor cannot withhold an informant's identity if the prosecutor intends to call the informant as a witness at some stage of the prosecution. Second, the prosecutor cannot withhold an informant's identity when this would violate the constitutional rights of the defendant. *Cf. Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957) (not actually decided on constitutional grounds but with strong constitutional overtones). When required to disclose an informant's identity, the prosecutor, if the case so warrants, may apply under MCR 6.211(B) for a specific order to delay disclosure.

Subrule (C). This subrule is based on ABA Standard for Criminal Justice (2d ed), § 11-2.6(c). Like subrule (B), this provision does not apply if the prosecutor intends to introduce such information at trial or if failure to provide discovery would violate the constitutional rights of the defendant.

Subrule (D). With the exception of MCR 6.206, none of the foregoing rules authorizes discovery of the defendant's own statements. Nevertheless, to remove any doubt that may exist, subrule (D) specially exempts from discovery the defendant's statements to his lawyer or to his lawyer's legal staff.

Subrule (D), however, is not intended to diminish the scope of discovery otherwise available to the prosecutor. For example, a witness may have given the defendant's lawyer a statement that relates conversations with the defendant. If the defendant intends to call this witness at trial, the witness's complete statement must be disclosed to the prosecutor pursuant to MCR 6.205(2). Subrule (D) is intended to permit free discussion between the defendant and his lawyer. Its intended scope is no broader than its underlying rationale.

Rule 6.211 Limitations on Disclosure

(A) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party shall disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court shall conduct an in camera hearing to determine whether the reasons for excision are justifiable. If the court upholds the excision, it shall seal and preserve the record of the in camera hearing for review in the event of an appeal.

(B) Protective Orders. On a showing of good cause, the court may enter such protective order as it deems appropriate. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial, the risk to any person of harm, undue annoyance, intimidation, or threats, the risk that evidence will be fabricated, and the need for secrecy regarding the identity of informants or other law enforcement matters. On application, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it shall seal and preserve the record of the proceeding for review in the event of an appeal.

Note

Subrule (A). This subrule is intended to make clear that disclosure under these rules cannot be avoided because a part of otherwise discoverable information is protected against disclosure. Rather, the party must disclose the discoverable part and may excise the protected part. See ABA Standard for Criminal Justice (2d ed), 11-4.5; Minn R Crim P § 9.03, Subd. 7. Of course, a party always is free to disclose information that need not be disclosed under these rules. See MCR 6.201.

A party excising information must inform the other party of the excision. This is necessary to permit the other party to challenge the excision in court. If such a challenge is made, the court shall conduct an in camera hearing with the party who has excised information. While adversary hearings usually are superior to in camera proceedings, it is obvious that a challenge to a party's decision to excise certain information cannot be resolved through an adversary process, for this would reveal what the party may be entitled to conceal. If the court upholds the excision, it must seal and preserve the record of its hearing. Even on appeal, however, the challenging party cannot be given access to excised information, for this would defeat the right to excise in the first place.

Subrule (B). All jurisdictions recognize that courts sometimes must issue protective orders limiting a party's obligation to disclose information that otherwise is discoverable. Jurisdictions divide, however, on the permissible scope of such protective orders. For example, FR Crim P 16(d) permits the court to enter a protective order that completely denies a party's right to certain discovery. ABA Standard for Criminal Justice (2d ed), 11-4.4, on the other hand, permits a court to take any appropriate action, "provided that all material and information to which a party is entitled is disclosed in time to permit counsel to make beneficial use of the disclosure." Rather than decide this issue in the abstract, the committee decided to leave it for judicial resolution in the context of concrete factual situations.

The party seeking a protective order has the burden of showing good cause. While subrule (B) enumerates factors that are relevant to a good cause determination, it does not attempt to define these factors precisely or to indicate how they are to be weighted in a given case. Such matters can be resolved only in the context of concrete factual situations. For example, less cause may be required to justify an order that permits a limited delay in discovery than would be needed to justify an order that drastically curtails discovery rights. In some cases, the court may feel that an order requiring a witness's testimony to be perpetuated, *cf.* MCR 6.213, may be adequate to deter threats of harm to the witness. The showing of risk for such an order arguably need not be as great as that required for an order that would shield the identity of the witness from disclosure.

Subrule (B) does not define the kinds of protective orders that may be issued. An order that postpones discovery sometimes may be appropriate. Depending upon judicial resolution of the issue left open in this subrule, an order denying discovery may be appropriate in some cases. As the above paragraph suggests, an order to perpetuate testimony may be an adequate measure for some risks. In some cases,

an order to refrain from certain conduct, with the threat of contempt held out as a possible sanction, may be adequate. Sometimes physical evidence may require special treatment to assure its integrity. Subrule (B) permits the court to be flexible. The kind of order that will be best in a given case ultimately must depend on the facts and on the court's ingenuity.

Concern for the safety of witnesses and the integrity of the judicial process should be neither denigrated nor minimized. Nevertheless, as the introductory commentary to this subchapter indicates, the discovery rules are premised on a belief that these concerns are not sufficiently strong in most cases to deny discovery. Rather, these rules presume that in most cases broad discovery safely can be provided to both sides. The protective order is designed for those occasional cases in which this presumption would be unrealistic. "Thus, the protective order permits the discovery system to be designed for the average case while still accommodating the 'legitimate needs of exceptional cases.'" ABA Standards for Criminal Justice (2d ed), Commentary at 11.61.

While motions for protective orders often will not require secrecy, they sometimes will. Subrule (B) places on the party seeking a protective order the burden of obtaining an in camera determination of the motion. The other party must be notified that an in camera determination of good cause is being sought, and the need for such an in camera review can be contested in court. If the court grants a protective order, after either an adversary hearing or an in camera review of the protective order motion, it must seal and preserve the record of the proceeding. Accord ABA Standard for Criminal Justice (2d ed), § 11-4.6; Fla R Crim P 3.220(i).

Rule 6.212 Sanctions

(A) Failure to Provide Discovery. If at any time during the course of the proceedings the court finds that a party has failed to comply with these rules, the court may,

(1) order such party to comply,

(2) grant a continuance,

(3) subject to subrule (B), enter such other order as seems just, except that the court may not preclude the defendant from testifying.

(B) Exclusion of Evidence or Defenses. The court shall not prohibit a party from calling a nondisclosed witness, from introducing nondisclosed information, or from offering a nondisclosed defense unless the court finds (1) that the party's failure to disclose has caused the other party prejudice likely to result in a miscarriage of justice and (2) that such prejudice cannot be cured by a less drastic sanction. If the defendant fails to

submit to an examination pursuant to MCR 6.206, the court shall bar him from presenting expert testimony relating to insanity, diminished capacity, or mental illness negating an element of the offense. If a witness fails to submit to an examination under MCR 6.203(C) or 6.207(C), the court shall bar the party who calls the witness from presenting expert testimony relating to the witness's physical or mental condition.

(C) Personal Sanctions. The court may impose on any person, including a lawyer, fines, costs, or other appropriate sanctions for wilfully violating these rules.

Note

MCR 6.212 is not as strict with respect to sanctions as the rules in some other states. For example, Fla R Crim P 3.220(j) simply includes as one of the available options a refusal to permit the party to call a nondisclosed witness or to introduce nondisclosed evidence. Accord Mo Sup Ct R 25.16. Nevertheless, the sanction of excluding evidence or defenses must be viewed as drastic, for it can have a distorting effect on the outcome of the trial. These rules mandate broad discovery to both sides because of the view that the criminal trial primarily is a search for truth. Accordingly, sanctions that undermine this goal must be looked upon with disfavor. Under subrule (B), exclusion of nondisclosed witnesses, information, or defenses is permissible only when necessary to prevent the goal of determining the truth from being thwarted. Such a sanction is permitted only to prevent a miscarriage of justice that cannot be cured by a less drastic sanction. *Cf. People v Merritt*, 396 Mich 67; 238 NW2d 31 (1976)(alibi). This limitation is intended to apply to sanctions against both sides. Exclusion of the prosecutor's evidence distorts the outcome as much as exclusion of the defendant's evidence.

This is not to suggest that the parties blithely may ignore the stringent disclosure requirements of these rules. To permit this to occur would undermine the important goals these rules seek to achieve. Accordingly, the court is given leeway in devising sanctions. Moreover, all persons, including the lawyers involved in the case, are subject to personal sanctions, including fines, costs, and other measures, such as contempt of court, for wilfully violating these rules. It is anticipated that courts will not be hesitant to impose such sanctions against lawyers in appropriate cases. Accord Fla R Crim Pro 3.22(j)(2); Mo Sup Ct R 25.16.

If the defendant fails to submit to a mental examination as required by MCR 6.206, the court is required to bar him from presenting expert testimony relating to a mental illness defense. This sanction is included in current law. See MCL 768.20a(4); MSA 28.1043(1)(4). Accord *People v Hayes*, 421 Mich 271; 364 NW2d 635 (1984). An exclusion sanction in this circumstance is fully consistent with the rationale discussed above. Similarly, if a witness fails to submit to a physical or mental examination in the exceptional case in

which the court has ordered such an examination, see MCR 6.203(C) and 6.207(C), the court is required to bar the party who calls the witness from presenting expert testimony relating to the physical or mental condition that would have been examined under the order. Thus, for example, if the complainant in a criminal sexual conduct case refuses to comply with a court ordered physical examination, the prosecutor will be precluded from introducing expert testimony about the witness's condition that would have been the subject of the examination. The prosecutor would not be barred, however, from calling the complainant to testify, for the subrule authorizes exclusion only of expert testimony.

Rule 6.213 Depositions

(A) Availability. On motion of any party or a witness, the court in its discretion, and subject to the conditions of this rule, may order the examination of any person except the defendant upon oral deposition.

(1) If the movant is a party, the party must show that a substantial likelihood exists that the person will not be available at the time of trial and that the person's testimony is material and not privileged.

(2) If the movant is a witness, the witness must show that he is incarcerated for failure to give satisfactory security that he will appear to testify at trial.

(B) Motion for Taking Deposition. A motion for deposition must specify the time and place for taking the deposition and the name and address of each person to be examined, together with the designated papers, documents, photographs, or other tangible objects, not privileged, to be produced at the same time and place. The court's order may specify the terms and conditions governing the conduct of the proceeding.

(C) Manner of Taking. Except as otherwise provided by court order, a deposition is to be taken in the manner specified for civil actions. Any statement of the witness being deposed that is in the possession of any party must be made available to the other party for use at the deposition.

(D) Defendant's Presence. Absent a waiver, the defendant has the right to be present at a deposition. If the defendant is in custody, the officer having custody of the defendant, on proper notice, shall produce him at the deposition and remain with him during it. If, after adequate notice, a defendant not in custody fails to

appear at a deposition, such failure, absent good cause shown, constitutes a waiver under this rule.

(E) Use. Depositions may be used at trial only in accordance with the Rules of Evidence.

Note

This rule is consistent with FR Crim P 15 and the rules in several other states that permit depositions of witnesses in criminal cases only in exceptional circumstances. Contra Fla R Crim P 3.220(d), which simply permits the defendant to "take the deposition upon oral examination of any person who may have information relevant to the offense charged." Because the discovery provisions in these rules are extremely broad, depositions should not be needed except in those rare cases when a substantial likelihood exists that a witness with nonprivileged material evidence will not be available for trial. The function of the deposition in criminal cases should not be to provide discovery, but rather to prevent the loss of possibly material evidence. Any broader rule would impose an unacceptable and unnecessary burden on witnesses and victims of crime.

Subrule (A). A party moving for a deposition under this subrule must show both that the witness's testimony is material and that a substantial likelihood exists that the witness will not be available at the time of trial. Unavailability is meant to be defined in accordance with the rules of evidence. Under this subrule, a witness may not be required to give privileged testimony at a deposition.

A witness who is incarcerated to assure his appearance at trial is permitted to move for his own deposition under this subrule. The subrule takes no position on whether the witness should be entitled to release after such a deposition is taken.

Subrule (B). This subrule is largely self-explanatory. Because the defendant, who may be incarcerated, has a right to be present at all depositions under subrule (D), it is important that the court, rather than the parties, have final authority to select the place and conditions for taking a deposition. For example, despite the wishes of the moving party, the court may find it appropriate to order that a witness's deposition be taken at the place where the defendant is incarcerated. Under subrule (B), the party in the first instance must specify the time and place for taking a deposition, but the court has final authority over such matters.

Subrule (C). This subrule merely specifies that the deposition procedure is to be conducted in accordance with the rules governing depositions in civil cases, including MCR 2.315.

Subrule (D). This subrule is self-explanatory. No attempt is made to define the requirements of adequate notice. Of course, notice is inadequate if it fails to satisfy constitutional requirements.

Subrule (E). This subrule makes clear that MCR 6.213 is intended neither to enlarge nor to diminish the permissible use of depositions under the rules of evidence. Necessarily, the rule makes no attempt to permit the use of deposition evidence when this would violate the constitutional rights of the defendant.

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Rule 6.214 Subpoenas

(A) Subpoena for Attendance of Witnesses. Any party may obtain and issue a subpoena commanding the person to whom it is directed to appear for the purpose of testifying at a specified time and place.

(B) Subpoena for Production of Documentary Evidence. A subpoena also may command the person to whom it is directed to produce books, papers, documents, or other specified objects. On motion of a party, the court may order that the books, papers, documents, or other objects be produced before trial or before the time when they are to be offered in evidence, and upon their production, the court may permit such items to be inspected and copied by the parties.

(C) Defendants Unable to Pay. Upon an ex parte application and a satisfactory showing (1) that the defendant is unable to pay the legally required fees, mileage, and costs of a named witness and (2) that the witness may be needed for an adequate defense, the court shall direct a subpoena to issue without the payment of such fees and costs. In such cases, the court shall direct the fees and costs to be paid as if the prosecutor had subpoenaed the witness. Upon the defendant's application, the court may also direct the manner in which service shall be made.

(D) Form, Issuance, and Service of Subpoena; Refusal to Comply. Except as otherwise provided in this rule, the provisions of MCR 2.506 govern the form, issuance, and service of a subpoena and the applicable penalties for failure to comply with a subpoena. If the defendant shows that he has been unable to serve a subpoena upon a known witness who may be needed for an adequate defense, the court may direct that the defendant receive reasonable assistance for such service.

(E) Relief from Subpoena. On motion, the court may quash or modify a subpoena if compliance would be unreasonable or oppressive. The provisions of MCR 2.506 govern the making and resolution of such motions.

Note

In general. Most of the rules in this subchapter concern the obligations of the parties to each other in the process of preparing for

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SEP - 2 1988

August 22, 1988

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

Dear Gordon:

I apologize for not answering your letter sooner; however, due to a trial in Washington, D.C. I have been out of town quite often.

Pat Scanlon has referred your letter of June 10, 1988 concerning your injury on exculpatory material to me. I will attempt to respond in a manner that I hope will be of service to you.

Under the Mississippi Rules of Criminal Procedure there are certain matters that a Defendant is entitled to receive from the prosecution under Rule 4.06, I enclose a copy of this motion under said rule.

Under the Federal practice you have Rule 16 of the Federal Criminal Rules which provide for discovery and also the Jenks Act which provides for discovery. The leading case that dictates that exculpatory material be provided is Brady v. Maryland and Giglio v. U.S., 405 U.S. 150.

Under both the State and Federal scheme, "trial by ambush" is now a thing of the past. With the discovery rules like they are, both sides eventually know what the other side has prior to trial on the merits.

I hope this information proves helpful, and if I can help further please let me know.

With kindest regards, we remain

Sincerely,

KIRKSEY & ASSOCIATES

William B. Kirksey

WBK/ehl

enclosure

Also included is a copy of the MS Magazine Business Index

CIRCUIT COURT PRACTICE

Annotations

Section (1) of the rule is drawn from Fla.R.Crim.P. 3.-150(B) and ABA Standards, Joinder and Severance § 1.2 (1968). These two rules are virtually identical. The Florida rule, however, omits a section which would allow joinder of charges "so closely connected . . . that it would be difficult to separate proof of one charge from proof of the other." ABA Standards, supra § 1.2(C)(2). The rationale behind the omission is that in such a case the defendant would have a right to severance. Fla.R.Crim.P. 3.750, Committee Note at 229. Se ABA Standard, supra (comment at 17). cf. Thompson v. State, 231 Miss. 624, 97 So.2d 227 (1957), (right to separate trial does not give defendants a corresponding right to be tried jointly).

Section (2) of the rule is drawn from Fla.R.Crim.P. 3.-150(a) and ABA Standards, supra, § 1.1. These rules are almost identical in their wording. While the outer limits of permissible joinder of offenses is identified, the rule does not suggest that a joinder of offenses in such cases would always be desirable. ABA Standards, supra (commentary at 10). See, Ford v. State, 225 So.2d 287 (Miss.1969); Woods v. State, 200 Miss. 527, 27 So.2d 895 (1946); Johnson v. State, 196 Miss. 402, 17 So.2d 446 (1944). In Ford, supra, the defendant contended on appeal that the trial court erred in refusing to consolidate two indictments charging him with manslaughter. The court held that the granting or refusing of a motion for consolidation is left to the discretion of the trial court and absent an abuse of discretion its decision will stand. Id. at 381.

Note: The jury must be instructed to issue separate verdicts on each count.

Rule 4.06

DISCOVERY

The prosecution shall disclose to each defendant or his attorney, upon request and without further court order, the following:

(1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial;

(2) Copy of any written statement from the defendant;

(3) Copy of criminal record of the defendant, if proposed to be used to impeach;

(4) Copy of crime lab reports or report or any tests made;

(5) Exhibit any physical evidence and photos to be offered in evidence; and

(6) Copy of any exculpatory material concerning defendant.

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.

The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person or 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.

The following shall not be 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 legal staff.

(2) Informants. Disclosure of an informant's identity 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.

If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, 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 possession or control of the defendant or his counsel:

(1) Names and addresses of all witnesses in chief proposed to be offered by the defendant at trial;

(2) Exhibit any physical evidence and photos to be offered in evidence; and

(3) Any reports or statements of experts, made in connection with the particular case.

Defense counsel shall make the foregoing disclosures simultaneously with the corresponding disclosure from the prosecutor.

Except as is otherwise provided or in cases where the witness would be forced to reveal self-incriminating evidence, 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.

If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

The attorney receiving materials on discovery is responsible for those materials and shall not distribute them to third parties.

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 his counsel to make beneficial use thereof.

When some parts of certain material are discoverable under these rules, and other parts not discoverable, as much of the material should be disclosed as is consistent with the rules. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate courts in the event of an appeal.

Upon request of the defendant, the prosecution shall furnish to the court in camera, any prior written statements of witnesses. If these materials are found to be materially inconsistent with the witness's testimony, the statements shall be supplied to defense counsel prior to cross-examination.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of

such proceedings. If the court enters an order granting 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.

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 an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

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

Annotations

This rule is modeled from Add.R. 16th Cir.Ct. Dist. 6, and from ABA Standards, Discovery and Procedure Before Trial §§ 2.1 to 4.7 (1970). Portions of the proposed rules were drawn from Ariz.R.Crim.P. 3.220, which is similar to ABA Standards, supra. Other state court rules on discovery tend to be similar to the rule. See, e. g., Mo.R.Crim.P. 25.31–45; Minn.R.Crim.P. 9.

It has been suggested that prior notice and statements of witnesses may be required by due process and the sixth amendment. See Palermo v. U. S., 360 U.S. 343, 362–66 (1959). Mississippi cases present a much more restricted view of providing the defense with witnesses' statements before trial. See Bellow v. State, 238 Miss. 734, 106 So.2d 146 (1958); Armstrong v. State, 243 Miss. 402, 137 So.2d 930 (1962). See also, Grady v. State, 274 So.2d 141 (Miss.1973). In Armstrong, supra, the court noted that the trial judge has discretionary power to determine whether tangible evidence under the prosecution's control should be given to the defendant for inspection. However, it was further stated that the defendant should be able to inspect tangible evidence which may be used against him or which may be helpful in his defense and that the concepts of due process and fair trial should prevent concealment of evidence. In Grady, supra, defendant's motions to inspect were granted, and a written report was given to the defendant. However, testimony was given at

the trial which was at variance with the report. It was held that the trial court did not err in permitting the testimony of witness which varied from the report, when the defendant refused an offer for a continuance to further investigate the facts testified to.

The basis of providing a defendant with a copy of his own statements is threefold: (1) fundamental fairness and the absence of any compelling reason to withhold disclosure; (2) the requirement of the Miranda warnings and the right of the defendant to move for suppression; (3) the "better practice" language of Cicenia v. LaGay, 357 U.S. 504, 511 (1958). A requirement that the defense be allowed to inspect statements made by codefendants often rests upon Bruton v. U. S., 391 U.S. 123 (1968), which held that it was constitutional error to try one defendant before a jury which had statements of a codefendant implicating the defendant. ABA Standards, supra § 2.1 (commentary, at 58–61).

Copies of crime lab reports or reports of tests made are required because of the near impossibility of testing or rebutting expert proof and testimony at trial. Jackson v. State, 243 So.2d 396 (Miss.1970) held, no error, when a defendant was denied a state test report when a portion of the tested substance was provided to the defendant. It was, however, error not to provide the defendant with a sample of the substance for test purposes.

It is to be noted that "relevant" is used as a limitation on the scope of some of the disclosures to be made by the prosecutor. This, of course, is to avoid the harassment of material being demanded which has no bearing on the case. For the problem of defining "relevant" see ABA Standards, supra § 2.1 (commentary at 54–56).

Section (6) is included, not only to deal with the moral aspect of withholding exculpatory evidence, but to deal with the constitutional requirement that the prosecution disclose evidence which tends to exculpate the accused or reduce the penalty. Brady v. Maryland, 373 U.S. 83 (1963). Although not required as a pretrial disclosure, the information must be disclosed at a time so that the defense can make use of it. Thus, pretrial would seem to be the most appropriate time for the disclosure. See ABA Standards, supra § 2.1 (commentary at 73–78); Ponder v. State, 335 So.2d 885 (Miss.1976).

The rule insures that information essential to a fair trial will not be refused because of no specific requirement to dis-

close it. The discretion of the court is utmost in importance to this section of the rule. This section seems to be well adapted to a large number of Mississippi cases concerning discovery. See e. g., Bright v. State, 293 So.2d 818 (Miss. 1974); Peterson v. State, 242 So.2d 420 (Miss.1970); ABA Standards, supra § 2.5 (commentary at 85–88).

The section on non-disclosure is largely self-explanatory. It is added to protect the thought processes of the prosecuting attorney. Opinions, theories and conclusions of the prosecutor or his staff are not subject to discovery. Therefore, the following would be protected by the rule: notes or outlines of trial strategy, of arguments to be made, of authorities to be cited and of questions to be asked witnesses; memoranda between personnel in the office on legal questions, evidence, prospective jurors or other aspects of the case, except medical, scientific and experts' reports; records of an attorney's travel with respect to a case; summaries and analysis of the case file; evaluations of anticipated witneses or their testimony; evaluations of the probability of obtaining certain evidence; and investigative sources and techniques. ABA Standards, supra § 2.6 (commentary at 91).

The rule also provides protection for the identity of the informant, one of the few privileges accorded to the prosecution. (See McCray v. Illinois, 386 U.S. 300 (1967); Roviard v. United States, 353 U.S. 53 (1957).

The rule requires the defendant to give substantially the same materials to the prosecution.

The rule also provides sufficient flexibility to meet the needs of exceptional cases. Without this flexibility, the needs of such cases will shape discovery policy to the extent that denial will result in all cases, as it does in most jurisdictions. 44 F.R.D. 481, 499 (1968). ABA Standards, supra § 4.4 (commentary at 101). It may be necessary in cases where there is a likelihood of intimidation of witnesses, harm to witnesses, or thwarting an on-going investigation. The court is allowed sufficient discretion to tailor its responses to the circumstances of the case, thus avoiding undue influence by exceptional cases on discovery policy, as well as providing for fair trials in such cases. See ABA Standards, supra §§ 4.4 to 4.6 (commentary at 101–06).

The rule contains remedies for the violation of rights and duties afforded by these rules. Explicit orders to disclose are provided for where persons affected have failed to understand

the more general provisions of a rule or statute. The court may impose sanctions where the breached duty was clear. Rather than provide specific sanctions for specific violations, the proposed rule leaves the sanctions to the discretion of trial courts under appellate court supervision. ABA Standards, supra § 4.7 (commentary at 106–07).

Rule 4.07

NOTICE OF ALIBI

Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such other time as the court may direct, upon the prosecuting attorney a written notice of his intention to offer a defense of alibi, which notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon which he intends to rely to establish such alibi.

Within 10 days thereafter, but in no event less than 10 days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or his attorney of the name and address of such additional witness.

Upon the failure of either to comply with the requirements of this rule, the court may use such sanctions as it deems proper, including:

(1) Granting a continuance;

(2) Limiting further discovery of the party failing to comply;

(3) Imposing criminal sanctions;

SEP 0 5 1988

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September 2, 1988

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Attention: Gordon F. Proudfoot

Re: The Royal Commission of Inquiry into the prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

I am writing in behalf of the State Bar of Montana in response to your letter dated August 5, 1988, to Max Hansen the President-Elect of the Montana State Bar Association. Your office has inquired as follows:

> Do you have any laws, guidelines issued by government, or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defence counsel at the earliest moment?

I have been charged with answering your inquiry.

In the United States a person can be prosecuted criminally by a State or by the United States. Most individual states have laws in the form of statutes that provide for discovery in a criminal case. For example in Montana, as a matter of right, the Defendant is entitled to receive from the prosecution the following:

> A list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with relevant written or recorded statements;
>
> All written or oral statements of the accused and of any person who will be tried with him;

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

A list of or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or proportedly belonged to the accused; and

All material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefore.

Furthermore the prosecutor must inform the defense of any written or recorded material or information showing whether there has been any electronic surveillance of any conversations to which the accused was a party and whether a search warrant has been executed in connection with the case. Also the defense is entitled to know whether the case involves an informant, and if so his identity, in some circumstances. Thus as a matter of right in Montana the defense is entitled to a considerable amount of information in the way of discovery in a criminal prosecution.

In addition the defense can make a written request for additional material upon a showing that he has substantial need for such material in the preparation of his case and that without the information he would suffer undo hardship in the preparation of his defense. I have enclosed a copy of these Montana Statutes for your consideration.

In the Federal arena, which would be a prosecution conducted by the United States, the defendant is also entitled to information. However in some respects the rules in Federal Court are in a state of flux and not as clearly defined as the rules in the State system. In this connection I direct your attention to Rule 16 of the Federal Rules of Criminal Procedure (a copy is enclosed). As you can see there is significant information that must be revealed by the prosecution upon request from the defense. However there are other considerations beyond Rule 16 that must be considered in a federal prosecution. For example some cases decided by the United States Supreme Court suggest that the prosecution may have duties under the constitution to supply the defense with evidence.

Brady -vs- Maryland, 373 U.S. 83 is an illustration of this legal reasoning (a copy of the case is enclosed). Since Brady a number

of other decisions of the United States Supreme Court have discussed the defendant's right of access to evidence. In this regard I have enclosed for your consideration a brief that I recently prepared in a criminal appeal. Specifically I direct your attention to Issue No. 4 of the brief which is taken up beginning on page 15. As you can see the issue in the trial court was whether the indictment should have been dismissed or in the alternative the government's evidence suppressed due to pre-indictment delay. I reference this portion of the brief to show you that there is law in the United States which says that lack of access to evidence can constitute a tactical disadvantage and therefore result in a violation of due process.

Understand Mr. Proudfoot that these cases say that the defendant must show "substantial prejudice". This burden is not an easy one to meet. However as a criminal defense attorney my sense is that the defense bar is beginning to demand that the government make more thorough investigations with an eye toward being fair to the accused. For instance see the cases that I cited on page 22 of the brief that say that the prosecution owes the accused a duty to see that justice is done. Also see the case of California -vs- Trombetta, 475 U.S. 479 that I cited at page 20 of the brief. Trombetta says that the government can transgress constitutional limitations if in the exercise of its sovereign powers it hampers a criminal defendant's preparation for trial.

Frankly Mr. Proudfoot there is a lot of information that I could supply on this issue. However due to the time restraints associated with my busy practice I am prohibited from going into greater depth at this time. Certainly if you desire further information, and I have the time available, I would be happy to address further inquiries from your office.

I hope the enclosed material benefits the Commission. It is my fervent belief that the government owes a duty to the accused as well as the victim. Disinterested investigative practices should be the standard rather than the exception. The defense is entitled to a fair shake from the government and, moreover, the defense is entitled to know what the prosecution is holding in the way of exculpatory evidence. It is the only fair way to do it.

Thank you for your inquiry I am yours

Sincerely,

Michael Donahoe

MD/js

Enclosures

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MONTANA CODE ANNOTATED

Adopted by Chapter 1, Laws of 1979

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46-15-203. Additional requirements when initiated by state or witness. The following additional requirements shall apply if the deposition is taken at the instance of the state or a witness:

(1) The officer having custody of a defendant shall be notified of the time and place set for examination and keep him in the presence of the witness during the examination.

(2) A defendant not in custody shall be given notice and shall have the right to be present at the examination.

(3) The state shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(g).

46-15-204. Use of depositions at trial. (1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears that:

(a) the witness is dead;

(b) the witness is out of the state of Montana unless it appears that the absence of the witness was procured by the party offering the deposition;

(c) the witness is unable to attend or testify because of sickness or infirmity; or

(d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(2) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(3) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(4) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(5) For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross-examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(e), (f).

Cross-References

Objections to receiving deposition in evidence, Rules 30(c), 32, M.R.Civ.P. (see Title 25, ch. 20).

Part 3

Discovery — Immunity for Witnesses

46-15-301. Repealed. Sec. 11, Ch. 202, L. 1985.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(1), (3); amd. Sec. 14, Ch. 713, L. 1979; amd. Sec. 1, Ch. 557, L. 1981.

46-15-302. Repealed. Sec. 11, Ch. 202, L. 1985.

History: (1), (2)En. 95-1801 by Sec. 1, Ch. 196, L. 1967; Sec. 95-1801, R.C.M. 1947; (3)En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; Sec. 95-1803, R.C.M. 1947; R.C.M. 1947, 95-1801(d), 95-1803(2); amd. Sec. 1, Ch. 496, L. 1979.

46-15-303. Repealed. Sec. 11, Ch. 202, L. 1985.
History: En. 95-1804 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1804.

46-15-304 through 46-15-310 reserved.

46-15-311. Renumbered 46-15-331 by Code Commissioner, 1985.

46-15-312. Renumbered 46-15-332 by Code Commissioner, 1985.

46-15-313 through 46-15-320 reserved.

46-15-321. Definitions. As used in 46-15-321 through 46-15-329, unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.
History: En. Sec. 1, Ch. 202, L. 1985.

46-15-322. Disclosure by prosecution. (1) Upon arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the accused and of any person who will be tried with him;

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

(d) a list or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or purportedly belong to the accused; and

(e) all material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefor.

(2) At the same time the prosecutor shall inform the defendant of and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the accused was a party;

(b) whether a search warrant has been executed in connection with the case;

(c) whether 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 502 of the Montana Rules of Evidence and 46-15-324(3).

(3) The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

(4) The prosecutor's obligation of disclosure 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.

(5) Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for 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.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at such later time as the court may for good cause permit, together with their relevant written or recorded statements, a list of the names and addresses of all persons whom he intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the accused did not have a particular state of mind that is an element of the offense charged.

History: En. Sec. 2, Ch. 202, L. 1985.

46-15-323. Disclosure by accused. (1) At any time after the filing in district court of an indictment or information, the accused, in connection with the particular crime with which he is charged, shall upon written request of the prosecutor and for good cause shown:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of his hair, blood, saliva, urine, or other specified materials that involve no unreasonable intrusions of his body;

(g) provide specimens of his handwriting; or

(h) submit to a reasonable physical or medical inspection of his body; however, such inspection does not include psychiatric or psychological examination.

(2) The accused is entitled to the presence of counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law.

(3) Within 30 days after arraignment in district court or at such later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of his intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the accused did not have a particular state of mind that is an essential element of the offense charged. The notice must specify for each defense the names and addresses of the persons that will be called as witnesses at trial in support of the defense. Prior to trial the defendant shall, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except for good cause shown. Any evidence that reasonably becomes available after the initial 30 days shall be admitted if 46-15-327 is complied with.

(4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names and addresses of all persons, other than the accused, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(b) the names and addresses of experts whom he will call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection with the particular case; and

(c) a list of all papers, documents, photographs, and other tangible objects that he will use at trial.

(5) The defendant's obligation under this section extends to material and information within the possession or control of the defendant or his attorneys and agents.

(6) Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the accused's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

History: En. Sec. 3, Ch. 202, L. 1985.

Cross-References

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

Notice of defense of mental disease or defect, 46-14-201.

46-15-324. Materials not subject to disclosure. (1) Except as provided in subsection (2), disclosure is not required for the work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the work product, that information must be disclosed.

(3) Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

History: En. Sec. 4, Ch. 202, L. 1985.

46-15-325. Failure to call a witness or raise a defense. The fact that a witness' name is on a list furnished pursuant to 46-15-321 through 46-15-329 or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows such comment after finding that the inclusion of the witness' name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

History: En. Sec. 5, Ch. 202, L. 1985.

46-15-326. Use of materials. Except as provided in 46-11-401, any materials, including witness lists, furnished to an attorney pursuant to 46-15-321 through 46-15-329 may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

History: En. Sec. 6, Ch. 202, L. 1985.

46-15-327. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, such party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

History: En. Sec. 7, Ch. 202, L. 1985.

46-15-328. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by 46-15-321 through 46-15-329 be denied, deferred, or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under 46-15-321 through 46-15-329, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or

information, the court may permit him to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when such presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable under 46-15-321 through 46-15-329, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

History: En. Sec. 8, Ch. 202, L. 1985.

46-15-329. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of 46-15-321 through 46-15-329 or any order issued pursuant to 46-15-321 through 46-15-329, the court may impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

History: En. Sec. 9, Ch. 202, L. 1985.

46-15-330 reserved.

46-15-331. Compelling testimony or production of evidence — immunity. Before or during trial in any judicial proceeding, a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, no compelled testimony or evidence or any information directly or indirectly derived from such testimony or evidence may be used against the witness in any criminal prosecution. Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be served thereby. Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section.

History: En. 95-1807 by Sec. 7, Ch. 513, L. 1973; R.C.M. 1947, 95-1807; amd. Sec. 4, Ch. 577, L. 1983; Sec. 46-15-311, MCA 1983; redes. 46-15-331 by Code Commissioner, 1985.

46-15-332. Privileged matters. All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(4); Sec. 46-15-312, MCA 1983; redes. 46-15-332 by Code Commissioner, 1985.

Part 4

Evidence in Cases Involving Sexual Offenses

Part Cross-References

Provisions generally applicable to sexual crimes, 45-5-511.

46-15-401. When videotaped testimony admissible. For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

History: En. 95-1814 by Sec. 1, Ch. 384, L. 1977; R.C.M. 1947, 95-1814; amd. Sec. 1, Ch. 151, L. 1979; amd. Sec. 1, Ch. 8, L. 1983.

46-15-402. Procedure at videotaping. (1) The procedural and evidentiary rules of the state of Montana which are applicable to criminal trials within the state of Montana shall apply to the videotape proceedings authorized by this part.

(2) The district court judge, the prosecuting attorney, the victim, the defendant, the defendant's attorney, and such persons as are deemed necessary by the court to make the recordings authorized under this part shall be allowed to attend the videotape proceedings.

History: En. 95-1815 by Sec. 2, Ch. 384, L. 1977; R.C.M. 1947, 95-1815.

46-15-403. Court order to protect privacy of victim. Videotapes which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: En. 95-1816 by Sec. 3, Ch. 384, L. 1977; R.C.M. 1947, 95-1816.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

46-15-404 through 46-15-410 reserved.

46-15-411. Payment for medical evidence. (1) The local law enforcement agency within whose jurisdiction an alleged incident of sexual intercourse without consent occurs shall pay for the medical examination of a victim of alleged sexual intercourse without consent when the examination is directed by such agency and when evidence obtained by the examination is used for the investigation or prosecution of an offense.

(2) This section does not require a law enforcement agency to pay any costs of treatment for injuries resulting from the alleged offense.

History: En. 95-1813 by Sec. 1, Ch. 128, L. 1977; R.C.M. 1947, 95-1813.

Cross-References

Sexual intercourse without consent, 45-5-503.

CHAPTER 16

TRIAL IN DISTRICT COURT

Part 1 — General Provisions

46-16-101. Who given precedence on calendar.
46-16-102. Right to jury trial — waiver.
46-16-103. Who decides questions of law and fact.
46-16-104. Plea of not guilty.

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AUG 18 1988

August 11, 1988

Mr. Gordon F. Proudfoot
Byne Clarke
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Suite 700, Belmont House
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B2Y 3Z5

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

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to Mr. Robert T. Grimit, President Elect of the Nebraska Bar Association was forwarded to me for response. Enclosed please find a memorandum prepared by staff in my office concerning the statutory and case law guidelines along with professional ethical codifications concerning the prosecutions duty to deliver to the defense exculpatory evidence. I believe the memorandum enclosed along with the attached cases set forth the standards imposed upon prosecutors in the State of Nebraska to disclose exculpatory or mitigating evidence. If you have any additional questions after reviewing the memorandum and case law, please let me know and I'll be glad to try to answer them.

Very truly yours,

Scott P. Helvie
Chief Deputy

SPH:lm

Enc.

pc Mr. Robert Grimit
President-Elect
Nebraska State Bar Assoc.

§ 29-1909. Witness From Another State; Not Subject to Arrest or Civil Process While in This State

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not while in this state pursuant to such summons be subject to arrest for the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons. If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

§ 29-1910. Act; How Construed

Sections 29-1906 to 29-1911 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them. They shall be construed as supplemental to and cumulative with section 29-1904.

§ 29-1911. Act; How Cited

Sections 29-1906 to 29-1911 may be cited as the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

(c) DISCOVERY

§ 29-1912. Discovery; Defendant; Request to Inspect and Make Copies of Evidence; Granted; When

(1) When a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:

(a) The defendant's statement, if any. For purposes of this subdivision statement shall mean a written statement made by the defendant and signed or otherwise adopted or approved by him or her, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and recorded contemporaneously with the making of such oral statement;

(b) The defendant's prior criminal record, if any;

(c) The defendant's recorded testimony before a grand jury;

(d) The names and addresses of witnesses on whose evidence the charge is based;

(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

(f) Documents, papers, books, accounts, letters, photographs, objects or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority.

(2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion the court shall consider among other things whether:

(a) The request is material to the preparation of the defense;

(b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;

(c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;

(d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or

(e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.

(3) Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.

(4) Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone. The statement 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 by the defendant.

§ 29-1913. Discovery; Evidence of Prosecuting Authority; Test or Analysis by Defense; When Allowed; When Inadmissible

(1) When in any felony prosecution or any prosecution for a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, the evidence of the prosecuting authority consists of scientific tests or analyses of ballistics, firearms identification, fingerprints, blood, semen, or other stains, upon motion of the defendant the court where the case is to be tried may order the prosecuting attorney to make available to the defense such evidence

necessary to allow the defense to conduct like tests or analyses with its own experts. The order shall specify the time, place, and manner of making such tests or analyses by the defense. Such an order shall not be entered if the tests or analyses by the defense cannot be made because of the natural deterioration of the evidence.

(2) If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

§ 29–1914. Discovery; Order; Limitation

Whenever an order is issued pursuant to the provisions of section 29–1912 or 29–1913, it shall be limited to items or information within the possession, custody, or control of the state or local subdivisions of government, the existence of which is known or by the exercise of due diligence may become known to the prosecution.

§ 29–1915. Discovery; Order; Specify Time, Place, and Manner of Inspections and Making Copies

An order issued pursuant to the provisions of sections 29–1912 to 29–1921 shall specify the time, place, and manner of making the inspections and of making copies or photographs and may prescribe such terms and conditions as are just.

§ 29–1916. Discovery; Order; Reciprocity to Prosecution; Waiver of Privilege of Self-Incrimination

(1) Whenever the court issues an order pursuant to the provisions of sections 29–1912 and 29–1913, the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:

(a) Are in the possession, custody, or control of the defendant;

(b) The defendant intends to produce at the trial; and

(c) Are material to the preparation of the prosecution's case.

(2) Whenever a defendant is granted an order under the provisions of sections 29–1912 to 29–1921, he shall be deemed to have waived his privilege of self-incrimination for the purposes of the operation of the provisions of this section.

§ 29–1917. Discovery; Deposition of Witness; When; Procedure; Use of Deposition

(1) At any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other

than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:

(a) May be material or relevant to the issue to be determined at the trial of the offense; or

(b) May be of assistance to the parties in the preparation of their respective cases.

(2) An order granting the taking of a deposition shall include the time and place for taking such deposition and such other conditions as the court determines to be just.

(3) The proceedings in taking the deposition of a witness pursuant to the provisions of this section and returning it to the court shall be governed in all respects as the taking of depositions in civil cases.

(4) A deposition taken pursuant to the provisions of this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

§ 29–1918. Discovery of Additional Evidence; Notify Other Party

If, subsequent to compliance with an order for discovery under the provisions of sections 29–1912 to 29–1921, and prior to or during trial, a party discovers additional material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly notify the other party or his attorney and the court of the existence of the additional material.

§ 29–1919. Discovery; Failure to Comply; Effect

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 the provisions of sections 29–1912 to 29–1921 or an order issued pursuant to the provisions of sections 29–1912 to 29–1921, the court may:

(1) Order such party to permit the discovery or inspection of materials not previously disclosed;

(2) Grant a continuance;

(3) Prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed; or

(4) Enter such other order as it deems just under the circumstances.

§ 29–1920. Discovery; Indigent Defendant; Costs; How Taxed

Whenever a defendant is adjudged indigent, the reasonable costs incurred in the operation of the provisions of sections 29–1912 to 29–1921 shall be taxed as costs against the prosecuting authority.

§ 29–1921. Discovery; Attorney-Client Privilege Protected

Nothing in sections 29–1912 to 29–1921 shall be construed to authorize any disclosure which would violate the attorney-client privilege.

§ 29–1922. Discovery; Motion to Produce Statement of Defendant and Names of Eyewitnesses; Filing; Order

Any defendant may file a motion to produce any statement made by the defendant, or furnish the name of every eyewitness who has identified the defendant at a lineup or showup. The motion shall be filed in the court where the case is to be tried and may be made at any time after the information, indictment, or complaint is filed, and must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. Upon a showing that the items requested by the defendant may be material to the preparation of his or her defense and that the request is reasonable, the court shall entertain such motion and upon sufficient showing may at any time order that the discovery or the inspection be denied, restricted, or deferred or may specify the time, place, and manner of the making of the examination and the taking of copies of items requested and may prescribe such other terms and conditions as are just.

§ 29–1923. Discovery; Additional Statement of Defendant or Name of Eyewitness; Order of Court

If, subsequent to compliance with an order issued pursuant to section 29–1922, and prior to or during trial, the prosecuting authority discovers any additional statement made by the defendant or the name of any eyewitness who has identified the defendant at a lineup or showup previously requested or ordered which is subject to discovery or inspection under section 29–1922, he or she shall promptly notify the defendant or his or her attorney or the court of the existence of this additional material. If at any time during the course of the proceedings it is brought to the attention of the court that the prosecuting authority has failed to comply with this section or with an order issued pursuant to section 29–1922, the court may order the prosecuting authority to permit the discovery or inspection of materials or witnesses not previously disclosed, grant a continuance, or prohibit the prosecuting authority from introducing in evidence the material or the testimony of the witness or witnesses not disclosed, or it may enter such other order as it deems just under the circumstances.

§ 29–1924. Statement, Defined

The term statement as used in sections 29–1922 and 29–1923 shall mean (1) a written statement made by such defendant and signed or otherwise adopted or approved by him or her; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,

EXCULPATORY STATEMENTS/EVIDENCE

For the past 25 years, the right of an accused to obtain favorable evidence from a prosecutor has been recognized by the U.S. Supreme Court. Since that time, the issue has been considered in several cases by that court as well as by state and appellate courts. These will be reviewed here, along with other codifications and statements on the issue.

CASE LAW

U.S. Supreme Court

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)

The first recognition by the U.S. Supreme Court of the prosecutor's duty to provide exculpatory evidence to the defense came in this capital case. After Brady was tried, convicted and sentenced for murder, and the conviction was affirmed, a statement by a co-defendant admitting to the murder was discovered. The statement had been withheld by the prosecutor.

Brady appealed, claiming that his right to a fair trial was violated and the suppression violated the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court agreed. "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." Brady at 87, 10 L.Ed.2d at 218. The Court affirmed the appellate court's reversal and remanded the case for retrial on the punishment issue only.

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972).

Brady dealt with exculpatory statements. The Court also ruled in Giglio that other exculpatory evidence must be disclosed. The Court held that nondisclosure of the government's agreement with a co-conspirator affected the co-conspirator's credibility and the due process rights of the defendant were violated. Giglio was convicted of forgery and sentenced to five years' imprisonment. While awaiting appeal, the defense learned of evidence that the government had allegedly promised not to prosecute its key witness in exchange for his testimony. The Court said that a witness' reliability and credibility may help determine guilt or innocence and that nondisclosure of evidence about credibility comes under the general rule of Brady.

The evidence must be material, however, according to the Court, which held that any agreement about a future prosecution is relevant to the witness' credibility and the jury should be told of it. A new trial was ordered.

Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L.Ed.2d 706, reh'g denied, 409 U.S. 897, 93 S. Ct. 87, 34 L.Ed.2d 155 (1972).

The Court applied the Brady standards to a death penalty case in Moore, identifying three elements necessary to prove a due process violation. The evidence must have been suppressed by the prosecutor after a request by the defense; must be favorable to the defense; and must be material. The Court upheld the Brady principles, but found no violation of them in this case. In a

separate opinion, concurring in part and dissenting in part, Justice Marshall, joined by Justices Douglas, Stewart and Powell, stated that the defendant was denied a fair trial by the nondisclosure of certain evidence. "When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information." Moore at 809, 33 L.Ed.2d at 721.

United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).

The issue of the request by the defense for exculpatory evidence was addressed by the Court in Agurs, in which the defendant's only defense for murder was self-defense. After her conviction for second-degree murder, defense counsel learned that the victim had a prior criminal record which would have demonstrated his tendencies to violent behavior. The prosecutor knew of his record, but did not disclose it. Even though the defense made no request for the information, the defendant appealed, seeking a new trial.

Three situations may arise where the Brady standards may apply, the Court held. The first involves perjured testimony of which the prosecutor had or should have had knowledge. The Court has held that such convictions are unfair and must be set aside if there is any possibility that the perjured testimony affected the jury's decision. That standard was not at stake in this case. The second situation is illustrated by Brady, where the prosecution receives a pretrial request for specific evidence, which must be material to the defense. The Court held that there

is no difference in cases where there has been a general request for exculpatory material or where there has been no request, which is the third situation. The Court said if there has been no request or a general request, the prosecutor should disclose clearly exculpatory material. "But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Agurs at 107, 49 L.Ed.2d at 351. The Court ruled that the defendant was not deprived of a fair trial in this case, however, because the trial judge believed beyond a reasonable doubt that the defendant was guilty, and the evidence would have made no difference in the outcome.

California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984).

Trombetta raised the issue of the prosecutor's duty to preserve exculpatory evidence. Motorists who were convicted of driving while intoxicated appealed when they discovered that the police had not preserved the drivers' breath samples. They claimed that this failure deprived them of evidence which could impeach their breath tests. The Court held that law enforcement agencies are not required to preserve such samples in order to introduce the breath tests as evidence at trial. The Court said that in order to meet the Agurs materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other means." Trombetta at 489, 81 L.Ed.2d at 422. The evidence in

this case failed these tests, the Court held.

United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985).

The defendant was convicted of narcotics charges in Bagley, where a specific request was made by defense counsel for any deals the government had made in exchange for witnesses' testimony. The government did not disclose in its response any information about any such arrangements with witnesses. After filing requests for documents under the Freedom of Information Act several years later, the defendant found that two witnesses had contracted with the government to be paid for their testimony. The defendant moved for a vacation of his sentence, citing Brady. The Court held that the Brady rule covers both impeachment and exculpatory evidence, but retained the requirement of materiality. The standard of materiality was defined as evidence where there is a "reasonable probability" that the outcome of the trial would have differed if the evidence had been disclosed to the defense. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley at 682, 87 L.Ed.2d at 494. The Court reversed and remanded the case to determine whether there was a reasonable probability that the trial's result would have differed if exculpatory evidence had been available.

U.S. Court of Appeals, Eighth Circuit

The Eighth Circuit has generally followed the Brady rules as standards, but has not often found violations of due process, either due to lack of materiality (792 F.2d 119, 831 F.2d 773);

failure to find suppression (791 F.2d 107); failure to find the evidence was exculpatory (801 F.2d 348, 834 F.2d 1431); or finding that the results would not have differed (823 F.2d 1241).

In a Nebraska case, Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975), the appeals court ruled that favorable evidence of a polygraph transcription had been suppressed, but found that the nondisclosure did not affect the fairness of the trial. The habeas corpus petitions were denied when the court determined that the requested report could have harmed as well as helped the defendant.

The appeals court in the same year reversed a conviction for filing a false claim and using a false document to receive urban renewal relocation payments. In U.S. v. Librach, 520 F.2d 550 (8th Cir. 1975), the court found an "egregious case of prosecutorial suppression of evidence that was both favorable and material to the defense" in the suppression of information that the government's chief witness was in protective custody and was being paid $10,000 for his testimony. Librach at 553.

A case which resulted in a conviction for cocaine distribution was remanded by the court in Anderson v. United States, 788 F.2d 517 (8th Cir. 1986). The state had refused to produce statements that were made by a co-conspirator during a polygraph exam, as well as tapes of conversations with him. The court held that whether those items were material should have been reviewed by the trial court.

In U.S. v. Risken, 788 F.2d 1361 (8th Cir. 1986), the court found error in a prosecutor's failure to disclose an agreement

between the government and a government witness, but held that it was not reversible error. The informal agreement called for the witness to be paid after the trial. The court said the "government's failure to disclose known evidence favorable to the accused is incompatible with Brady, even though nondisclosure in a particular case may not warrant reversal under" the standard of materiality of Bagley. Risken at 1375.

Nebraska Supreme Court

The Nebraska Supreme Court has also applied Brady standards, but has generally held that the failure to disclose is not material [See State v. Patterson, 213 Neb. 686 (1983)]; that no evidence was withheld [See State v. Fries, 214 Neb. 874 (1983)]; that the evidence was not exculpatory [See State v. Tweedy, 224 Neb. 715 (1987)]; or that a Brady violation was not proven [See State v. Meis, 217 Neb. 770 (1984), State v. Reyes, 218 Neb. 588 (1984)].

A murder conviction was affirmed when the court found no suppression of evidence in State v. Peery, 205 Neb. 271 (1980). The defendant's appeal was based on the prosecution's suppression of exculpatory evidence about a motorcyclist who was near the scene of the crime. Quoting Agurs, the court said the evidence must be favorable to the defense, material to either punishment or guilt, and exculpatory. The court found no connection between the motorcyclist and the murder and affirmed the trial court's finding that no exculpatory information was found in the police reports.

The court ordered a new trial in State v. Brown, 214 Neb. 665 (1983). After his arrest for robbery, the defendant filed motions asking for disclosure of examination and test reports. The state replied that it knew of no examinations or tests. The defendant also sought written statements of depositions. The defendant was found guilty and sought a new trial, based on the claim that information was suppressed about an attempted hypnotic session with the defendant. The court reviewed Brady, but said that case did not focus on pretrial preparation because it was not a rule of discovery. Discovery rules, codified in the Federal Rules of Criminal Procedure or state statutes, "can exact more than the constitutional minimum, so that courts must focus on information potentially useful to the defense." Brown at 675.

The court said the hypnotic session was not an examination or test and the failure to disclose was not prejudicial. However, a pathologist's opinion concerning the cause of his wounds did fall within state statute [Neb. Rev. Stat. 29-1912(1)(e)] and should have been disclosed. Without that information, the defendant did not receive a fair trial.

Again relying on Brady, the court affirmed a murder conviction, holding that the evidence was not specifically requested nor obviously exculpatory. State v. Rice, 214 Neb. 518 (1983). After several appeals were denied following a murder conviction, the defendant sought a new trial. His claim was based on the suppression of a tape of a 911 call, which allegedly lured a police officer to a home where he was killed by a bomb. The defendant also claimed that the state did not disclose

promises of leniency made to a government witness or a letter written by the government witness while he was in jail.

The court analyzed the three situations identified in Agurs in which the Brady rules apply. The court ruled out the existence of the perjury standard. It also found no specific request for the tape, eliminating that standard. In the third situation, a general request requires a response when the evidence is obviously exculpatory. The court said that standard is proper, but held that the tape was "not so obviously exculpatory as to create a reasonable doubt about the defendant's guilt which did not otherwise exist." 214 Neb. at 528. No relief was granted the defendant.

A defendant convicted of first degree assault claimed he was denied effective assistance of counsel because the counsel was allowed to see a state ombudsman's report, but the report was kept from the defendant. State v. Schaeffer, 217 Neb. 4 (1984). The court affirmed the conviction, finding that the result was based on overwhelming evidence, not on the withholding of information from a defendant. In a concurring opinion, Chief Justice Krivosha said he disagreed with the suggestion that a court may "instruct counsel to withhold documents or information from a client. If the client does not have the benefit of all of the information available to counsel, then the relationship between attorney and client cannot be fulfilled. . . . If the client should not see the information, and that may be the case, neither should his counsel." 217 Neb. at 7.

Federal Rules of Criminal Procedure (FRCP)

The Federal Rules of Criminal Procedure, which govern proceedings in criminal cases, address the disclosure of evidence by the prosecutor in Rule 16. Rule 16(a)(1)(A) requires that the government, upon request, permit the defendant "to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, . . .known, or by the exercise of due diligence may become known, to the attorney for the government . . . ." FRCP Rule 16. The prosecution is also required to provide, upon request, copies of the defendant's criminal record [Rule 16(a)(1)(B)], documents and tangible objtects material to the defense [Rule 16(a)(1)(C)], and reports of examinations or tests material to the defense [Rule 16(a)(1)(D)]. The rule does not provide for discovery of internal information or documents made by the prosecutor or statements of government witnesses [Rule 16(a)(2)]. The rules require that the duty to disclose continues during the trial if a party discovers additional evidence or material that was earlier requested [Rule 16(c)].

Nebraska Revised Statutes (1985)

Nebraska law addresses requests and suppressions in two chapters. Neb. Rev. Stat. § 29-115 requires that any person who is aggrieved by a statement which he or she has made that is not voluntary "may move for suppression of such statement for use as evidence against him or her."

In the discovery rules, a defendant is allowed to request that the court order the prosecutor to allow the defendant "to inspect and copy or photograph the defendant's statement." Neb.

Rev. Stat. § 29-1912(1)(a). The court may use its discretion and consider the materiality of the request; whether the request is made to harass the prosecution or witnesses; whether the request would delay the trial; whether the request would "preclude a just determination of the issues"; or whether the request would result in bodily harm. Neb. Rev. Stat. § 29-1912(2)(a-e).

The order is limited to items or information within the possession or control of the government and of which the prosecutor has knowledge. Neb. Rev. Stat. § 29-1914. If additional material is discovered during trial, and the party would have been under a duty to disclose earlier, the other party or attorney and the court should be notified. Neb. Rev. Stat. § 29-1918 and § 29-1923.

The law also allows any defendant to file a motion to produce a defendant's statement, and upon a showing that the request is reasonable and material to the defense, the motion may be granted by the court. Neb. Rev. Stat. § 29-1922.

Ethical Considerations

Attorneys are also guided by ethical standards promulgated by the American Bar Association. The ABA Model Code of Professional Responsibility, adopted in Nebraska and a majority of other states, requires that a public prosecutor make timely disclosure to the defendant's counsel, or to the defendant who has no counsel, 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." Disciplinary Rule 7-103(B). Exculpatory statements would

arguably fall within those standards.

The Model Rules of Professional Conduct were approved by the ABA in 1983 and have been adopted in many states. Rule 3.8 correlates with DR 7-103 in the Model Code and addresses the special responsibilities of a prosecutor. It requires that a prosecutor in a criminal case shall make timely disclosure to the defense of evidence known to the prosecutor "that tends to negate the guilt of the accused or mitigates the offense. . . ." [Rule 3.8(d)].

The ABA has also developed Standards of Criminal Justice Relating to the Prosecution Function, which expand on the Model Code and Model Rules and which have been adopted in some jurisdictions. Standard 3-3.11(1) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." Unprofessional conduct is defined by the standards as activity for which an attorney may be disciplined. Prosecutors are also asked to comply in good faith with applicable discovery procedures [Standard 3-3.11(b)]. It is disciplinable conduct for a prosecutor to intentionally "avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." [Standard 3-3.11(c)].

CONCLUSION

Case law supports the concept that prosecutors should disclose evidence, including statements, which are exculpatory, but it must be shown that the evidence is material to the defense, clearly exculpatory, and has a reasonable probability of altering the outcome of the trial.

Federal and state statutes require that prosecutors respond in good faith to requests from defendants for exculpatory materials, including defendant's statements, criminal records and other documents. The prosecutor's duty begins before the trial and continues through the proceedings, if new evidence is discovered.

The codes of professional responsibility which guide an attorney's ethical conduct suggest, and in some cases require, that a prosecutor make timely disclosure to the defense counsel of evidence which has a bearing on the defendant's guilt or punishment.

Failure to disclose evidence which has a material effect on a defendant's case may be held to be a violation of the defendant's right to a fair trial or to due process guaranteed by state and federal constitutions. However, courts appear to be most likely to consider the facts of each case before ruling that such violations exist and that a new trial is necessary.

OFFICE OF THE DISTRICT ATTORNEY

Clark County, Nevada

REX BELL
District Attorney

DONALD K. WADSWORTH
ASSISTANT DISTRICT ATTORNEY

WILLIAM T. KOOT
CHIEF CRIMINAL DEPUTY

JUL 13 1988

July 5, 1988

Mr. Gordon F. Proudfoot
BOYNE CLARK
Barristers and Solicitors
Suite 700, Belmont House
33 Alderney Drive
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:

On June 17, 1988, Bill Curran, President of the State Bar of Nevada, forwarded your letter of June 10, 1988 addressed to him concerning the above matter to my attention. In said letter you inquired on behalf of the Canadian Bar Association whether or not the State of Nevada had any laws, guidelines or ethical codifications which require that exculpatory statements in criminal prosecutions be timely delivered up to defense counsel.

In that regard please find enclosed herein the following exhibits and related documentation:

1. Exhibit "A" which contains copies of Nevada Supreme Court Rules (of professional conduct) 179 and 173 entitled "Special Responsibilities of a Prosecutor" and "Fairness to Opposing Party and Counsel" respectively.

2. Exhibit "B" which sets forth a copy of Nevada Revised Statute 172.145 pertaining to a grand jury that is impaneled in the State of Nevada to hear criminal matters.

3. Exhibit "C" which sets forth copies of sections 174.235, 174.245 and 174.295 of the Nevada Revised Statutes, which sections pertain to the pre trial criminal discovery and inspection rights of an accused.

As reflected in the attached exhibit "A", subsection (4) of the Supreme Court Rule 179 places a special responsibility on a prosecutor in the State of Nevada to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate or mitigate the guilt of the accused. Additionally, subsection (1) of Supreme Court Rule 173 directs that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

Section 172.145 of the Nevada Revised Statutes which is set forth in Exhibit "B" likewise specifically requires that if the District Attorney (prosecutor) is aware of any evidence which will explain away the charge, he shall submit it to the Grand Jury.

The three criminal discovery and inspection statutes, i.e. NRS sections 174.235, 174.245 and 174.295 set forth in Exhibit "C", while not directly mentioning a duty to disclose exculpatory evidence, may in certain circumstances certainly have that effect. I would also mention with regard to said statutes that while the scope of the evidence which is legally discoverable thereunder is somewhat limited in that we exclude statements of state's witnesses, that in practice the actual discovery that is forwarded to an accused in this jurisdiction far exceeds those requirements. The Clark County District Attorney's Office has an "open file" policy of discovery, meaning that the defendant is entitled to copies of everything, i.e. reports, scientific examinations, witness statements, etc. that is contained in our file. The only exception to our "open file" policy is our office work product.

I sincerely hope that the enclosed documents will be helpful to you in your upcoming brief on the "Role of the Crown Prosecutor" which is being prepared for the Canadian Bar Association.

Very truly yours,

Donald K. Wadsworth
Assistant District Attorney

DKW/kab

Enclosures

cc: Bill Curran

Rule
103. Disciplinary boards and hearing panels.
104. State bar counsel.
105. Procedure on receipt of complaint.
106. Privilege.
107. Refusal of complainant to proceed, compromise, etc.
108. Matters involving related pending civil or criminal litigation.
109. Service.
110. Subpoena power, witnesses, and pretrial proceedings.
111. Attorneys convicted of crimes.
112. Disbarment by consent.
112A. Repealed.
113. Discipline by consent.
114. Reciprocal discipline.
115. Disbarred or suspended attorneys.
116. Reinstatement.

E. Disability

117. Proceedings when an attorney is declared to be incompetent or is alleged to be incapacitated.
118. Appointment of counsel to protect client's interest.
119. Additional rules of procedure.

F. Miscellaneous Provisions

120. Costs; bar counsel conflict or disqualification.
121. Confidentiality and publication of public reprimand.
122. Effective date.
123. Citation to unpublished opinions and orders.
124 through 133. Repealed.
133.3. Repealed.
133.5. Repealed.
134 through 149. Repealed.

G. Rules of Professional Conduct

150. Adoption of Rules of Professional Conduct.
151. Competence.
152. Scope of representation.
153. Diligence.
154. Communication.
155. Fees.
156. Confidentiality of information.
157. Conflict of interest: General rule.
158. Conflict of interest: Prohibited transactions.
159. Conflict of interest: Former client.
160. Imputed disqualification: General rule.
161. Successive government and private employment.
162. Former judge or arbitrator.
163. Organization as client.
164. Client under a disability.
165. Safekeeping property.
165.1. Renumbered.
166. Declining or terminating representation.
167. Advisor.
168. Intermediary.
169. Evaluation for use by third persons.
170. Meritorious claims and contentions.
171. Expediting litigation.
172. Candor toward the tribunal.
173. Fairness to opposing party and counsel.
174. Impartiality and decorum of the tribunal.
175. Relations with opposing counsel.

EXHIBIT "A"

Rule
176. Relations with jury.
177. Trial publicity.
178. Lawyer as witness.
179. Special responsibilities of a prosecutor.
180. Advocate in nonadjudicative proceedings.
181. Truthfulness in statements to others.
182. Communication with person represented by counsel.
183. Dealing with unrepresented person.
183.5. Repealed.
184. Respect for rights of third persons.
185. Responsibilities of a partner or supervisory lawyer.
186. Responsibilities of a subordinate lawyer.
187. Responsibilities regarding nonlawyer assistants.
188. Professional independence of a lawyer.
189. Unauthorized practice of law.
190. Restrictions on right to practice.
191. Pro bono publico service.
192. Accepting appointments.
193. Membership in legal services organization.
194. Law reform activities affecting client interests.
195. Communications concerning a lawyer's services.
196. Advertising.
197. Direct contact with prospective clients.
198. Communication of fields of practice.
199. Firm names.
200. Bar association and disciplinary matters.
201. Judicial and legal officials.
202. Reporting professional misconduct.
202.1, 202.2. Repealed.
203. Misconduct.
203.5. Jurisdiction.
204. Repealed.

H. Continuing Legal Education for Active Members of the State Bar

205. Definitions.
206. Purpose.
207. Creation of board.
208. Powers and duties of board.
209. Expenses of board.
210. Minimum continuing legal education requirements.
211. Reporting requirements.
212. Procedure in event of noncompliance.
213. Reinstatement to active status.
214. Exemptions.
215. Petitions for relief.

I. Clients' Interest-Bearing Trust Accounts

216. Creation of foundation.
217. Creation and maintenance of interest-bearing trust accounts.
218. Arrangements with unauthorized financial institutions.
219. Availability of earnings to client.
220. Availability of earnings to attorney.
221. Determination of whether funds are eligible.

J. Rules of Procedure for the Standing Committee on Ethics and Professional Responsibility

222. Purpose.
223. Creation and organization of the committee.

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Rule
224. Functions
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CASE NOTES

Editor's note. — The following annotations were decided under former similar rules.

Public defender to be called as witness should be replaced. — Where public defender in murder trial had formerly represented defendant's co-defendant and thus he had the duty not to disclose statements made by former client and also to make a vigorous defense and deputy public defender was to be called as a witness such public defender and deputy had a conflict of duty and should have been replaced. Koza v. Eighth Judicial Dist. Court ex rel. County of Clark, 99 Nev. 535, 665 P.2d 244 (1983).

Rule 179.

Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

1. Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

2. 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;

3. Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

4. 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

5. 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 177. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 179 was repealed effective March 28, 1986.

CASE NOTES

A prosecutor's primary duty is not to convict, but to see that justice is done. Williams v. State, — Nev. —, 734 P.2d 700 (1987).

Rule 173.

Fairness to opposing party and counsel.

A lawyer shall not:

1. 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;

2. Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

3. Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

4. 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;

5. 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 culpablility of a civil litigant or the guilt or innocence of an accused; or

6. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

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

(b) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 173 was repealed effective March 28, 1986.

Rule 174.

Impartiality and decorum of the tribunal.

A lawyer shall not:

1. Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

2. Communicate ex parte with such a person except as permitted by law; or

3. Engage in conduct intended to disrupt a tribunal. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 174 was repealed effective March 28, 1986.

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Nev. 324, 429 P.2d 831
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152 (1979).

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nd the grand jurors

1. Question an attorney or his employee regarding matters which he has learned during a legitimate investigation for his client.

2. Issue a subpena for the production of the private notes or other matters representing work done by the attorney or his employee regarding the legal services which the attorney provided for a client. (1985, p. 1028.)

172.145. Grand jury required to hear and district attorney required to submit known evidence which will explain away charge; invitations and issuance of process for witnesses.

1. The grand jury is not bound to hear evidence for the defendant. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they shall order that evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

2. If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury.

3. The grand jury may invite any person, without process, to appear before the grand jury to testify. (1967, p. 1409; 1985, p. 555.)

CASE NOTES

Cited in: United States ex rel. Morford v. Hocker, 268 F. Supp. 864 (D. Nev. 1967); Maiden v. State, 84 Nev. 443, 442 P.2d 902 (1968); Hyler v. Sheriff, Clark County, 93 Nev. 561, 571 P.2d 114 (1977); Seim v. State, 95 Nev. 89, 590 P.2d 1152 (1979); Biglieri v. Washoe County Grand Jury Report, 95 Nev. 696, 601 P.2d 703 (1979).

LEGAL PERIODICALS

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

172.155. Degree of evidence to warrant indictment; objection.

1. The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant has committed it.

2. The defendant may object to the sufficiency of the evidence to sustain the indictment only by application for a writ of habeas corpus. (1967, p. 1409; 1979, p. 331.)

EXHIBIT "B"

Effective date. — This section became effective June 3, 1985.

174.229. Videotaped testimony.

If a prospective witness who is scheduled to testify before a grand jury or at a preliminary hearing is less than 14 years of age, the court shall, upon the motion of the district attorney, and may, upon its own motion, order the child's testimony to be videotaped at the time it is given. (1985, p. 1424.)

Effective date. — This section became effective June 3, 1985.

174.231. Effect of NRS 174.227 and 174.229.

The provisions of NRS 174.227 and 174.229 do not preclude:

1. The submission of videotaped depositions or testimony which are otherwise admissible as evidence in court.

2. A victim or prospective witness from testifying at a proceeding without the use of his videotaped deposition or testimony. (1985, p. 1424.)

Effective date. — This section became effective June 3, 1985.

DISCOVERY AND INSPECTION

174.235. Defendant's statements or confessions; reports of examinations and tests.

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph any relevant:

1. Written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney; and

2. Results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney. (1967, p. 1419.)

CASE NOTES

Voluntary disclosure is not contemplated by the statutory provisions concerning criminal discovery. Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977).

Cited in: Franklin v. Eighth Judicial Dist. Court ex rel. County of Clark, 85 Nev. 401, 455 P.2d 919 (1969); Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978); Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980).

EXHIBIT "C"

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OPINIONS OF ATTORNEY GENERAL

Breath samples. — There is no requirement in Nevada case law nor the statutes that breath samples be preserved as evidence in driving under the influence cases in which a breach test is conducted. AGO 83-11 (9-14-1983).

RESEARCH REFERENCES

Defendant's right to disclosure of presentence reports. 40 A.L.R.3d 681.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 A.L.R.3d 571.

Exclusion of evidence in state criminal actions for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses — Modern cases. 33 A.L.R.4th 301.

174.245. Other books, papers, documents, tangible objects or places.

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subsection 2 of NRS 174.235 and NRS 174.087, this section does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) to agents of the state. (1967, p. 1419; 1969, p. 350.)

CASE NOTES

Intransigent defiance, until a trial court ultimately loses patience and dismisses charges, is not an appropriate means by which to frame appellate issues concerning criminal discovery. State v. Stiglitz, 94 Nev. 158, 576 P.2d 746 (1978).

Cited in: Franklin v. Eighth Judicial Dist. Court ex rel. County of Clark, 85 Nev. 401, 455 P.2d 919 (1969); Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980).

OPINIONS OF ATTORNEY GENERAL

Breath samples. — There is no requirement in Nevada case law nor the statutes that breath samples be preserved as evidence in driving under the influence cases in which a breath test is conducted. AGO 83-11 (9-14-1983).

RESEARCH REFERENCES

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like — Modern cases. 27 A.L.R.4th 105.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution — Modern cases. 27 A.L.R.4th 1188.

174.285. Time of motions.

A motion under NRS 174.235 to 174.295, inclusive, may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under such sections. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice. (1967, p. 1420.)

174.295. Continuing duty to disclose; failure to comply.

If, subsequent to compliance with an order issued pursuant to NRS 174.235 to 174.295, inclusive, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under such sections, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. 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 such sections or with an order issued pursuant to such sections, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. (1967, p. 1420.)

CASE NOTES

No relief for breaches of informal discovery agreements. — Although this statute provides relief for a prosecutor's failure to notify defense counsel of all discoverable material, that statute is only operative in situations where a previous defense motion has been made and a court order issued; it is not applicable to any informal arrangements that are made between counsel without benefit of court sanction. Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978).

Correction of inadvertent nondisclosure. — Where, on cross-examination, witness stated she had looked at mugbooks in attempt to identify perpetrator, but such books had not been made available to defendant under discovery order since it was apparent from the district attorney's statements at trial that he was unaware that witness had looked at the mugbooks, that the nondisclosure was inadvertent, and even were the court to assume the nondisclosure prejudiced defendant, the trial court alleviated this prejudice by allowing inspection of the mugbooks at a time during the trial when defendant could, if he so elected, cross-examine witnesses concerning the mugbooks, there was no abuse of discretion in order denying the motion for a mistrial. Langford v. State, 95 Nev. 631, 600 P.2d 231 (1979).

Cited in: Maginnis v. State, 93 Nev. 173, 561 P.2d 922 (1977).

RESEARCH REFERENCES

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 A.L.R.4th 837.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like — Modern cases. 27 A.L.R.4th 105.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses — Modern cases. 33 A.L.R.4th 301.

NEW HAMPSHIRE BAR ASSOCIATION

18 CENTRE STREET • CONCORD, NEW HAMPSHIRE 03301 • 603-224-6942

June 21, 1988

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

Dear Brother Proudfoot:

In response to your inquiry dated June 10, 1988, I have enclosed a copy of Rule 3.8 of the New Hampshire Rules of Professional Conduct. These ethical rules were adopted by our Supreme Court in New Hampshire effective February 1, 1986, and in large measure were based upon the American Bar Association's recommendations for updated and codified rules.

You will note that Rule 3.8(d) would be applicable to your inquiry. If you are looking for more substantive information than this ethical rule, I suggest you contact the New Hampshire Bar Association in Concord, NH and inquire of the Criminal Justice section. The Bar's office address is:

New Hampshire Bar Association
18 Centre Street
Concord, NH 03301

and the phone number is (603) 224-6942.

I hope and trust that you find this information useful, and good luck on your project.

Yours very truly,

Stephen L. Tober

Stephen L. Tober

SLT/wlc

cc: Ms. Gail Kinney

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADOPTED JANUARY 16, 1986

EFFECTIVE FEBRUARY 1, 1986

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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.

Committee Notes to Decisions

ECOP 82-4/4 **Representing Both Parties in Marital Mediation.** The Committee's opinion in regard to consulting attorneys for a non-profit mediation service was that both of the clients are those of the attorney and the mediation service is not the client. See Committee Notes, Rule 2.2.

ECOP 82-3/16 **Divorce Mediation.** Private divorce mediation creates an impermissible conflict of interest. See Committee Notes, Rule 2.2.

CPCOP 74-10/31 **Dual Representation.** Dual representation frequently creates impermissible conflicts of interest and should be avoided. See Committee Notes, Rule 1.7.

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.

ABA Model Code Comments

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 relating to the administration of Criminal Justice, 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.

New Hampshire Comments

This Rule does not address the problems raised by the authorization of police officers to act as prosecutors in New Hampshire. While police officers do have limited legal training, they are not lawyers, and may, or may not, recognize the special responsibilities that are inherent in the quasi-judicial office of prosecutor. When those responsibilities are ignored or abrogated, the rights of an accused are very likely to be jeopardized. The most frequent contact between the general public and the courts involves motor vehicle violations and in all likelihood police prosecutors. It is at this level that much of the public's perception about our system of justice is formed, and it is at this level that precautions against prosecutorial abuse are most needed.

While the Committee had very strong concerns about police prosecutors, it felt that the scope of these Rules did not extend the Committee's jurisdiction to police officers.

Committee Notes to Decisions

ECOP 82-3/3 **Use of Shared Space by Part Time County Attorney.** Sharing of office space by a part time county attorney and defense attorneys is improper. See Committee Notes, Rule 1.6.

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.

ABA Model Code Comments

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 the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before 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.

New Hampshire Comments

See also Rule 1.11A.

TRANSACTION

Rule 4.1. Truthfulne

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JUN 27 1988

June 17, 1988

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Suite 700, Belmont House
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PO Box 876
Dartmouth, Nova Scotia B2Y 3Z5
Att: Gordon F. Proudfoot

Re: Exculpatory Evidence;
Royal Commission on the
Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

This is in response to your May 25, 1988 letter to the Attorney General of the State of New York concerning the existence of rules or guidelines governing the disclosure of exculpatory evidence to defense counsel during a criminal prosecution.

In New York, Criminal Procedure Law (CPL) Sec. 240.20(h) requires the prosecution to disclose exculpatory evidence to the defendant and his attorney immediately or whenever he becomes aware of its existence.

A copy of that section, the practice commentary and the most recent amendments to that section are enclosed herein.

The rule of law that was codified in CPL Sec. 240.20(h) was enunciated by the United States Supreme Court in its decision of Brady v. Maryland, 373 U.S. 220, 83 S. Ct. 1194 (1963). The decision, which is applicable to all criminal prosecutions in New York, held that 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. A copy of the Brady decision is enclosed herein along with a copy of a United States Supreme Court decision called U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976) which further defines the rule of

Brady v. Maryland in the context of a prosecutor's duty to disclose exculpatory material absent a request from the defendant.

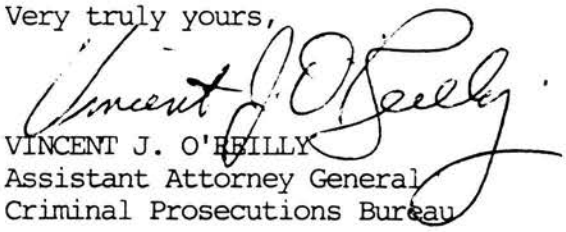
As can be seen, exculpatory evidence relating to a defendant's guilt or punishment must be disclosed to defense counsel by the prosecutor. This is true whether defense counsel requests it or not.

In New York, not only does a prosecutor have a duty to disclose exculpatory "Brady" material, he also has a duty to provide defense counsel with all pre-trial statements of prosecution witnesses. This is called "Rosario" material, and a breach of this "Rosario" duty can have severe consequences as can be seen by reading People v. Ranghelle, 69 N.Y.2d 56 (1986). A copy of the Ranghelle decision is enclosed herein.

Finally, the Code of Professional Responsibility, Disciplinary Rule #7-103 (B) requires a prosecutor in New York to disclose exculpatory evidence. A copy of that rule is enclosed herein for your guidance.

I have tried to supply you with the basic rules governing disclosure of exculpatory evidence in New York State. I hope these materials prove helpful to you in the preparation of your brief to the Royal Commission. If you have any questions about anything herein, please feel free to contact me.

Very truly yours,



VINCENT J. O'REILLY
Assistant Attorney General
Criminal Prosecutions Bureau

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il court would, notwithstanding
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department. Id.

Counterclaims

n attorney may interpose a coun-
laim in any suit which the attor-
believes is neither frivolous nor
arranted. N.Y.County 585 (1971).

Usurious mortgages

n attorney may not properly pre-
usurious mortgage papers for a
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nt in violating the law. N.Y.
e 126 (1970).

Whereabouts of client

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Private placement adoptions

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N.Y.State 68 (1968).

Estates

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sh the information on his own.
State 207 (1971).

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s found after the decedent had
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iving at the public expense, no
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County 616 (1973).

9. Collection agencies

It is not ethical for an attorney to permit employees of a collection agency client to represent that they are from his office in their efforts to collect alleged debts. N.Y.County 586 (1971).

10. Matrimonial actions

An attorney may not properly refer a New York resident to a Mexican attorney to obtain a unilateral Mexican divorce where the plaintiff will appear in person in the action, but the defendant will appear neither in person or by attorney. N.Y.State 125 (1970).

It would be improper for a lawyer to advise or assist in, or refer client to another lawyer for the purpose of, procuring a foreign state divorce where the foreign court would not be informed of the client's actual residence. N.Y.State 10 (1965).

Where husband who intends to institute a divorce proceeding asked his lawyer not to disclose to the court a prior divorce decree obtained by the wife and where the husband represented to the lawyer that the prior decree was obtained without notice to him until after it was entered and that it was based on wife's false and perjured testimony, the nature of the proceeding was such as to indicate that disclosure might be required. N.Y.County 622 (1973).

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104. Communicating With One of Adverse Interest [1]

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party [2] or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel,[3] if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

People v. Gradville Bailey, Sup.Ct., Kings Co., N.Y., N.Y.Law J., April 19, 1982, p. 16.

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Notes of Decisions

1. Purpose

Trial court in delinquency adjudication erred in failing to direct prosecution to turn over arresting officer's memo for purposes of cross-examination. Matter of Pernell M., 1983, 98 A.D.2d 776, 469 N.Y.S.2d 95.

4. Applicability of provisions

Provisions of Criminal Procedural Law do not empower a court to grant any preindictment discovery to prospective target desiring to appear before a grand jury investigating commission of a crime. Application of Ajax Inc., 1985, 127 Misc.2d 534, 486 N.Y.S.2d 663.

RECENT AMENDMENTS

§ 240.20. Discovery; upon demand of defendant

1. Except to the extent protected by court order, upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:

[See main volume for text of (a) to (d)]

(e) Any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of section 450.10 of the penal law, irrespective of whether the people intend to introduce at trial the property or the photograph, photocopy or other reproduction.

(f) Any other property obtained from the defendant, or a codefendant to be tried jointly;

(g) Any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction;

(h) Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.

(i) The approximate date, time and place of the offense charged and of defendant's arrest.

(j) In any prosecution under penal law section 156.05 or 156.10, the time, place and manner of notice given pursuant to subdivision six of section 156.00 of such law.

[See main volume for text of 2]

(As amended L.1983, c. 317, § 1; L.1984, c. 795, § 3; L.1986, c. 514, § 8.)

1986 Amendment. Subd. 1, par. (j). L.1986, c. 514, § 8, eff. Nov. 1, 1986, added par. (j).

1984 Amendment. Subd. 1, par. (e). L.1984, c. 795, § 3, eff. Nov. 1, 1984, added par. (e) and redesignated former par. (e) as (f).

Subd. 1, par. (f). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (e) as (f) and former par. (f) as (g).

Subd. 1, par. (g). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (f) as (g) and former par. (g) as (h).

Subd. 1, par. (h). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (g) as (h) and former par. (h) as (i).

Subd. 1, par. (i). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (h) as (i).

1983 Amendment. Subd. 1, opening par. L.1983, c. 317, § 1, eff. 30 days after June 21, 1983 and applicable only to criminal actions commenced on or after such date, substituted "prosecutor's information," for "prosecutor's information or" and inserted ", or simplified information charging a misdemeanor".

Effective Date of 1984 Amendment; Applicability. Amendment by L.1984, c. 795, eff. Nov. 1, 1984, applicable to criminal actions commenced on or after such date, pursuant to section 4 of L.1984, c. 795, set out as a note under Penal Law § 450.10.

Effective Date of 1983 Amendment; Application. See section 4 of L.1983, c. 317, set out as a note under section 240.40.

Supplementary Practice Commentaries

by Peter Preiser

1986

The 1986 amendment to subdivision one of this section, adding paragraph (j), is one of several CPL provisions formulated to implement new crimes established in the Penal Law (see Art. 156) to attack the rapidly emerging modern problems created by unauthorized use, duplication of and tampering with computer data and programs (see also CPL 20.60[3], 250.30). The present provision relates to discovery in cases where the defendant is charged with Unauthorized Use of a Computer (Penal Law § 156.05) or Computer Trespass (Penal Law, § 156.10). Those crimes require that the use or trespass occur after prior notice of the restriction on authorized use has been given by one of several methods prescribed in Penal Law § 156.00[6]. The present provision permits defense discovery on demand of the time, place and manner of the transmittal of that notice.

by Joseph W. Bellacosa

1984

New paragraph (e) of subdivision one of this section was added in 1984 to conform to the new Penal Law provisions governing the return of stolen property. The Penal Law amendments loosen the existing restrictions upon the return of this property, and severely limit the sanctions which may be imposed under CPL 240.70 for failure to comply with the Penal Law requirements (see Penal Law 450.10 and Supplementary Practice Commentary to CPL 240.70).

By providing for the prompt photographing and return of the stolen property, the new provisions attempt to strike a balance between the legitimate interests of the victim and the due process and discovery rights of the defendant to the original best evidence. The new provision should help to clarify and simplify this procedure except that there is a danger lurking in the amendment that routine applications by defendants to retain or extend times could generate unnecessary and additional court business.

Interestingly, the Court of Appeals decided a recent case in this general area dealing with the sanctions available for unauthorized disposal of discoverable property (see People v. Kelly, 62 N.Y.2d 516, 478 N.Y.S.2d 834 and commented on in the pocket part at CPL 240.70).

1983

Discovery will now be available even upon the pendency of a simplified misdemeanor information. This change for conformatory reasons may also be found reflected in CPL 240.30 and 240.40.

The Advisory Committee on Criminal Law and Procedure urged this technical expansion because there was no discernible basis or rationale for excluding this category from the otherwise plenary list of accusatory instruments with respect to which discovery was available. Further, it was felt unfair to limit a defendant's discovery rights, dependent

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perhaps arbitrarily or haphazardly, on the police officer's mere choice of form of the accusatory instrument in a misdemeanor situation.

Practice Commentaries Cited

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People v. Bennett, 1981, 80 A.D.2d 68, 438 N.Y.S.2d 389.
People v. Delgado, 1981, 110 Misc.2d 492, 442 N.Y.S.2d 748.

Notes of Decisions

Composite sketch of defendant 20
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Preservation of evidence 17a
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Scope of disclosure
- **Bank reports 6a**
- **Dead body 6b**
- **Diary of victim 7a**
- **Identity of unindicted coconspirators 15b**
- **Identity of witnesses 15a**
- **Laboratory notes 11a**
- **Photographs 11b**
- **Physical examinations 11c**
- **Privileged information 12b**
- **Property obtained from defendant 12a**
- **Subpoenaed materials 14a**
- **Test results 14b**

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1. Constitutional requirements respecting disclosure

Suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, be excusable but, where the defense makes only a general request or none at all, failure to turn over obviously exculpatory material violates due process only if omitted evidence creates a reasonable doubt which did not otherwise exist. People v. Smith, 1984, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879, certiorari denied 105 S.Ct. 1226, 469 U.S. 1227, 84 L.Ed.2d 364, rehearing denied 105 S.Ct. 2042, 471 U.S. 1049, 85 L.Ed.2d 340.

Failure to disclose to defendant fact that complainant had initially stated that sexual attack took place at tavern rather than defendant's home did not deprive defendant of his due process rights or a fair trial. People v. McMullen, 1983, 92 A.D.2d 1059, 461 N.Y.S.2d 565.

Violation of "*Brady*" rule which requires disclosure of certain preexisting, favorable information or evidence within knowledge of prosecution does not automatically result in violation of defendant's constitutional right to due process, but depends upon materiality thereof, and materiality depends upon nature of what was withheld or circumstances accompanying pretrial demand for discovery. People v. Rich, 1983, 118 Misc.2d 1057, 462 N.Y.S.2d 163.

2. Defendant, rights of

People v. Smoot, 1981, 112 Misc.2d 877, 447 N.Y.S.2d 575 [main volume] affirmed 86 A.D.2d 880, 450 N.Y.S.2d 397.

Prosecution was not required to provide defendant with free transcripts of all proceedings involving man who had previously pled guilty to attempted rape of same victim; man's crime occurred over different period of time than defendant's crime, and man and defendant were not codefendants. People v. Morrow, 1987, ___ A.D.2d ___, 513 N.Y.S.2d 891.

In determining whether defendant charged with rape is entitled to discover statements made by victim to and records kept by rape crisis counselors, court must balance defendant's Sixth Amendment right of confrontation and cross-examination of adverse witnesses, his right to exculpatory evidence and evidence material to issue of guilt or innocence, and his right to statements made by prosecution witness with right of complainant to seek counseling to aid her in dealing with trauma of rape and her reasonable expectation that such counseling will not be made public. People v. Pena, 1985, 127 Misc.2d 1057, 487 N.Y.S.2d 935.

Criminal defendants' rights guaranteed by the Constitution, statutes and case law do not include the right to gain access to police records containing personal information about crime victims and witnesses by use of court-ordered subpoenas duces tecum issued ex parte. People v. Bolivar, 1983, 121 Misc.2d 229, 467 N.Y.S.2d 525.

Proper procedure for effectuating defendants' right to discover evidence against them so that they can intelligently prepare trial and negotiate plea agreements is specified in statute governing subpoenas duces tecum, and if there is dissatisfaction with this statutory procedure, relief should be sought

ple v. Bolivar, 7 N.Y.S.2d 525.

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demanded that po- ogate person ecome valuable ople v. Preston, 8 N.Y.S.2d 587.

dence is not in secution and is defendant, then the People to produce the same. People v. Caban, 1984, 123 Misc.2d 943, 475 N.Y.S.2d 330.

Duty of the prosecution to disclose material evidence to an accused exists when there is a general request or even no request. People v. McCann, 1982, 115 Misc.2d 1025, 455 N.Y.S.2d 212.

5. Demand

Prosecutor had right to make his request that defendant exhibit his knee, for identification purposes, in presence of jury, thereby allowing inference to be drawn that defendant's knee was as described by witness, but it would have been better practice if prosecutor had moved for pretrial discovery pursuant to article. People v. Rumph, 1985, 128 Misc.2d 438, 488 N.Y.S.2d 998.

6a. —— Bank reports

In criminal proceeding, bank was required to produce any relevant report submitted by it to the Federal Reserve Board which was prepared by its agents or employees, but was not required to produce any report prepared by the Board, its agents or employees. People v. Calandra, 1983, 120 Misc.2d 1059, 467 N.Y.S.2d 141.

6b. —— Victim's body

Victim's body in homicide case is not discoverable item prosecution must produce upon demand by defendant. People v. Rose, 1986, 122 A.D.2d 484, 505 N.Y.S.2d 244.

7. —— Defendant statements, etc.

State was not required to disclose to defense counsel prior to trial that defendant might have told arresting officer that he had taken some valium on date of burglary, where prosecutor used defendant's use of drugs to impeach defendant's credibility and prosecutor had no reason to believe that statements regarding valium consumption were of exculpatory nature. People v. [illegible], 1986, 121 A.D.2d 748, 504 N.Y.S.2d [illegible].

Corporate defendant was not entitled to discovery of statements made by nondefendant employees to law enforcement authorities before grand jury investigating corporation's possible violation of tax laws where corporation did not specifically designate such employees to testify on its behalf. People v. Christie, 1986, 133 Misc.2d 468, 505 N.Y.S.2d 310.

Memorandum from assistant district attorney to district attorney concerning status and progress of investigation that culminated in defendant's indictment was required to be disclosed to defendant to extent that oral statements made by defendant in presence of the assistant district attorney were reported where assistant district attorney was expected to be called to testify about those statements. People v. Essner, 1984, 125 Misc.2d 905, 480 N.Y.S.2d 857.

Informant, who was a prospective trial witness, became a subagent of law enforcement officials as of November 24, 1982, the date on which detective knew that informant was assisting another in obtaining, or attempting to obtain, information from defendant, and thus State was precluded, on its direct case, from introducing any statement allegedly made by defendant to informant on or after that date, and prosecutor would be required to disclose those statements allegedly made subsequent to that date. People v. Odierno, 1983, 121 Misc.2d 32[illegible], 467 N.Y.S.2d 968.

7a. —— Diary of victim

Murder defendant was not entitled to discover personal diary of murder victim to determine whether diary contained any information useful to his defense, even though defendant's name appeared in diary; diary was not in district attorney's possession, and defendant failed to demonstrate that it was reasonably likely that diary contained evidence or potential evidence. People v. Chambers, 1987, 134 Misc.2d 688, 512 N.Y.S.2d 631.

8. —— Exculpatory materials

Absent a connection to three counts of first-degree robbery with which defendant was charged, evidence of one victim's drug-related activity or such activity at victim's place of business was collateral and was not the kind of material the People were required to supply to defendant for use to impeach a witness. People v. Battee, 1986, 122 A.D.2d 527, 505 N.Y.S.2d 10.

Under principles of retroactivity, *Brady* requirement that prosecution disclose evidence that is exculpatory and material to issue of guilt or punishment would be applied to defendant's motion to vacate 1951 conviction of murder in second degree based upon guilty plea. People v. Armer, 1986, 119 A.D.2d 930, 501 N.Y.S.2d 203.

It was *Brady* violation for prosecution to fail to provide burglary defendant with evidence that key witness against him may also have believed that defendant was responsible for a prior robbery of witness' wife, and thus had an over-

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riding animosity against defendant, as jury was entitled to hear any evidence which would assist them in their valid assessment of the credibility of the witness. People v. Velez, 1986, 118 A.D.2d 116, 504 N.Y.S.2d 404.

Though police have duty to disclose exculpatory material in their control, failure to so disclose will constitute reversible error if such evidence is material to defense and likely to have changed jury's verdict. People v. Russo, 1985, 109 A.D.2d 855, 486 N.Y.S.2d 769.

United States Supreme Court's *Brady* decision regarding State's disclosure of exculpatory material was not violated, where photographs in dispute were of nonexculpatory nature, and photographs would not have affected judgment of jury in view of overwhelming evidence of defendant's guilt in committing first-degree robbery and first-degree attempted robbery. People v. Russo, 1985, 109 A.D.2d 855, 486 N.Y.S.2d 769.

On defense motion to produce victim of rape with which defendant had not been charged, who had assisted police in making composite sketch, evidence that defendant might not have committed the rape, with which he was not charged, was irrelevant and inadmissible and was not exculpatory as to charged robbery, and thus *Brady* application was properly denied. People v. Reynolds, 1984, 104 A.D.2d 611, 479 N.Y.S.2d 736.

Police had no duty to record monitored transaction between undercover police agent and defendant simply because of speculative assumption that, if recorded, tapes might have contained potentially exculpatory information. People v. De Zimm, 1984, 102 A.D.2d 633, 479 N.Y.S.2d 859.

Material contained in police report which was not disclosed to defendant was not exculpatory and would not have affected verdict of jury where description of defendant in report substantially conformed to defendant's actual description except as to age reference, which was immaterial, defendant's photograph was not among photographs which witness saw before lineup, and thus fact that he failed to identify anyone, if anything, tended to strengthen his lineup identification of defendant, and failure of witness to identify defendant from composite drawing was of no significance since it was not shown that composite looked like defendant. People v. LaBombard, 1984, 99 A.D.2d 851, 472 N.Y.S.2d 764.

Record established that defendant was provided with Brady and Rosario material in sufficient time to use it effectively in his defense to charge of murder in the second degree. People v. McAfee, 1983, 95 A.D.2d 898, 463 N.Y.S.2d 916.

Prosecutor had an obligation to disclose true identity of voice on tape recording of conversation between defendant and individual requesting defendant's help to prevent latter's incarceration because defendant's accomplice in alleged scheme to receive kickbacks in exchange for awarding municipal contracts was going to testify against him as, on its face, the tape could have served to create false impression as to exculpatory impact, in that the other party was an undercover officer, but any prejudice was ameliorated by curative instruction. People v. Tempera, 1983, 94 A.D.2d 748, 462 N.Y.S.2d 512.

Prosecutor has an affirmative duty to view a videotape taken of a defendant following his arrest for driving while intoxicated and, if it is exculpatory, make it available to the defendant, even absent a request therefor. People v. Karns, 1985, 130 Misc.2d 247, 495 N.Y.S.2d 890.

Jury may draw inference against defendant who fails to produce evidence which, if favorable, would naturally have been produced. People v. Rumph, 1985, 128 Misc.2d 438, 488 N.Y.S.2d 998.

Duty to disclose exculpatory material arises from the prosecutor's interest, overriding the particular and immediate interest of his client in the prosecution, that justice be done; justice cannot be done if the prosecutor in withholding evidence, even for a brief period, casts himself in the role of an architect of a proceeding that does not comport with minimal standards of justice; prosecution must bend every effort to avoid prejudice to defendant in all future proceedings. People v. Hunter, 1984, 126 Misc.2d 13, 480 N.Y.S.2d 1006.

Witness' statement that defendant was not the thief but, rather, the captor, was one that obviously tended to exculpate the defendant and establish his innocence of third-degree grand larceny, and therefore the statement was one that the prosecutor could not knowingly suppress or conceal from defendant upon request for evidence of that specific character; given its obviously exculpatory nature, it was a statement which the prosecutor was obliged to disclose to the defense even in the absence of such request. People v. Hunter, 1984, 126 Misc.2d 13, 480 N.Y.S.2d 1006.

Since suppression is a prohibited evil, prosecutor satisfies disclosure obligation and *Brady* requirement by revealing favorable material in time for defense to present it effectively for jury's consideration during trial. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

Preferred practice is pretrial disclosure of *Brady* material, since delayed disclosure, during trial, may be so unfair as to occasion a mistrial, with a resulting double jeopardy dismissal or later reversal. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

In prosecution for assault in third degree, obstructing governmental administration and resisting arrest, the People's timely pretrial disclosure that exculpatory material existed and their efforts to acquire it amply satisfied their *Brady* obligation, despite fact that production of full details of the material was delayed, since defendants could and did obtain postponements to prepare adequately for trial. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

It is incumbent on the state to employ regular procedures to preserve evidence which the state's agent could reasonably foresee might be favorable to the accused. People v. Molina, 1983, 121 Misc.2d 483, 468 N.Y.S.2d 551.

Government has a duty to preserve material evidence favorable to an accused. People v. McCann, 1982, 115 Misc.2d 1025, 455 N.Y.S.2d 212.

9. —— Exploration of case of prosecutor

Where exculpatory evidence was disclosed prior to close of People's direct case and defense had sufficient time to utilize material and there was no indication that earlier disclosure would have substantially affected nature of evidence or altered defendants' trial strategy, alleged late disclosure of exculpatory materials did not deprive defendants of fair trial. People v. Clark, 1982, 89 A.D.2d 820, 453 N.Y.S.2d 525.

10. —— Grand jury records and minutes

Grand jury synopsis sheet, which was not abbreviated summary of interview with any of People's witnesses, did not constitute "*Rosario* material" and was not subject to disclosure to defendant. People v. Williams, 1987, ___ A.D.2d ___, 513 N.Y.S.2d 840.

Accused who had already pled guilty to and been sentenced for crime arising out of activities investigated by grand jury and who waited four and one-half years after council of hospital of which accused was copartner was notified of attempt to obtain grand jury materials before initiating proceedings to vacate release order was not entitled to vacatur of release order on basis that he was not informed of attempts to procure grand jury materials. Matter of Deputy Attorney-General for Medicaid Fraud Control, 1986, 120 A.D.2d 586, 502 N.Y.S.2d 493.

Defense counsel was not entitled to transcript of defendant's sealed grand jury testimony in unrelated case due to People's motion to unseal minutes, where defendant did not make cross motion within three days before principal motion was heard, and People's motion was denied. People v. Lester, 1987, ___ Misc.2d 205, 514 N.Y.S.2d 861.

Release of expert's grand jury testimony under statute governing release of grand jury minutes of witness' testimony is limited to instance whereby court has determined that assistance of defense counsel is required in order to decide motion to dismiss indictment upon ground that evidence presented to grand jury is legally insufficient to support a charge. People v. Delaney, 1984, 125 Misc.2d 928, 4[illegible] N.Y.S.2d 229.

11. —— Identity of informant

In light of the marginal nature of the information provided by informant, who observed defendant walking with kidnap victim and gave police defendant's name and address, defendant was not entitled to disclosure of informant's identity absent an extremely strong showing of relevance. People v. Rios, 19[illegible] 60 N.Y.2d 764, 469 N.Y.S.2d [illegible], 457 N.E.2d 776.

Even assuming that defendant's pro se demand for production or disclosure of informant encompassed request for in camera inquiry, People's inability to produce her at hearing directed by Appellate Division did not mandate suppression of items seized at time of defendant's arrest where record supported both findings that informant existed and that People made diligent effort to comply with direction to find her; nor was it an abuse of discretion to deny hearing. People v. Fulton, 1983, 58 N.Y.2d [illegible], 46[illegible] N.Y.S.2d 508, 447 N.E.2d 56.

Defendant was not entitled to production of informant who had purchased

The North Carolina State Bar

FICE OF THE PRESIDENT-ELECT
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JUN 2 7 1988

June 20, 1988

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

Dear Mr. Proudfoot:

This is in response to your letter of June 10 on behalf of The Canadian Bar Association regarding laws, government guidelines and professional ethical codifications requiring exculpatory statements in criminal prosecutions to be provided to the defense.

As I am sure you are aware, in the United States each of the 50 states has its own separate court system which administers the laws of that state under procedures enacted or approved by the legislature or Supreme Court of that state. In addition, there is a completely separate federal court system, which administers laws enacted by the U.S. Congress in accordance with procedures in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The information contained below should be read in that context, inasmuch as the information relates solely to the State of North Carolina.

The North Carolina Legislature enacted Chapter 15A of the General Statutes, known as the Criminal Procedure Act. A copy of Subchapter IX, Article 48, G.S. § 15A-901, et. seq., is enclosed. Your particular attention is directed to G.S. § 15A-903(a)(2) which requires the Court, <u>upon motion of a defendant</u>, to order the prosecutor to divulge the substance of any statement relevant to the case made by the defendant which is within the possession of the State, the existence of which is known to the prosecutor or becomes known to him before or during the course of trial, except that disclosure is not required if the statement was made to an informant whose identity is a secret and who will not testify for the prosecution and if the statement is not

exculpatory. I also call your attention to the provisions of G.S. § 15A-907, regarding a continuing duty of disclosure. I should point out that this type of formal discovery is available only in cases within the original jurisdiction of our Superior Court, which is to say those cases involving felony crimes.

As regards ethical codifications relevant to your question, Rule 7.3 of the North Carolina Rules of Professional Conduct is entitled "Special Responsibilities of a Prosecutor". Rule 7.3(D) reads as follows:

> The prosecutor in a criminal or quasi criminal case shall make timely disclosure to the defense of all evidence or information known to him 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 him, except when he is relieved of this responsibility by a protective order of the tribunal;

I trust that this information will be of some assistance to you in the preparation of your brief.

Sincerely,

Robert G. Baynes

RGB/gh

Enclosure

cc: James Y. Preston, Esq.
Emil F. Kratt, Esq.
B. E. James, Esq.

offender was placed in custody is a Class G or more serious felony.

(12) Is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1). (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-826. Victim and witness assistants.

Victim and witness assistants are responsible for coordinating efforts within the law-enforcement and judicial systems to assure that each victim and witness is treated in accordance with this Article. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-827. Scope.

This Article does not create any civil or criminal liability on the part of the State of North Carolina or any criminal justice agency, employee, or volunteer. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§§ 15A-828 to 15A-849: Reserved for future codification purposes.

ARTICLE 46.

§§ 15A-850 to 15A-875: Reserved for future codification purposes.

ARTICLE 47.

§§ 15A-876 to 15A-900: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

This Article applies to cases within the original jurisdiction of the superior court. (1973, c. 1286, s. 1.)

§ 15A-902. Discovery procedure.

(a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

(b) To the extent that discovery authorized in this Article is voluntarily made in response to a request, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

(c) A motion for discovery under this Article must be heard before a superior court judge.

(d) If a defendant is represented by counsel, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after either the probable-cause hearing or the date he waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before he has been afforded or waived a probable-cause hearing, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after

(1) The defendant's consent to be tried upon a bill of information, or the service of notice upon him that a true bill of indictment has been found by the grand jury, or

(2) The appointment of counsel — whichever is later.

For the purposes of this subsection a defendant is represented by counsel only if counsel was retained by or appointed for him prior to or during a probable-cause hearing or prior to execution by him of a waiver of a probable-cause hearing.

(e) The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

(f) A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate or if the judge for good cause shown determines that the motion should be allowed in whole or in part. (1973, c. 1286, s. 1.)

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

(a) Statement of Defendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the State the existence of which is known or by the exercise of due diligence may become known to the prosecutor; and

(2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial; except that disclosure of such a statement is not required if it was made to an informant whose identity is a prosecution secret and who will not testify for the prosecution, and if the statement is not exculpatory. If the statement was made to a person other than a law-enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial. If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial.

(b) Statement of a Codefendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any written or recorded statement of a codefendant which the State intends to offer in evidence at their joint trial; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by a codefendant which the State intends to offer in evidence at their joint trial.

(c) Defendant's Prior Record. — Upon motion of the defendant, the court must order the State to furnish to the defendant a copy of his prior criminal record, if any, as is available to the prosecutor.

(d) Documents and Tangible Objects. — Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

(e) Reports of Examinations and Tests. — Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

(f) Statements of State's Witnesses.

(1) In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case.

(2) After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State

that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(3) If the State claims that any statement ordered to be produced under this section contains matter that does not relate to the subject matter of the testimony of the witness, the court shall order the State to deliver that statement for the inspection of the court in camera. Upon delivery the court shall excise the portions of the statement that do not relate to the subject matter of the testimony of the witness. With that material excised, the court shall then direct delivery of the statement to the defendant for his use. If, pursuant to this procedure, any portion of the statement is withheld from the defendant and the defendant objects to the withholding, and if the trial results in the conviction of the defendant, the entire text of the statement shall be preserved by the State and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this subsection, the court, upon application of the defendant, may recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement by the defendant and his preparation for its use in the trial.

(4) If the State elects not to comply with an order of the court under subdivision (2) or (3) to deliver a statement to the defendant, the court shall strike from the record the testimony of the witness, and direct the jury to disregard the testimony, and the trial shall proceed unless the court determines that the interests of justice require that a mistrial be declared.

(5) The term "statement," as used in subdivision (2), (3), and (4) in relation to any witness called by the State means

a. A written statement made by the witness and signed or otherwise adopted or approved by him;

b. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 759, ss. 1-3; 1983, Ex. Sess., c. 6, s. 1.)

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

(a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

(b) Nothing in this section prohibits a prosecutor from making voluntary disclosures in the interest of justice. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-905. Disclosure of evidence by the defendant — information subject to disclosure.

(a) Documents and Tangible Objects. — If the court grants any relief sought by the defendant under G.S. 15A-903(d), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of Examinations and Tests. — If the court grants any relief sought by the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments

made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in 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 his testimony. In addition, upon motion of a prosecutor, the court must order the defendant to permit the prosecutor to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure.

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys. (1973, c. 1286, s. 1.)

§ 15A-907. Continuing duty to disclose.

If a party, subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence or decides to use additional evidence, and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence. (1973, c. 1286, s. 1; 1975, c. 166, s. 16.)

§ 15A-908. Regulation of discovery — protective orders.

(a) Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person or physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

(b) The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a), the material submitted in camera must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal. (1973, c. 1286, s. 1; 1983, Ex. Sess., c. 6, s. 2.)

§ 15A-909. Regulation of discovery — time, place, and manner of discovery and inspection.

An order of the court granting relief under this Article must specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions. (1973, c. 1286, s. 1.)

§ 15A-910. Regulation of discovery — failure to comply.

If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or
(2) Grant a continuance or recess, or
(3) Prohibit the party from introducing evidence not disclosed, or
(3a) Declare a mistrial, or
(3b) Dismiss the charge, with or without prejudice, or
(4) Enter other appropriate orders. (1973, c. 1286, s. 1; 1975, c. 166, s. 17; 1983, Ex. Sess., c. 6, s. 3.)

§§ 15A-911 to 15A-920: Reserved for future codification purposes.

ARTICLE 49.

Pleadings and Joinder.

§ 15A-921. Pleadings in criminal cases.

Subject to the provisions of this Article, the following may serve as pleadings of the State in criminal cases:

(1) Citation.
(2) Criminal summons.
(3) Warrant for arrest.
(4) Magistrate's order pursuant to G.S. 15A-511 after arrest without warrant.

Svete & Wickline Co., L.P.A.
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Joseph T. Svete
Paul O. Wickline
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Of Counsel:
R. L. Grubb
Norman J. Raasch

June 21st, 1988

JUN 2 7 1988

Gordon F. Proudfoot, Esq.
BOYNE CLARKE Barristers & Solicitors
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Dartmouth, Nova Scotia B2Y 3Z5

RE: CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL JR.

Dear Mr. Proudfoot:

I am an associate with the lawfirm of SVETE & WICKLINE. One of my areas of expertise is Criminal Law. Accordingly, your letter of June 10th, 1988, to Attorney Joseph T. Svete, in his capacity as President-Elect of the Ohio State Bar Association, was forwarded to me for response.

Although our legal systems have the same roots, it is apparent that evolution has done much to our "common" law. With that in mind, I trust that you will not find my reply condescending.

With slight variations, the Ohio Criminal Code parallels the majority of other states. Once an individual has been charged with a crime, he has an opportunity, prior to trial, to obtain several categories of information from the State. Upon written request made, within twenty-one days after arraignment, or seven days before the date of trial, the defendant is entitled to be provided with the following information:

(a) The statement of the defendant or the co-defendant.

(b) Defendant's prior record.

(c) Documents and tangible objects within the possession of the State which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial.

(d) Reports of physical or mental examinations, and of scientific tests or experiements.

(e) Witnesses names and addresses and prior felony convictions of any such witnesses.

(f) Disclosure of evidence favorable to defendant.

Once the defendant requests and obtains discovery, the State's attorney may request to be provided the same information from the defendant. Both parties have a continuing duty to disclose subsequently obtained information.

Central to your inquiry would be the category of items above-designated as "evidence favorable to defendant". Pursuant to that item, upon motion by the defendant, before trial, the court shall order the prosecuting attorney to disclose to counsel for defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material to either guilt or punishment. Ohio Criminal Rule 16 reflects a procedural codification of the holding of the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). There is a myriad of decisions on both the state and federal level construing the scope of this right, attachment and waiver. Without knowing the thoroughness of the response sought, I will allow this brief synopsis to suffice.

Should you desire additional elaboration or information, please do not hesitate in writing me, or contacting me by phone, at the number provided above.

Very truly yours,

SVETE & WICKLINE CO., L.P.A.

Charles F. Cichocki

Charles F. Cichocki, Esquire.

CFC:pg

JOHN HENRY HINGSON III, P.C.
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TELEPHONE
(503) 656-0355

August 24, 1988

Ref. No. 21311028

Keith Burns, President
Oregon State Bar
109 Standard Plaza
1100 SW 6th Avenue
Portland, Oregon 97204

Dear President Burns:

I am in receipt of Mr. Proudfoot's letter of June 10, 1988. I offer the following in response to Mr. Proudfoot's inquiry.

In 1963 the United States Supreme Court announced the rule of law that the prosecution's withholding of evidence favorable to an accused on the issue of guilt or sentencing violates due process of law afforded all citizens of the United States by the Fourteenth Amendment to the United States Constitution. Brady v. Maryland, 373 US 83, 83 S Ct 1194, 10 L Ed2d 215 (1963). In 1985, the United States Supreme Court extended that rule of law to require the prosecution to disclose, upon request, evidence that impeaches government witnesses. United States v. Bagley, 473 US ___, 105 S Ct 3375, 87 L Ed2d 481 (1985).

The State of Oregon, by a disciplinary rule, DR 7-103 (enclosed) requires the performance by the prosecution of the same functions. The majority of states in this nation have similar disciplinary rules governing the performance of duties by public prosecutors.

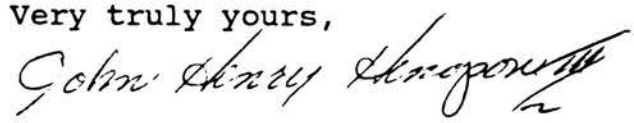
The actual performance of this duty by public prosecutors is problematic. Due to the perception by many criminal defense lawyers in America that those functions are not properly performed, the National Association of Criminal Defense Lawyers- an organization of over 5000 public and private criminal defenders in America - has established a Prosecutorial Misconduct Committee.

Should Mr. Proudfoot desire to correspond directly with the National Association of Criminal Defense Lawyers - which I recommend that he do - they can be reached at the following address:

National Association of Criminal Defense Lawyers
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005
202/872-8688

I am sending a copy of Mr. Proudfoot's letter, together with a copy of my response, to the National Association of Criminal Defense Lawyers in order that they may be informed should Mr. Proudfoot desire to contact them. I hope this is of assistance.

Very truly yours,



John Henry Hingson III

JHH/nb
Enclosure
cc: David Dorsey, NACDL

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist the lawyer's client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the lawyer's client to rectify the same, and if the lawyer's client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal except when the information is a confidence as defined in DR 4-101(A).

(2) A person other than the lawyer's client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when the lawyer knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant, mitigate the degree of the offense or reduce the punishment.

DR 7-104 Communicating with a Person Represented by Counsel.

(A) During the course of the lawyer's representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects, with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law to do so. This prohibition includes a lawyer representing the lawyer's own interests.

(2) Give advice to a person who is not represented by a lawyer, 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 the lawyer's client.

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not threaten to present criminal charges to obtain an advantage in a civil matter.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise the lawyer's client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding but the lawyer may take appropriate steps in good faith to test the

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the lawyer's client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(C) In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert the lawyer's personal knowledge of the facts in issue except when testifying as a witness.

(4) Assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of a criminal defendant but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the lawyer's intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107 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 intended to affect the fact-finding process or the lawyer knows or reasonably should know the statements pose a serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect.

(B) The foregoing provision of DR 7-107 does not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative or other investigative bodies.

(C) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107(A).

DR 7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to

pennsylvania Bar association 100 South Street, Post Office Box 186 • Harrisburg, PA 17108 • Telephone (717) 238-6715

COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

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Ethics Coordinator
Dona Porvaznik

SEP 16 1988

September 13, 1988

Gordon F. Proudfoot, Esquire
Canada Bar Association
P. O. Box 876
Dartmouth, N.S.
B2Y 3Z5

Dear Mr. Proudfoot:

Your letter of August 5, 1988 to Carl W. Brueck, Jr., President of the Pennsylvania Bar Association has been forwarded to me for response.

I am enclosing a copy of Rule 305 (Pretrial Discovery and Inspection) of the Rules of Criminal Procedure and a copy of Rule 3.8 (Special Responsibilities of a Prosecutor) of the Rules of Professional Conduct.

Hopefully, the foregoing is responsive to your inquiry. If you have any further questions, please feel free to contact me.

Very truly yours,

Dona Porvaznik

Dona Porvaznik, Ethics Coordinator

DP:rep

CC: Carl W. Brueck, Jr., Esquire
James E. Tarman, Esquire
(w/o enclosures)

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; (4) As to 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) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested 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."

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) and (b), and 3.5.

COMMENT:

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 the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before 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 thru 4.4.

CODE COMPARISON:

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and legislative rules." EC 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body . . . should never be participated in . . . by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose . . . Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him."

in this rule, are observed in some fashion in all court cases.

The main purposes of arraignment are: to assure that the defendant is advised of the charges against him; to have counsel enter an appearance, or, if the defendant has no counsel to consider defendant's right to counsel; and to commence the period of time within which to initiate pretrial discovery and to file other motions. With regard to the waiver of counsel, see Rule 318.

It is intended that, in addition to other instances of "cause shown" for delaying the arraignment, the arraignment may be delayed where the defendant was unavailable for arraignment within the ten day period after indictment or information.

Adopted June 30, 1964, effective Jan. 1, 1965. Amended, effective Nov. 22, 1971; amended Nov. 29, 1972, effective in 10 days; amended and effective Feb. 15, 1974; renumbered from Rule 317 and amended June 29, 1977, effective Jan. 1, 1978; amended Oct. 21, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; amended Jan. 28, 1983, effective July 1, 1983; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 304. BILL OF PARTICULARS

(a) A request for a bill of particulars shall be served in writing by the defendant upon the attorney for the Commonwealth within seven (7) days following arraignment. The request shall promptly be filed as provided in Rule 9022 subsequent to service upon the attorney for the Commonwealth.

(b) The request shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested.

(c) Upon failure or refusal of the attorney for the Commonwealth to furnish a bill of particulars after service of a request upon him, the defendant may make written motion for relief to the court within seven (7) days after such failure or refusal. If further particulars are desired after an original bill of particulars has been furnished, a motion therefor may be made to the court within five (5) days after the original bill is furnished.

(d) When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice.

Note

Adopted June 29, 1977, effective January 1, 1978; amended October 21, 1983, effective January 1, 1984.

Comment

This rule replaces previous Rules 221 and 230 in their entirety. Prior to the 1977 revision of this Chapter, the rules dealing with Bills of Particulars appeared in Chapter 200, concerning indictments (Rule 221) and informations (Rule 230). The traditional function of a bill of particulars—namely, to clarify the pleadings and to limit the evidence which can be offered to support the indictment or information—has not been changed by the transfer of the provision to Chapter 300. The purpose of the transfer was to place the procedure in chronological context with other pretrial matters, including discovery and the omnibus pretrial motion.

Adopted June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978. Amended Nov. 22, 1977; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 305. PRETRIAL DISCOVERY AND INSPECTION

A. Informal. Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion to the court. Such motion shall be made within fourteen (14) days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.

B. Disclosure by the Commonwealth.

(1) *Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused which is material either to guilt or to punishment, and which is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant, which are within

the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence;

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

(2) *Discretionary with the Court.* In all court cases, except as otherwise provided in Rule 263 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(a) the names and addresses of eyewitnesses;

(b) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(c) all written or recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not;

(d) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

C. Disclosure by the Defendant.

(1) *Mandatory.*

(a) Notice of Alibi Defense. A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(b) Notice of Insanity or Mental Infirmity Defense. A defendant who intends to offer at trial the defense of insanity, or a claim of mental infirmity, shall, at the time required for filing an omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific available information as to the nature and extent of the alleged insanity or claim of mental infirmity, the period of time which the defendant allegedly suffered from such insanity or mental infirmity, and the names and addresses of witnesses, expert or otherwise, whom the defendant intends to call at trial to establish such defense.

(c) Disclosure of Reciprocal Witnesses. Within seven (7) days after service of such notice of alibi defense or of insanity or claim of mental infirmity defense, or within such other time as allowed by the court upon cause shown, the attorney for the Commonwealth shall disclose to the defendant the names and addresses of all persons the Commonwealth intends to call as witnesses to disprove or discredit the defendant's claim of alibi or of insanity or mental infirmity.

(d) Failure to File Notice. If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

(e) Failure to Supply Reciprocal Notice. If the attorney for the Commonwealth fails to file and serve a list of its witnesses as required by this rule, or omits any witness therefrom, the court at trial may exclude the testimony of any omitted witness, or may exclude any evidence offered by the Commonwealth for the purpose of disproving the alibi, insanity or mental infirmity defense, or may grant a continuance to enable the defense to investigate such evidence, or may make such other order as the interests of justice require.

(f) Failure to Call Witnesses. No adverse inference may be drawn against the defendant, nor may any comment be made concerning the defendant's failure to call available alibi, insanity or mental infirmity witnesses, when such witnesses have been prevented from testifying by reason of this rule unless the defendant or the defendant's attorney shall attempt to explain such failure to the jury.

(g) Impeachment. A defendant may testify concerning an alibi notwithstanding that the defendant has not filed notice, but if the defendant has filed notice and testifies concerning his presence at the time of the offense at a place or time different from that specified in the notice, the defendant may be cross-examined concerning such notice.

(2) *Discretionary With the Court.* In all court cases, if the Commonwealth files a motion for pre-

trial discovery, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable:

(a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief, or which were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph B(1)(e);

(b) the names and addresses of eyewitnesses whom the defendant intends to call in its case in chief, provided that the defendant has previously requested and received discovery under paragraph B(2)(a).

D. Continuing Duty to Disclose. If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material or witness.

E. Remedy. 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, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

F. Protective Orders. Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

G. 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 attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

Note

Replaces former Rule 310 in its entirety. Former Rule 310 was originally adopted June 30, 1964, effective January 1, 1965. Present Rule 305 adopted June 29, 1977, effective January 1, 1978; Comment revised April 24, 1981, effective June 1, 1981; amended October 22, 1981, effective January 1, 1982.

Comment

This rule is intended to apply only to court cases; the constitutional guarantees mandated in *Brady v. Maryland*, 83 S.Ct. 1194, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions, apply to all cases, including court cases and summary cases, and nothing to the contrary is intended. For definitions of "court case" and "summary case", see Rule 3.

In determining the extent to which pretrial discovery should be ordered under the "Discretionary with the Court" sections of this rule, judges may be guided by the following general principles of the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970):

SEC. 1.1: PROCEDURAL NEEDS PRIOR TO TRIAL.

(a) Procedure prior to trial should serve the following needs:

(i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;

(ii) to provide the accused sufficient information to make an informed plea;

(iii) to permit thorough preparation for trial and minimize surprise at trial;

(iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;

(v) to reduce interruptions and complications of trial by identifying issues collateral to guilt or innocence and determining them prior to trial; and

(vi) to effect economies in time, money and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.

(b) These needs can be served by:

(i) fuller discovery;

(ii) simpler and more efficient procedures; and

(iii) procedural pressures for expediting the processing of cases.

SEC. 1.2: SCOPE OF DISCOVERY.

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

Whenever the rule makes reference to the term "identification," or "in-person identification," it is understood

that such terms are intended to refer to all forms of identifying a defendant by means of the defendant's person being in some way exhibited to a witness for the purpose of an identification: *e. g.*, line-up, stand-up, show-up, one-on-one confrontation, one-way mirror, etc. The purpose of this provision is to make possible the assertion of a rational basis for a claim of improper identification based upon *Stovall v. Denno*, 87 S.Ct. 1967, 388 U.S. 293, 18 L.Ed.2d 1199 (1967), and *United States v. Wade*, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed.2d 1149 (1967).

This rule is not intended to affect the admissibility of evidence discoverable under this rule or the fruits thereof, nor the standing of the defendant to seek suppression of such evidence.

The notice-of-alibi provision of this rule contained in part C(1)(a) is intended to comply with the requirement of *Wardius v. Oregon*, 93 S.Ct. 2208, 412 U.S. 470, 37 L.Ed.2d 82 (1973), by the inclusion of reciprocal disclosure responsibilities placed upon the Commonwealth in paragraph C(1)(c). This rule thus replaces former Rule 312, which was rescinded on June 29, 1973, pursuant to *Wardius, supra. See also Commonwealth v. Contakos*, 455 Pa. 136, 314 A.2d 259 (1974). The provision requiring a notice of insanity defense, paragraph C(1)(b), has not previously been included in these rules, but the safeguards surrounding them have been made identical to those protecting the defendant under the notice-of-alibi provision.

The provision for a protective order, part F, does not confer upon the Commonwealth any right of appeal not presently afforded by statute.

Part G is derived in part from ABA *Standards Relating To Discovery And Procedure Before Trial* § 2.6(a). See *Commentary* contained therein. Part G, however, makes this provision applicable to the work product of the defense, while the ABA Standards refer only to the prosecution.

It should also be noted that as to material which is discretionary with the court, or which is not enumerated in the rule, if such information contains exculpatory evidence as would come under the *Brady* rule, it *must* be disclosed. Nothing in this rule is intended to limit in any way disclosure of evidence constitutionally required to be disclosed.

The limited suspension of Section 5720 of the Wiretapping and Electronic Surveillance Control Act, Act of October 4, 1978, P.L. 831, No. 164, 18 Pa. C.S. § 5720, (see Rule 340(g)), is intended to insure that the statutory provision and Rule 305B(1)(g) are read in harmony. A defendant may seek discovery under subparagraph B(1)(g) pursuant to the time frame of the rule, while the disclosure provisions of Section 5720 would operate within the time frame set forth in Section 5720 as to materials specified in Section 5720 and not previously discovered.

Adopted June 30, 1974, effective Jan. 1, 1965. Renumbered from Rule 310 and amended June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; April 24, 1981, effective June 1, 1981; Oct. 22, 1981, effective Jan. 1, 1982.

RULE 306. OMNIBUS PRETRIAL MOTION FOR RELIEF

Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus pretrial motion.

Note

Formerly Rule 304, adopted June 30, 1964, effective January 1, 1965; amended and renumbered 306, June 29, 1977, effective January 1, 1978; amended Oct. 21, 1983, effective January 1, 1984.

Comment

Types of relief requested in the omnibus pretrial motions shall include, but shall not be limited to, the following:

(1) for continuance;

(2) for severance and joinder or consolidation;

(3) for suppression of evidence;

(4) for psychiatric examination;

(5) to quash an indictment or information;

(6) for change of venue or venire;

(7) to disqualify a judge;

(8) for appointment of investigator; and

(9) for pretrial conference.

This rule previously contained several paragraphs that provided requirements for the form and content of the omnibus pretrial motion. These paragraphs were deleted as unnecessary in 1983, when these requirements were incorporated into Rule 9020, a general rule applicable to all motions, including the omnibus pretrial motion.

Adopted June 30, 1964, effective Jan. 1, 1965. Renumbered from Rule 304 and amended June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 307. TIME FOR OMNIBUS PRETRIAL MOTION AND SERVICE

Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within thirty (30) days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

Copies of all pretrial motions shall be served in accordance with Rule 9023.

Note

Formerly Rule 305, adopted June 30, 1964, effective January 1, 1965; renumbered 307 and amended June 29, 1977, effective January 1, 1978; amended Oct. 21, 1983, effective January 1, 1984.

RHODE ISLAND BAR ASSOCIATION
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June 30, 1988

JUL 6 1988

Gordon F. Proudfoot, Esq.
BOYNE CLARKE
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
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:

In response to your inquiry of June 10, the law of the State of Rhode Island is in the United States mainstream regarding prosecutorial duty to disclose exculpatory matter. Enclosed is a copy of Rule 16 of the Rhode Island Superior Court Rules of Criminal Procedure, which is based upon but not identical with Federal Rule 16. Also enclosed are copies of excerpts from Canon 7 of the Rhode Island Code of Professional Responsibility, specifically Disciplinary Rule 7-103 and Ethical Consideration 7-13. As I am sure you are aware, various American jurisdictions - including the State of Rhode Island - are in the process of adopting new rules of professional responsibility to replace the Code. The new rules, however, contain language substantially similar to the present Disciplinary Rule 7-103(b).

All United States jurisdictions are subject to the constitutional due process requirement enunciated by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), which requires the production of exculpatory information under the Fourteenth Amendment to the United States Constitution.

I trust that the enclosed information will assist your work.

Sincerely,

William F. McMahon
President

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Enclosures

16. Discovery and inspection. — (a) *Discovery by Defendant.* Upon written request by a defendant, the attorney for the State shall permit the defendant to inspect or listen to and copy or photograph any of the following items within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State:

(1) all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the defendant, or copies thereof;

(2) all relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his employment;

(3) all written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such a co-defendant in the event the State intends at the trial to offer evidence of such oral statements or confessions;

(4) all books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant;

(5) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(6) a written list of the names and addresses of all persons whom the attorney for the State expects to call as witnesses at the trial in support of the State's direct case;

(7) as to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at the trial;

(8) all reports or records of prior convictions of the defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within fifteen (15) days after receipt from the defendant of a list produced pursuant to paragraph (b) (3) of persons whom the defendant expects to call as witnesses all reports or records of prior convictions of such persons;

(9) all warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns and inventories.

(b) *Discovery by the State.* A defendant who seeks any discovery under subdivision (a) of this rule shall permit the State, upon receipt

of written request, to inspect or listen to and copy or photograph any of the following items within the possession, custody or control of the defendant or his attorney:

(1) all books, papers, documents, photographs, sound recordings or copies thereof, or tangible objects, buildings, or places which are intended for use by the defendant as evidence at the trial;

(2) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and prepared by a person whom the defendant intends to call as a witness at the trial and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(3) a written list of the names and addresses of all persons other than the defendant whom the defendant expects to call as witnesses at the trial in the event the State presents a prima facie case;

(4) as to those persons other than the defendant whom the defendant expects to call as witnesses at the trial, all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such statement of a witness is in the possession of the defendant, a summary of the testimony such person is expected to give at the trial.

(c) *Notice of Alibi.* In the event a defendant seeks any discovery under subdivision (a) of this rule, then upon demand by the attorney for the State and delivery by him to the defendant of a written statement describing with specificity the date and time when and the place where the offense charged is alleged to have occurred, the defendant, within twenty-one (21) days after receipt of such demand and particulars, shall give written notification whether he intends to rely in any way on the defense of alibi. If the defendant does so intend, the notice shall state with specificity the place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses he intends to call at the trial to establish such alibi. Within twenty-one (21) days after receipt of written notification of intent to rely on the defense of alibi, together with particulars thereof, the attorney for the State shall furnish to the defendant written notice of the names and addresses of the witnesses whom the State intends to call at the trial to establish defendant's presence at the place where and the time when the offense is alleged to have occurred.

(d) *Material Not Subject to Discovery.* Except as provided in subdivisions (a) and (b), this rule does not authorize discovery of internal reports, memoranda, or other documents made by a defendant, or his attorney or agent, or by the attorney for the State, or by officers or agents of the State, in connection with or in preparation for the prosecution or defense of a criminal proceeding.

(e) *Failure to Call a Witness.* The fact that a person was designated by a party pursuant to subdivision (a)(6) or subdivision (b)(3) as an intended witness but was not called to testify shall not be commented upon at the trial by any party.

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(f) *Protective Orders.* Upon motion and a sufficient showing the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted or deferred, or make such other order as is appropriate. In determining the motion, the court may consider, among other things, the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; and protection of confidential relationships and privileges recognized by law; the need to safeguard from loss or to preserve the condition of tangible objects sought to be discovered under paragraphs (a)(4), (a)(5), (b)(1) and (b)(2). The court may permit a party to make a showing of good cause, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court thereafter enters a protective order, the entire text of the party's statement shall be sealed and preserved in the records of the court, to be made available only to an appellate court in the event of an appeal. Upon application of a party who has, pursuant to subdivision (a) (6) or subdivision (b) (3), been requested to designate the names of persons who will be called as witnesses at the trial, the court may order that the testimony of one or more persons so designated be perpetuated by oral deposition pursuant to Rule 15 at a time and place and before an officer ordered by the court. Examination and cross-examination shall proceed as permitted at the trial. A record of the testimony of such a witness shall be made and shall be admissible at the trial as part of the case of the party who requested the taking of the deposition in the event the witness becomes unavailable without fault of such party or if the witness changes his testimony materially.

(g) *Procedure and Timing.*

(1) *Defendant's Request.* A request by a defendant for discovery and inspection shall be made within twenty-one (21) days after arraignment. The attorney for the state shall respond in writing within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time defendant may inspect the items being made available.

(2) *State's Request.* Within twenty-one (21) days after serving a response to a defendant's request for discovery and inspection, the attorney for the State may serve a defendant with a request for discovery and inspection. The defendant shall respond within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time the attorney for the State may inspect the items being made available.

(3) *Discovery or Inspection Withheld.* In the event a party refuse to comply with a request for discovery or inspection, the party wh served the request may move for an order to compel compliance wit his request.

(4) *Extensions of Time.* The court may on motion of a party an for good cause shown extend the time for serving requests or re sponses permitted or required under this rule.

(h) *Continuing Duty to Disclose.* If, subsequent to complian with a request for discovery or with an order issued pursuant to th rule, and prior to or during trial, a party discovers additional mat rial previously requested which is subject to discovery or inspectio under this rule, he shall promptly notify the other party of the exi tence thereof.

(i) *Failure to Comply.* If at any time during the course of th proceedings it is brought to the attention of the court that a part has failed to comply with this rule or with an order issued pursuan to this rule, it may order such party to provide the discovery o inspection, grant a continuance, or prohibit the party from introduc ing in evidence the material which or testimony of a witness whos identity or statement were not disclosed, or it may enter such othe order as it deems appropriate.

(j) *Applicability of Rule.* This rule applies only to criminal trial in the Superior Court.

Reporter's Notes to 1974 Amendment. This memorandum is intended to review the new version of Rule 16 of the Rules of Criminal Procedure of the Superior Court. The proposed rule was submitted to the Advisory Committee of the Superior Court this past November and has been subjected to extensive discussion, criticism and revision. On April 26th, the Committee gave final approval to the attached rule and recommended its adoption by the Justices of the Superior Court.

The purpose of the revision is to provide for the fullest, reciprocal discovery in criminal cases in the Superior Court that is practicable as well as consistent with the Constitutional rights of defendants. Until fairly recently, there existed serious and widespread doubt concerning the constitutionality of requiring a criminal defendant to give discovery, even if only as a condition to obtaining discovery from the State. See 1 Wright, Federal Practice & Procedure, 523-528 (1969); ABA, Standards Relating to Discovery and Procedure Before Trial 44-45 (Tent. Draft 1969) [hereinafter referred to as "ABA Standards,"]. In 1970, however, the Supreme Court in *Williams v Florida*, 399 US 78, resolved much of the doubt when it held that a defendant in a state proceeding could, consistent with the privilege against self-incrimination, be required on request to give pretrial notice of his intention to raise the de fense of alibi as well as to supply the nam of witnesses he intended to call in support the defense. Although the Florida rule in volved in the *Williams* case provided for re ciprocal discovery, the Court did not ex pressly condition its approval of the rule on that ground. In June of 1973, the Court, in *Wardius v Oregon*, 412 US 470, squarely held that a state rule which compelled a defendant to provide discovery with respect to the de fense of alibi violates the Fourteenth Amend ment if reciprocal discovery rights are no available to the defendant. Although th Court was dealing with a rule limited only to discovery of alibi defense, its statement con cerning reciprocity would appear to be appli cable to other aspects of discovery: "... in th absence of a strong showing of state interest to the contrary, discovery must be a two-way street.... It is fundamentally unfair to re quire a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning rebutation of the very pieces of evidence which he disclosed to the State." 412 US 475-6.

Though the decision in *Wardius* requires that discovery be a "two-way street" it does not deal directly with the further question of whether a defendant who chooses not to seek discovery available to him can nonetheless be compelled to give discovery at the initiative

of the prosecution. (covery rules consi *Wardius* were not c dant first seeking di cally designed for th the process. Until qu all clear whether a trusive discovery of rials and informatio prosecution would f cause the defendant lent right to seek materials. Very su tion problems were scheme. It was as flected in [former] Rules of Criminal P dant initiates discov can be provided w rights. This approac waiver by the defe lege against self-inc erwise possess to res adoption of [former] the express doubts Justice Douglas, joi F.R.D. 276-78 (196 that the Court woul discovery by the p Rule 16 [formerly a that the discovery p defendant.

In early 1970 the the Federal Crimina liminary draft of a Rule 16 that provid of discovery for bot prosecution. The Co potential self-incri volved in permittin discovery in the abs demand by the defe upon decisions uph state of the defense constitutionality of 607-609 (1970). Ho uncertainty about t quiring the defend prior to trial," an a also circulated und tion's right of disco a prior request by th of similar evidence f F.R.D. 596 (1970). the Supreme Court it promulgated Rule 1st, essentially in th the Committee, per covery by the prose that has perturbed f laid to rest.

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NOTES TO DECISIONS

ANALYSIS

1. False statements.
2. Misrepresentations.

1. False Statements.

Where defendant was convicted in a federal court of conspiring to have false declarations under oath given to the court, the supreme court found that, under the circumstances of the case, defendant's integrity was not irreparably damaged, and therefore suspended him from the practice of law rather than disbar him. In re Bucci, 119 R.I. 904, 376 A.2d 723 (1977).

2. Misrepresentations.

An attorney who misrepresents to the court the assets of his client and the extent of the attorney's fee violated DR 1-102(A)(4) and (5) and subdivision (A)(3) of this Disciplinary Rule. Carter v. Kamaras, — R.I. —, 478 A.2d 991 (1984).

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer. — (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104. Communicating With One of Adverse Interest. — (A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, 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.

NOTES TO DECISIONS

ANALYSIS

1. Purpose.
2. Intent irrelevant.

1. Purpose.

The purpose of the prohibition against an attorney in a controversy communicating directly or indirectly about the controversy with a party who is known to be represented by counsel is to prevent a person from being deprived of the advice of retained counsel by the bypassing of such counsel. Carter v. Kamaras, — R.I. —, 430 A.2d 1058 (1981).

2. Intent Irrelevant.

It is immaterial whether the direct contact prohibited by paragraph (1) of subsection (A) of this Disciplinary Rule is an intentional or negligent violation of this Rule. Carter v. Kamaras, — R.I. —, 430 A.2d 1058 (1981).

incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor 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.

EC 7-14. A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15. The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or

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June 28, 1988

JUL 7 1988

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

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

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to South Dakota State Bar Association President Charles B. Kornmann, inquiring as to any laws, guidelines, or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defense counsel which may be enforced in South Dakota, has been forwarded to me for response as chairman of the Criminal Law Committee of the State Bar of South Dakota.

As respects exculpatory statements, South Dakota has no particular statutory provisions requiring prosecutorial disclosure of exculpatory evidence to the defense. South Dakota, however, does follow the rule laid down by the United States Supreme Court in Brady v. Maryland, 373 US 83, 83 S. Ct. 1194, 10 LEd 2d 215(1963) that withholding evidence favorable to an accused on the issue of guilt or sentencing is a denial of the right to due process under the Constitution of the United States. In State v. Wilde, 306 NW2d 645(S.D. 1981), the South Dakota Supreme Court adopted the Brady rule stating that the

> "(S)uppression by the prosecution of evidence favorable to an accused violates due process where the evidence has been requested by the accused and is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Reaffirmed in Reutter v. Meierhenry, 405 NW2d 627(S.D. 1987)."

South Dakota statutory rules of criminal discovery are set out at South Dakota Codified Laws Title 23(A), Chapter 13. Generally, our statutory rules provide for mandatory disclosure of information by the prosecution upon a defendant's written request.

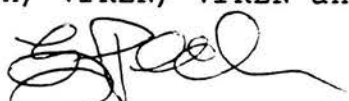
On June 20, 1987, the State Bar of South Dakota approved new model rules of professional conduct. These rules were enacted by the South Dakota Supreme Court on December 15, 1987, and will become effective on July 1 of this year. Model Rule 3.8(D), Special Responsibilities of a Prosecutor, provides that a prosecutor in all criminal cases shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to exculpate the guilt of the accused, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged exculpatory information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;".

Accordingly, in South Dakota, a prosecutor has both a legal and an ethical obligation to disclose to a defendant exculpatory information known to the prosecutor.

I certainly hope this response will be of assistance to you in providing your submission to the Royal Commission. If I may be of further help, please do not hesitate to let me know.

Sincerely,

FINCH, VIKEN, VIKEN and PECHOTA



Terry L. Pechota

TLP: kd
cc: Charles B. Kornmann, President
State Bar of South Dakota

August 18, 1988

TENNESSEE BAR ASSOCIATION
WILLIAM LANDIS TURNER
President

Mr. Gordon F. Proudfoot
CBA-NOVA SCOTIA BRANCH
2nd Floor, Bank of Canada
1583 Hollis Street
Halifax, Nova Scotia
B3J1V4

Dear Mr. Proudfoot:

In response to your request for our laws on disclosure of exculpatory information, I enclose the relevant sections from the latest edition of David Raybin's book on Tennessee Criminal Procedure, in which he summarizes the authorities on this subject.

If you need additional information, please let me know.

Sincerely,

Wm. Landis Turner

WLT/sgb

Enclosure

102 North Court Street □ Post Office Box 789 □ Hohenwald, Tennessee 38462 □ (615) 796-2264

§ 13.41 Disclosure of Exculpatory "Brady" Material

The state has a constitutional obligation to disclose evidence which is exculpatory in nature, either as to guilt or as to punishment.[1] The degree of relief for a failure to disclose information is highly dependent on whether there has been a request for exculpatory information and the degree of specificity of the request. If there is no request or only a general "boiler plate" request, a reversal for nondisclosure will only occur if the omitted evidence creates a reasonable doubt that did not otherwise exist.[2] A specific request, on the other hand, will be of value if nondisclosure *might* have affected the outcome of the trial.[3] Consequently, any request for "Brady" material should be as specific as possible.[4]

The failure to disclose relates to the failure to disclose *prior* to or *during* trial.[5] If there is disclosure during the trial, this

§ 13.41

1. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Branch v. State, 4 Tenn.Cr.App. 164, 469 S.W.2d 533 (1970) (failure to disclose victim's knife in self defense case).

2. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Cason v. State, 503 S.W.2d 206 (Tenn.Cr.App.1973) (no request for photograph of victims in a rape case).

3. Id. State v. Smith, 656 S.W.2d 882 (Tenn.Cr.App.1983) (matters proffered to establish that state had withheld exculpatory evidence and that one of state's witnesses had tried to suppress unfavorable testimony, developed at hearing on motion for new trial, were either refuted or satisfactorily explained by prosecution; any matters that were not refuted or explained did not affect outcome of trial); State v. Wooden, 658 S.W.2d 553 (Tenn.Cr.App.1983) (Jane Doe complaint, charging a black man with raping a white woman, on which grand jury returned a no true bill, was not exculpatory evidence in prosecution against defendant on multiple charges connected with sexual assaults, and state was not required to reveal complaint in response to defendant's pretrial discovery motion); State v. Caldwell, 656 S.W.2d 894 (Tenn.Cr.App. 1983) (that state failed to provide defendant with various items of allegedly exculpatory evidence did not warrant reversal of murder conviction in view of questionable exculpatory value and in view of knowledge possessed by defendant).

4. See § 13.42.

5. Clariday v. State, 552 S.W.2d 759 (Tenn.Cr.App.1976) (alleged inconsistent statement of witness); State v. Venable, 606 S.W.2d 298 (Tenn.Cr. App.1980) (prior statements of witnesses); Hull v. State, 589 S.W.2d 948 (Tenn.Cr.App.1979) (destruction of victim's shirt without subjecting it to tests); Stewart v. State, 534 S.W.2d 875 (Tenn.Cr.App.1975) (statements of rape victim); Graves v. State, 489 S.W.2d 74 (Tenn.Cr.App.1972) (any agreement by state with a witness must be divulged); State v. Hammonds, 616 S.W.2d 890 (Tenn.Cr.App. 1981) (nothing exculpatory in alleged fingerprint of another person in a burglary case when the other person admitted to presence); State v. Teague, 645 S.W.2d 392 (Tenn.1983) (deal).

may involve a discovery violation but not necessarily a "Brady" violation.[6] The remedy for a total failure to disclose can be a new trial or a possible dismissal.[7]

§ 13.42 Disclosure of Exculpatory "Brady" Material—Form

[18.] Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the defendant requests any and all evidence in possession of the state or in the possession of any governmental agency that might fairly be termed "favorable," whether that evidence either be completely exculpatory in nature or simply tends to reduce the degree of the offense or punishment therefore, or whether that evidence might be termed "favorable" in the sense that it might be fairly used by the defendant to impeach the credibility of any witness the government intends to call in this matter. See generally, Williams v. Dutton, 400 F.2d 797 (5th Cir.1968). Specifically, the defendant seeks, but does not limit, his request to the following:

a. The nature and substance of any agreement, immunity promise or understanding between the government or any agent thereof, and any witness, relating to that witness' expected testimony, including but not limited to, understandings or agreements, relating to pending or potential prosecutions. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), Graves v. State, 489 S.W.2d 74 (Tenn.Cr.App.1972).

b. The nature and substance of any preferential treatment given at any time by any state agent, whether or not in connection with this case, to any potential witness, including, but not limited to, letters from State Attorneys or other law enforcement personnel to governmental agencies, state agencies, creditors, etc., setting out that witness' cooperation or status with the state, and which letter or communication might fairly be said to have been an attempt to provide some benefit or help to the witness.

6. Hamilton v. State, 555 S.W.2d 724 (Tenn.Cr.App.1977) (disclosure of evidence during trial); State v. Hicks, 618 S.W.2d 510 (Tenn.Cr.App.1981) (failure to disclose pretrial statement of defendant); State v. Beal, 614 S.W.2d 77 (Tenn.Cr.App.1981) (inconsistency of description brought out at trial); Lackey v. State, 578 S.W.2d 101 (Tenn.Cr.App.1978) (statement of witness brought out at trial); State v. Goodman, 643 S.W.2d 375 (Tenn.Cr.App.1982) (defendant failed to call witness who had exculpatory information of which defense lawyer was aware).

7. State v. Cagle, 626 S.W.2d 719 (Tenn.Cr.App.1981).

c. Any money or other remuneration paid to any witness by the State, including, but not limited to, rewards, subsistence payments, expenses or other payments made for specific information supplied to the state.

d. Any and all information in the possession of the state regarding the mental condition of the state's witnesses which would reflect or bring into question the witnesses' credibility. State v. Brown, 552 S.W.2d 383 (Tenn.1977).

e. The original statement and any amendment thereto, of any individuals who have provided the government with a statement inculpating the defendant, who later retracted all or any portion of that statement where such retraction would raise a conflict in the evidence which the state intends to introduce. See United States v. Enright, 579 F.2d 980 (6th Cir.1978).

f. Any and all interview memoranda or reports which contain any information, whatever the sources, which might fairly be said to contradict or be inconsistent with any evidence which the government intends to adduce in this matter. See United States v. Enright, supra.

g. The names and addresses of any witnesses whom the State believes would give testimony favorable to the defendant in regard to the matters alleged in the indictment, even though the state may not be in possession of a statement of this witness and regardless of whether the state intends to call this witness. See United States v. Eley, 335 F.Supp. 353 (N.D.Ga.1972).

h. The results of any scientific tests or analysis done on any person or object in connection with this case where the result of that test or analysis did not implicate, or was neutral to the defendant. See Barbee v. Warden of Maryland Penitentiary, 331 F.2d 842 (4th Cir.1964); Norris v. Slayton, 540 F.2d 1241 (4th Cir.1976).

i. Any documentary evidence in the possession of the State which contradicts or is inconsistent with any testimony the State intends to introduce in this cause.

j. The statement of any individual who has given a description to any person of an individual involved in the perpetration of the charged offense, which person the State alleges to be the defendant, where such description might fairly be said not to match the defendant in characteristics such as height, weight, body build, color of hair, etc. See Jackson v. Wainwright, 390 F.2d 288 (5th Cir.1968).

k. The name and address of any individual who has been requested to make an identification of the defendant in connection with this case, and failed to make such identification. Grant v. Aldredge, 498 F.2d 376 (2nd Cir.1974).

§ 13.43 Disclosure of Juror Information

Some district attorneys compile information about prospective jurors in serious cases. There is some precedent in other jurisdictions that jury information should be disclosed to the opposing party.[1] Giving such information may avoid challenge to individual jurors after the verdict.[2]

§ 13.44 Disclosure of Juror Information—Form

[19.] That the District Attorney disclose any information compiled by him as to any prospective juror, including but not limited to arrest or conviction records, or whether the prospective juror was ever a witness.

§ 13.45 Disclosure of Identification Procedure

Normally, disclosure of physical evidence will indicate from whom it was obtained so that an appropriate suppression motion can be filed. However, where there have been identification procedures, this fact may not be readily apparent. Consequently, discovery should request notification of any identification procedures.[1] Copies of any identification photographs should be disclosed.[2]

§ 13.46 Disclosure of Identification Procedure—Form

[20.] That in the event the State intends to offer any "eyewitness identification testimony," the defendant, through his attorney, be informed as to whether any such witness has at any time been asked to make any pretrial, extrajudicial identification of the defendant, whether by means of a live lineup, a photo-

§ 13.43

1. See Prosecution Information as to Jurors, 86 A.L.R.3rd 571. The clerk is required to disclose some juror information prior to trial, see Rule 24(g), Tenn.R.Crim.P.

2. See e.g. Clariday v. State, 552 S.W.2d 759 (Tenn.Cr.App.1976) (undisclosed fact of jury foreman being a student in a law class taught by district attorney).

§ 13.45

1. United States v. Cranson, 453 F.2d 123, 126 n. 6 (4th Cir.1971). See also § 20.2.

2. State v. Wilkens, Tenn.Cr.App at Jackson, filed Sept. 11, 1980 (unpublished) (trial court erred in declining to require the state to produce the photographs).

§ 13.41 Disclosure of Exculpatory "Brady" Material

In United States v. Bagley[8] the government failed to disclose that two witnesses had signed contracts for undercover work which would pay money to the witnesses commensurate with the information furnished. The Court's opinion was more concerned with the standard of a post-trial review of whether the withheld information was "material."[9] However, the Court did clarify the scope of the prosecutor's duty to disclose. The Court found that "impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."[10] Impeachment evidence in Tennessee is very broad and should now be disclosed upon proper request.[11]

1. See LaFave & Israel, Criminal Procedure § 19.5 (1984).

3. State v. Hartman, 703 S.W.2d 106 (Tenn.1985), certiorari denied ___ U.S. ___, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986) (omitted evidence "does not create a reasonable doubt of guilt of defendant and would not have affected outcome of trial").

4. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986) the Court seemed to alter the standard of a post-trial review of withheld evidence without regard to specific nature of the discovery request. The Court found that material evidence is proof which, had it been disclosed to the defense, would have created a reasonable probability that the result of the proceeding would have been different.

5. State v. Swanson, 680 S.W.2d 487 (Tenn.Cr.App.1984) (the absence of the defendant's fingerprints on a truck is not material where defendant admitted to having been inside the victim's truck prior to the occurrence of the offense); State v. Williams, 690 S.W.2d 517 (Tenn. 1985) (when the reliability of a witness may well be determinative of guilt or innocence, the non-disclosure of evidence affecting credibility may justify a new trial, regardless of the good or bad faith of the prosecutor).

6. State v. Shelton, 684 S.W.2d 661 (Tenn.Cr.App.1984) (officers actually testified at trial).

8. 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

9. See discussion in note 4 supra.

10. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986) (failure "to assist the defense by disclosing information that might have been helpful in conducting the cross-examination").

11. See § 27.180 et seq.

§ 13.43 Disclosure of Juror Information

2. State v. Pender, 687 S.W.2d 714 (Tenn.Cr.App.1984) (no authority which would have required state to disclose that juror was a reserve police officer).

C. STATE DISCOVERY REQUEST

§ 13.60 Right to Discovery

2. See LaFave & Israel, Criminal Procedure § 19.4 (1984).

STATE BAR OF TEXAS

JUL 18 1988

Office of the General Counsel

July 6, 1988

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

Dear Mr. Proudfoot:

Your letter of June 10, 1988, addressed to Mr. James B. Sales, President of the State Bar of Texas, has been referred to me for response. I have enclosed for your information a copy of Texas Disciplinary Rule 7-103. Please note the (B) provision of that particular Disciplinary Rule. Timely disclosure is required of exculpatory evidence.

Further, the case law in the United States follows Brady v. Maryland, 373 U.S. 83 (1963), which requires production of evidence favorable to an accused upon request. The good faith or bad faith of the prosecutor in suppressing such evidence is not material.

I hope this information is of some assistance to you. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Steven D. Peterson
General Counsel

SDP/db

cc: James B. Sales, 1301 McKinney, Gulf Tower, Houston, Texas 77010

P.O. BOX 12487, CAPITOL STATION, AUSTIN, TEXAS 78711, (512) 463-1381

lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36. Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37. In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, setting, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39. In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of the tribunal and make their decisional processes prompt and just, without impinging upon the obligation of the lawyer to represent his client zealously within the framework of the law.

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:
- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
- (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
- (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:
- (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
- (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:
- (1) 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.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
- (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:
- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so he shall reveal the fraud to the affected person or tribunal.
- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating with One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:
- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
- (2) Give advice to a person who is not represented by a lawyer, 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.

Office of Bar Counsel

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AUG 1 0 1988

July 20, 1988

Gordon F. Proudfoot
BOYNE CLARK
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

In response to your letter to Mr. Kent Kasting of June 10, 1988, I have enclosed a copy of our rule which governs the disclosure of exculpatory statements in criminal prosecutions. I appreciated the opportunity to be of assistance to you in this matter.

Sincerely,

Christine A. Burdick
Acting Bar Counsel

CAB/jw

Enclosure

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 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. See 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 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) provided 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) provided 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."

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.

COMMENT:

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 the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before 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 negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

CODE COMPARISON

EC 7-15 stated that a lawyer "appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 stated that "[w]hen a lawyer appears in connection with proposed legislation, he ... should comply with applicable laws and legislative rules." EC 8-5 stated that "fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body ... should never be participated in ... by lawyers." DR 7-106(B)(1) provided that "[i]n presenting a matter to a tribunal, a lawyer shall disclose ... [u]nless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

SUPREME COURT OF VERMONT
111 STATE STREET
MONTPELIER, VERMONT
05602

AUG 26 1988

CHAMBERS OF
JOHN A. DOOLEY
ASSOCIATE JUSTICE

August 19, 1988

Gordon F. Proudfoot
P.O. Box 876
Dartmouth, N.S.
B2Y 3Z5

Dear Mr. Proudfoot:

In response to your inquiry, enclosed please find a copy of Rule 16(b) of the Vermont Rules of Criminal Procedure, with Reporter's Notes, that addresses the issue with which you are concerned.

Sincerely,

John A. Dooley
Associate Justice

JD:ab

reversal since depositions remain sealed until filed with the court and the court could not abrogate the rules of criminal procedure based on oversight or fiscal choice. Id.

3. Unavailable witnesses. Where purpose of bringing in testimony of a witness was to impeach testimony of another witness and the examiner had the witness on the stand and later available for recall, was fully aware of the inconsistent statement and of his own intention to bring it forth from the witness, who was only available for a limited time, and had full opportunity to comply with the requirement that a preliminary foundation for impeachment be laid by calling the statement to the attention of the testifier and failed to do so, later attempt to introduce deposition of witness, who had since moved out of state, in place of his testimony on the ground that he was then an absent witness was properly denied. State v. Young (1981) 139 Vt. 535, 433 A.2d 254.

RULE 16. DISCOVERY BY DEFENDANT

(a) Prosecutor's Obligations. Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

(A) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) any 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;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney

intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness;

(F) any record of prior criminal convictions of the defendant; and

(G) any other material or information not protected from disclosure under subdivision (d) of this rule that is necessary to the preparation of the defense.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at or before the status conference, disclose in writing the foregoing items or state in writing that they do not exist.

(b) Same: Collateral or Exculpatory Matter. The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(c) Same: Scope. The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.

(d) 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 mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required except as provided in Rule 509(c) of the Vermont Rules of Evidence.—Amended Dec. 19, 1973, eff. Jan. 1, 1974; March 17, 1977, eff. May 1, 1977; Dec. 8, 1981, eff. March 1, 1982; Dec. 28, 1982, eff. April 1, 1983.

Cross references. Identity of informant, privilege, see Rule 509, Vermont Rules of Evidence.

Lawyer-client privilege, generally, see Rule 502, Vermont Rules of Evidence.

Writings or objects used to refresh memory of witness, penalty for failure to produce, see Rule 612(c), Vermont Rules of Evidence.

Reporter's Notes—1983 Amendment

Rule 16(d)(2) is amended for conformity with Evidence Rule 509 which creates an informant's privilege. The privilege, like the present rule, applies only to matters that are prosecution secrets and does not apply to informants who are to be called as witnesses by the state. The most important exception to the privilege, however, is somewhat broader in scope than the rule, extending under Rule 509(c)(2) to "any issue" in a criminal case. Rule 16(d)(2) was limited to issues where disclosure was compelled by the Constitution—i.e., those essential to the determination of guilt or innocence—or where the informant's identity was itself in issue—e.g., entrapment. See Reporter's Notes to Evidence Rule 509, Criminal Rule 16(d)(2).

Reporter's Notes—1982 Amendment

Rule 16(a) is amended as part of the change from the omnibus hearing to the status conference. See Reporter's Notes—1982 Amendments to Rule 12. The rule formerly required the prosecutor to make certain disclosures at the omnibus hearing unless a request is made earlier. It now requires the disclosures to be in writing and to be made at or before the status conference. Oral disclosures formerly were made in response to the omnibus checklist, a practice that has been eliminated with the shift to the status conference.

Reporter's Notes—1977 Amendment

This amendment is intended to make clear that the list of items which the defendant may discover under Rule 16(a) is not exclusive. For example, defendant should be able to inquire as to any arrangements between the prosecution and its witnesses or any information about the background of prospective jurors which prosecution investigators may have uncovered. The amendment does

not specify the matters that are discoverable, but requires that they be outside the protections for work product and informants contained in Rule 16(d) and that they be "necessary to the defense." If the prosecution wishes to resist disclosure of a particular item under this provision, it should move for a protective order under Rule 16.2(d). On that motion the court will decide the question of necessity. Conversely, the defendant can compel compliance with a request under this provision either by a motion for sanctions under Rule 16.2(g) or by successfully resisting a motion for a protective order. Since the amendment applies to either "material or information," it is in effect similar to the interrogatory procedure of Civil Rule 33, without the formality and detail of that rule.

Reporter's Notes

This rule must be read with Rules 16.1 and 16.2, which form with it a system of reciprocal discovery. The three rules are in general similar to the ABA Minimum Standards (Discovery and Procedure before Trial) §§ 2.1–4.7 and to the currently proposed amendments to Federal Rule 16, first presented in January 1970, 48 F.R.D. 553, 587 (1970), and transmitted to the Supreme Court with important revisions in November 1972 Proposed Amendments to the Federal Rules of Criminal Procedure (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rules go further than either source in the breadth of discovery accorded the defendant, however, and extend considerably the defendant's rights under former 13 V.S.A § 6727, repealed by Act No. 118 of 1973, § 25. The rules also alter Vermont practice significantly by allowing discovery by the prosecution. See Rule 16.1.

Rule 16(a) is based on ABA Minimum Standards § 2.1(a). It provides for disclosure to the defendant of stated matters upon request, which may be made in writing or orally in open court at any time. Under the last sentence of the subdivision, if no request is made, the prosecutor must in any event disclose the items, or state that they do not exist, at the omnibus hearing. The request procedure, adapted from the proposed Federal Rule, is designed to avoid loss of time in needless motions. At the same time the prosecutor is relieved of the burden of automatic disclosure, unnecessary in many routine cases, that ABA Minimum Standards § 2.2 requires. If the prosecution wishes to oppose or limit disclosure, its remedy is a motion for a protective order under Rule 16.2(d). This self-operating feature of discovery practice under the rules, like the deposition procedure under Rule 15(a), is similar to civil practice, where it has worked effectively. See Reporter's Notes to Rule 15(a). Cf. ABA Minimum Standards § 2.2, Commentary.

Rule 16(a)(1), requiring disclosure of all witnesses known to the prosecution and access to their statements, whether the witnesses are to be used at trial or not, is broader than either ABA Minimum Standards § 2.1 or the proposed Federal Rule. The Vermont rule in effect makes available to the defendant the prosecution's full investigative resources on the theory that justice is best served and

speedy disposition of cases is encouraged if both sides have equal access to sources of potential evidence. Because knowledge of the existence of witnesses is essential in the preparation of defendant's case this disclosure must be made "as soon as possible" after request, rather than "within a reasonable time," as is provided for disclosures under Rule 16(a)(2). The breadth of disclosure required under this rule is, of course, subject to the limitations as to work product and informants provided by Rule 16(d). The prosecution may resist disclosure on such grounds by motion for protective order under Rule 16.2(d). Although disclosure under Rule 16(a)(1) is required only upon request, the obligation of the prosecution to reveal the existence of informant's evidence and to disclose exculpatory evidence without request under Rule 16(b) will, where applicable, supersede the procedure of Rule 16(a)(1).

The items enumerated in Rule 16(a)(2) are essentially those as to which disclosure is required under ABA Minimum Standards § 2.1(a). See Commentary to that section. The provision of subparagraph (A) for inspection of codefendants' statements goes beyond the discovery allowed under former 13 V.S.A. § 6727, supra. See State v. Anair, 123 Vt. 80, 181 A.2d 61 (1962). Such disclosure is desirable to give defendant advance notice of possible grounds for severance in a joint trial situation under Rule 14(b)(2)(B). See Reporter's Notes to that rule and ABA Minimum Standards § 2.1(a)(ii), Commentary.

Subparagraph (B) goes beyond ABA Minimum Standards § 2.1(a)(iii), which requires disclosure only of the defendant's own grand jury testimony and relevant testimony of witnesses to be called at trial. Proposed Federal Rules 16(a)(1)(A), (3), apply only to testimony of the defendant and officers of a corporate defendant, except as further disclosure may be permitted under Federal Rule 6(e). Cf. Reporter's Notes to Rule 6. The Vermont rule is also a significant departure from prior Vermont practice under which disclosure of grand jury and inquest testimony was allowed in the court's discretion only upon a showing of genuine need. See State v. Alexander, 130 Vt. 54, 286 A.2d 262 (1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18, cert. denied 404 U.S. 965 (1971); State v. Miner, 128 Vt. 55, 258 A.2d 815 (1969). The complete disclosure required under the rule is intended to equalize the investigative advantage which the grand jury and inquest procedures give the prosecution and to eliminate time-consuming disputes over questions of relevance and need. The prosecution must seek a protective order if disclosure will imperil the secrecy of the grand jury or inquest.

Subparagraphs (C)-(F) require disclosure that would presumably have been permissible under former 13 V.S.A § 6727, supra. See State v. Miner, supra, 128 Vt. at 71-73. Those provisions all are consistent with the general goal of equalizing investigative advantages and eliminating surprise at trial, and all are of course subject to the prosecution's right to a protective order. See ABA Minimum Standards § 2.1(a)(i), (iv)-(vi), Commentary. Proposed Federal Rule 16(a)(1)(B)-(E) provides for similar disclosure. The requirement of subparagraph (E) that witnesses to be used at trial

be disclosed must be complied with even after a general disclosure of witnesses is made under Rule 16(a)(1). Disclosure of trial witnesses is an aid in planning trial strategy. The broader disclosure is for investigative purposes. Statements of trial witnesses are not specifically referred to in subparagraph (E), but such statements either will have been made available under Rule 16(a)(1) or must be disclosed under the continuing duty to implement that rule imposed by Rule 16.2(b). The provision prohibiting comment on the prosecution's failure to call a listed witness is intended to protect the prosecution from an unfair implication that might be drawn from a tactical step. The prohibition is only against commenting upon the fact that the witness was previously listed; it does not bar comment generally upon the prosecution's failure to call the witness. See Federal Advisory Committee's Note, 48 F.R.D. 553, 606.

Rule 16(b) is taken from ABA Minimum Standards § 2.1(b), (c). It imposes an absolute obligation upon the prosecution to disclose matters pertaining to certain collateral procedural and constitutional issues susceptible of preliminary determination, as well as exculpatory matters. The provision as to informants in subparagraph (A) was eliminated in an amendment to ABA Minimum Standards § 2.1(b) (Supp. 1970) on the theory that the point was adequately covered by the provision for exculpatory matter and by other procedural devices. The informant clause has been retained in the rule, however, because of issues, such as search and seizure, to which such matter may pertain, that are not strictly speaking within the exculpatory clause, and because of the desirability of giving the defendant prompt access to matter pertaining to preliminary issues. Subparagraph (B) implements Rule 16(a)(2)(B) by making routine transcription of grand jury and inquest proceedings unnecessary. If fully apprised of the contents of such proceedings, defendant presumably will not request transcripts of no value to him. Rule 16(b)(2) is intended to implement the constitutional requirement of disclosure of exculpatory material imposed by Brady v. Maryland, 373 U.S. 83 (1963). See ABA Minimum Standards § 2.1(c), Commentary.

Rule 16(c), taken from ABA Minimum Standards § 2.1(d), makes clear that the prosecution's obligations extend not only to material in the hands of the prosecutor's immediate staff but to that possessed or controlled by others, such as police officers, involved in the investigation of the case under the prosecutor's direction. Excluded from the obligations of Rule 16 are employees or officers of other governmental agencies who may be involved with the matter in question but have no working connection with the prosecution. Although the rules do not require it, as a matter of good practice prosecutors should follow the guidelines of ABA Minimum Standards § 2.4 in seeking to make available upon defendant's request material that is under the control of other agencies of the State. If the prosecution fails in such efforts, the defendant has available the subpoena duces tecum under Rule 17(c) to compel production of such material. See Reporter's Notes to Rule 17(c).

The standard of "possession, custody or control" found in Rule 16(a) is further defined by Rule 16(c). The same language in Federal Rule 16 and Civil Rule 34 may be looked to for interpretive guidance. "Control" should be so construed that the prosecution will not be able to avoid discovery by declining possession or custody of material which normally should be in its files. Moreover, although the rule does not contain the language of Federal Rule 16(a), which applies to matter "the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government," such a due diligence requirement should be read into the rule, consistent with the continuing duty to disclose imposed by Rule 16.2(b). The better practice is that delineated in ABA Minimum Standards § 2.2(c): "The prosecuting Attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged." See id., Commentary.

Rule 16(d) is taken from ABA Minimum Standards § 2.6(a), (b). Objections to disclosure based upon it should be made by motion for protective order under Rule 16.2(d). Rule 16(d)(1) is similar in language and effect to Civil Rule 26(b)(3). The limitation in the rule to work product provides a narrower protection than that accorded government agents under Federal Rule 16(a). The Vermont rule is more protective than ABA Minimum Standards § 2.6(a), however. That section only covers members of the prosecutor's "legal staff." In view of the broad protection accorded by the rule, the courts should interpret "mental impressions, conclusions, opinions, or legal theories" narrowly to achieve the basic purpose of the rule to protect the adversary process from intrusion. See ABA Minimum Standards § 2.6(a), Commentary. Such a narrow interpretation is particularly called for where reports of nonlawyers are involved, if the general purpose of Rule 16 to give the defendant access to the basic information concerning the case in the prosecution's hands is not to be defeated. Of course, even the work product exception may give way where there is a constitutional duty to disclose, as in the case of exculpatory matter. See discussion of Rule 16(b)(2) above. Where a work product objection is legitimately made, its impact upon the defendant's right of access may be limited by the excision of the challenged matter under Rule 16.2(e).

Rule 16(d)(2) bars disclosure of an informer's identity over prosecution objection unless constitutionally compelled, unless shown by the defendant to be a fact essential to a defense such as entrapment, or unless the informer's identity will in any event be revealed by his testifying at trial. The essential-fact exception may also express a constitutional compulsion. See Roviaro v. United States, 353 U.S. 53 (1957). Revelation may also be constitutionally compelled when the basis of an arrest or search is challenged on Fourth Amendment grounds and there is doubt as to the credibility of the affiant or the informant. See McCray v. Illinois, 386 U.S. 300 (1967); People v. Verrecchio, 23 N.Y.2d 489, 245 N.E.2d 222 (1969).

ANNOTATIONS

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1. Duty of prosecutor. The prosecutor has a duty of disclosure under this rule, which duty is part of his professional responsibility, and a failure to fulfill it that does not amount to reversible error may still prompt submission and review of the matter as an ethical violation. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

2. Applicability. Provision of this rule making discovery of grand jury minutes available would not be applied to allow such discovery in case in which conviction was had prior to the rule's effective date. Berard v. Moeykens (1974) 132 Vt. 597, 326 A.2d 166.

Provision of this rule requiring prosecutor to disclose to defense reports made in connection with the particular case did not apply to reports completed long before the crime involved in the case was committed. State v. Kasper (1979) 137 Vt. 184, 404 A.2d 85.

3. Rebuttal witnesses. Rebuttal witnesses may not be subject to pretrial disclosure in cases in which they are not known to the prosecution at that time; however, there is no right to withhold, but rather a duty to disclose witnesses, and, such a duty being a continuing one, as soon as a previously unknown witness becomes known, his or her existence must be declared to the defense. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

4. Failure to disclose witnesses. Where state never informed defendant before trial that a certain witness whose testimony was central to the state's case was on the list of witnesses the state intended to call, and the witness was allowed to testify at the trial which resulted in conviction, requirement of this rule, that defendant be supplied, on request therefore, with a list of the witnesses the state intends to call, was not complied with, defendant was prejudiced and reversal was required. State v. Evans (1976) 134 Vt. 189, 353 A.2d 363.

Prosecutor's duty to disclose certain things to a defendant is a continuing one, and where prosecutor knew of eyewitness for weeks before trial and did not disclose him to defendant until second day of trial, there was sufficient prejudice to require reversal, absent cure of the error. State v. Connarn (1980) 138 Vt. 270, 413 A.2d 812.

Otherwise reversible error occurring when prosecutor knew for weeks before trial of eyewitness against defendant and did not disclose him until second day of trial was cured where defendant was given opportunity to depose witness and did so, was offered a continuance several times and refused, defendant called him as a witness, his testimony was largely cumulative, and defendant did not show prejudicial error. Id.

Where defendant was charged and convicted by jury of operating a vehicle under the influence of intoxicating liquor and two medical witnesses were allowed to testify even though their names were not included on the list of prospective witnesses required by this rule to be furnished when known to the prosecuting attorney, state failed to comply with this rule, and court's failure to grant defendant's motion to suppress, or, alternatively, to grant a continuance adequate for unhurried deposition was error; however, based on the record, including court's justifiable taking of

judicial notice, without objection, that names of witnesses were revealed during voir dire, defendant did not meet burden of affirmatively demonstrating prejudicial error. State v. Cheney (1977) 135 Vt. 513, 380 A.2d 93.

In prosecution for unlawful trespass, admission of testimony by an oil company deliveryman, as a rebuttal witness for the prosecution, without notice to defense counsel, was not grounds for reversal where there was no prejudice to the defendant since the testimony of the deliveryman merely corroborated facts and since there was no surprise to the defendant, who had ample notice of the line of argument supported by the testimony from a proposed exhibit in the case. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

5. **Failure to call witness.** In prosecution for driving while intoxicated, where state gave defendant a list of its witnesses as required by rule, state did not put a certain doctor who had administered a blood alcohol test on the stand, though the doctor was on the witness list, and court would not allow a continuance to obtain the doctor's testimony, defendant was not unfairly deprived of the right to present the doctor as a witness or to cross-examine him, since, if defendant wanted to insure the doctor's presence, he could have done so by subpoena, and not having done so, the risk of the doctor's absence from court fell on defendant. State v. Stevens (1980) 139 Vt. 184, 423 A.2d 853.

6. **Reports.** Where this rule required that prosecutor disclose to defense reports material to the preparation of the defense and supreme court found undisclosed reports not to be material to the defense, there was no error in lower court's failure to grant motion for disclosure. State v. Kasper (1979) 137 Vt. 184, 404 A.2d 85.

7. **Exculpatory matter.** In murder prosecution defended against on ground alleged victim murdered a look-alike so that he could disappear and avoid an upcoming robbery prosecution, where evidence not given to defense by prosecutor, as required by this rule, that person had seen someone who appeared to be the alleged victim, was relevant to an element of state's case that was subject to doubt, and where prosecutor, in his argument to jury, stressed the nonexistence of any evidence supporting defendant's theory of defense, defendant's constitutional right to fair trial was denied, and new trial would be granted. State v. Goshea (1979) 137 Vt. 69, 398 A.2d 289.

8. **Waiver.** Where letter written by the accused urging a prospective witness to lie was admitted to impeach the testimony of accused's psychiatrist but had not been disclosed to the defense prior to trial as required by this rule, failure of the accused to object in a timely fashion or to move to strike constituted a waiver of the claimed error. State v. Mecier (1980) 138 Vt. 149, 412 A.2d 29.

9. **Cited.** Cited in State v. Moran (1982) 141 Vt. 10, 444 A.2d 879; State v. Olds (1982) 141 Vt. 21, 443 A.2d 443.

RULE 16.1. DISCLOSURE TO THE PROSECUTION

(a) The Person of the Defendant.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon motion and notice a judicial officer may require the defendant to:

(A) appear in a line-up;

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July 22, 1988

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Dartmouth, Nova Scotia
CANADA
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 Jay McAllister, III, was referred to me as Chairman of Criminal Law Committee of the Virginia Bar Association for a response. Since our Committee has no plans to meet until the end of August, I am taking the liberty of responding to your letter without Committee endorsement because of your request for a speedy reply in view of the need to file your brief in this matter in September 1988. This reply is therefore not an official one on behalf of the Committee and reflects only my throughts on this matter in an effort to assist you in answering the questions which you have raised.

You have inquired as to whether there are any laws or guidelines issued by the government, or professional ethical codifications, requiring exculpatory statements to be disclosed by the prosecution in criminal cases.

The United States Supreme Court has held 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 punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

In the federal system, the disclosure of evidence by the prosecution is governed generally by Rule 16 of the Federal Rules of Criminal Procedure, a copy of which I am enclosing for your

information. Upon request by the defendant, the prosecution must turn over any statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations and tests. Statements of government witnesses are not required to be turned over except pursuant to the Jencks Act, 18 U.S.C. § 3500, which provides that witness statements must be turned over after the witness testifies in open court for purposes of cross-examination by the defendant. I am also enclosing a copy of the Jencks Act for your information.

In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court further refined the requirements of Brady v. Maryland to disclose exculpatory evidence. It stated that the due process clause would be violated (1) where the prosecution knowingly uses perjured testimony, and there is a reasonably likelihood it could have affected the jury verdict; (2) where the prosecutor fails to disclose exculpatory evidence after a specific request, and the undisclosed information might have affected the outcome of the trial; and (3) where, after a general request or no request by the defense, the prosecutor fails to disclose information suffiently material as to raise a reasonable doubt about the guilt of the defendant.

The Code of Professional Responsibility in Virginia includes a Disciplinary Rule dealing with "special responsibilities of a prosecutor or government lawyer". Under Canon 8 these special responsibilities are set forth in DR 8-102. In addition, certain ethical considerations are set forth in EC 8-10. Among the ethical considerations is: "The prosecutor should make timely disclosure to the defense of all information required by law. 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." I am enclosing a copy of these Disciplinary Rules and Ethical Considerations for your information.

Several years ago, I had occasion to publish an article on "Professional Responsibilities of the Federal Prosecutor". 17 U. Rich L. Rev. 511 (1983). To the extent that it might provide some general information on the subject or give you leads for further research, I am enclosing a copy for your information. A brief discussion of the duty to disclose exculpatory information is set forth at page 529.

I hope the foregoing and enclosures will be of some assistance to you as you prepare your brief. Should you have any questions or if I can provide you with any further information, please do not hesitate to contact me.

Because I have an interest in the subject matter of your brief, I would appreciate receiving a copy of it after it has been prepared.

I look forward to hearing from you.

Sincerely,

John S. Edwards

JSE/clr

Enclosures

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JUL 29 1988

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

Dear Mr. Proudfoot:

The president of the Virginia State Bar, Jay Corson, referred your letter of June 10, 1988 to me. I am chairman of the Virginia State Bar Standing Committee on Lawyer Discipline. Our committee is responsible for supervising the disciplinary system in Virginia. Our duties include considering proposed changes in the Code of Professional Responsibility. This Code is a Rule of the Virginia Supreme Court which governs lawyers' professional conduct in Virginia.

You have inquired as to whether we have any laws or guidelines requiring a prosecutor to disclose exculpatory statements in criminal prosecutions to defense counsel. The answer is yes. The current rule is found in the Code of Professional Responsibility at DR 8-102(A)(4). A copy is enclosed. A copy of the ethical consideration relating to this rule, which is deemed to be aspirational in nature rather than a mandatory requirement, is also enclosed. It is EC 8-10.

A little over a year ago, the Virginia Supreme Court had occasion to interpret DR 8-102(A)(4) in the case of Read v. Virginia State Bar, 357 S.E.2d 544. A copy of that decision, dated June 12, 1987 is enclosed. In response to that decision, the Virginia State Bar Counsel, Michael L. Rigsby, by letter of July 10, 1987 asked that our committee consider recommending a change in the rule.

After some study and seeking input from both the Virginia Association of Commonwealth's Attorneys as well as several defense attorneys' organizations, our committee presented a proposed change in the rule to the Virginia State Bar Council. A copy is enclosed.

The Council approved the committee's recommendation on June 16, 1988. This proposal will now go to the Virginia Supreme Court for its consideration and hopefully approval.

Also enclosed are copies of reports and correspondence from my file relating to our study of this proposed rule change and also a couple of articles commenting on the Read case. I hope these will be of assistance to you. If I can be of any further help, please do not hesitate to let me know.

Yours sincerely,

Virginia H. Hackney

89/657

Enclosures

cc: J. Jay Corson, IV, Esquire

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VIRGINIA STATE BAR
PROFESSIONAL HANDBOOK

1987
SUPPLEMENT

Comprising rules and opinions added, amended, or deleted since publication of the 1986 Edition, through December 1, 1987

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

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Canon 8.

A Lawyer Should Assist in Improving the Legal System.

DISCIPLINARY RULES.

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer.

(A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) Disclose to a defendant all information required by law.

(5) Not subpoena an attorney in any criminal case or proceeding, including any proceeding before any grand jury, without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is or was represented by the attorney/witness.

PROPOSED CHANGE TO PART 6 OF

THE RULES OF COURT, SECTION IV: DR 8-102(A)(4)

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer.

(A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) ~~Disclose to a defendant all information required by law.~~ Make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

(5) Not subpoena an attorney in any criminal case or proceeding, including any proceeding before any grand jury, without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is or was represented by the attorney/witness.

Adopted by Virginia State Bar Council
June 16, 1988

VIRGINIA STATE BAR PROFESSIONAL HANDBOOK

1986
EDITION

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer. — (A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) Disclose to a defendant all information required by law.

ETHICAL CONSIDERATIONS.

EC 8-1. — Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2. — Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3. — The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4. — Whenever a lawyer seeks legislative or administrative changes he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5. — Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6. — Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7. — Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8. — Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9. — The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

EC 8-10. — The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) The prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. The prosecutor should make timely disclosure to the defense of all information required by law. 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.

EC 8-11. — A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he

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July 15, 1988

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

Dear Mr. Proudfoot:

Tom Potter has requested that I respond to your letter of June 10, 1988, in which you requested information on West Virginia law in connection with the disclosure of a exculpatory evidence in criminal prosecutions.

Because we are not familiar with the facts concerning the prosecution of Donald Marshall, Jr., it is difficult to respond to your inquiry with any degree of specificity. However, there are several general principles of law recognized in West Virginia which may be of some interest. Specifically, it is generally recognized that the prosecuting attorney has a duty to disclose exculpatory evidence regardless of whether that information has been requested by defense counsel. E.g., State v. Meadows, 304 S.E.2d 831 (W. Va. 1983); State v. Brewster, 261 S.E.2d 77 (W. Va. 1979); State v. Wilder, 352 S.E.2d 723 (W. Va. 1986); State v. Cowan, 197 S.E.2d 641

(W. Va. 1973); State v. Jacobs, 298 S.E.2d 836 (W. Va. 1982). Further, failure to produce exculpatory evidence after it is requested is reversible error. Hall v. McCoy, 329 S.E.2d 860 (W. Va. 1985). However, there are certain circumstances in which our court has refused to reverse where exculpatory evidence was not requested. State v. Hamrick, 151 S.E.2d 252 (W. Va. 1966).

Copies of the cases cited above are enclosed. Hopefully, they will be of some value to you in preparing your brief.

Sincerely,

THAD S. HUFFMAN

TSH/tfh

Enclosures

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John Walsh
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June 30, 1988

JUL 6 1988

Mr. Gordon F. Proudfoot
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Dartmouth, Nova Scotia B2Y 3Z5
CANADA

Dear Mr. Proudfoot:

I am in receipt of your request for information regarding the duty to disclose exculpatory statements to the defense counsel in a criminal prosecution. On behalf of the State Bar of Wisconsin, I am pleased to respond.

The short answer to your question is that public prosecutors in Wisconsin are under an ethical duty to 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. This requirement has been acepted and codified by the Wisconsin Supreme Court into the Supreme Court Rules; SCR Chapter 20, Rule 3.8(d).

On January 1 of this year, SCR Chapter 20 was amended. Previously, it had consisted of the Code of Professional Responsibility. The Supreme Court repealed that Code and replaced it with Wisconsin's own version of the Model Rules of Professional Conduct, adopted by the American Bar Association in August, 1983. Other states in the U.S. are also now using the Model Rules or studying them.

Under both the old and new codes, public prosecutors have special duties. When the Code of Professional Responsibility governed attorney conduct, SR 20.37, "Performing the duty of public prosecutor or other government lawyer," provided:

> (2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

Under the new Model Code, SCR 20:3.8, "Special responsibilities of a prosecutor," provides that the prosecutor in a criminal case shall:

> (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...

In addition to rule 3.8, there are several other rules in the Model Code that impose a similar duty on all attorneys and a breach of Rule 3.8 may sometimes go hand-in-hand with a breach of the other rules. For example, SCR 20:3.3, "Candor toward the tribunal," provides in (a)(4) that an attorney shall not knowingly offer evidence that the lawyer knows to be false. Furthermore, SCR 20.3.4, "Fairness to opposing party and counsel," prohibits a lawyer from unlawfully obstructing another party's access to evidence, falsifying evidence, requesting a person other than a client to refrain from voluntarily giving relevant information to another party under certain conditions, etc.

I have enclosed a photocopy of each of the rules mentioned above. I hope this information is helpful to you, and please contact me if I can be of any further assistance. Good luck in presenting your brief to the Royal Commission in September.

Very truly yours,

John Walsh, President

JW/nem
Enclosures

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.

* * *

ADVOCATE

SCR 20:3.1 Meritorious claims and contentions

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, 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 never is 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.

Committee comment: Paragraphs (a)(1) and (a)(3) are now embodied in Supreme Court Rule 20.36(1)(a) and (b). Paragraph (a)(2) is new. One of the weaknesses of the ABA Model Rule is that it appears to establish an objective standard. In the committee's view, the subjective test for an ethical violation under this rule should be retained in Wisconsin. Matter of Lauer, 108 Wis. 2d 746, 324 N.W.2d 432 (1982). If the objective test were adopted, the standards of Wis. Stat. sec. 814.025 could be applied to disciplinary proceedings. The conduct rising to an ethical violation should be more egregious than conduct resulting in the imposition of costs and fees under sec. 814.025. CF. Sommer v. Carr, 99 Wis. 2d 789, 299 N.W.2d 856 (1981); Radlein v. Industrial Fire & Cas. Co., 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

* * *

SCR 20:3.2 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.

* * *

SCR 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

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

(2) fail to disclose a 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) 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) apply even if compliance requires disclosure of information otherwise protected by Rule 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 Rule 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 pre-

scribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 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.

Except in the defense of a criminal accused, 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 truth-finding process which the adversary system is designed to implement. See Rule 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 resolution, 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 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 Rule 1.2(d).

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.

Constitutional requirements

The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

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.

Committee comment: The committee does not limit the rule under paragraph (a)(1) and (2) to instances involving "material" facts. Under paragraph (b), the duties under this rule do not terminate at the conclusion of the proceeding.

* * *

SCR 20:3.4 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 the 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 Rule 4.2.

* * *

SCR 20:3.5 Impartiality and decorum of the tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official 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.

* * *

SCR 20:3.6 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 deprivation of liberty, 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 deprivation of liberty, 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

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.

* * *

SCR 20:3.8 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.

* * *

SCR 20:3.9 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.

COMMENT

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 the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before 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 PERSONS OTHER THAN CLIENTS

SCR 20:4.1 Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

* * *

SCR 20:4.2 Communication with person represented by counsel

the client to rectify the same and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal.

(b) A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

SCR 20.37. Performing the duty of public prosecutor or other government lawyer

(1) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when the lawyer knows or it is obvious that the charges are not supported by probable cause.

(2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

SCR 20.38. Communicating with one of adverse interest

During the course of representing a client a lawyer may not:

(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing the other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of the person are or have a reasonable possibility of being in conflict with the interests of the client.

SCR 20.39. Threatening criminal prosecution

A lawyer may not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.

SCR 20.40. Trial conduct

(1) A lawyer may not disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of the rule or ruling.

(2) In presenting a matter to a tribunal, a lawyer shall disclose:

(a) Legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of his or her client and which is not disclosed by opposing counsel.

(b) Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

Attorneys at Law

Daly, Anderson & Taylor

A Professional Corporation

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June 20, 1988

Gordon F. Proudfoot
BOYNE CLARK
Barristers & Solicitors
P. O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5

JUN 2 8 '988

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

Dear Mr. Proudfoot:

There are ethical guidelines in the model Rules and Professional Conduct fairness to opposing counsel for the party that state that a lawyer shall not obstruct another party's access to evidence or unlawfully alter the story or conceal a document or other potential material having evidenciary value. This is set forth in Rule 3.4. The code comparison was Rule 3.4(a) DR 7-109(a) which provides that a lawyer shall not suppress any evidence that he and his client have a legal obligation to reveal.

It would seem to me from the fact situation which you have set forth in the prosecution of Donald Marshall, Jr. that the prosecutor would fall within that Rule and subsequently could be disbared or perhaps even sued for malpractice by Donald Marshall, Jr., if in fact the prosecution did fail to disclose exculpatory statements.

I have not at this point devoted a great deal of time to your problem. If you wish to discuss this matter further, please advise me.

Sincerely yours,

John M. Daly

JMD/bl

Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection.

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) *Information Subject to Disclosure.*

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) DEFENDANT'S PRIOR RECORD. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the

exercise of due diligence may become known, to the attorney for the government.

(C) DOCUMENTS AND TANGIBLE OBJECTS. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) REPORTS OF EXAMINATIONS AND TESTS. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) *Grand Jury Transcripts.* Except as provided in Rules 6, 12(i) and 26.2 and subdivision (a)(1)(A) of this rule, these

rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) *Information Subject to Disclosure.*

(A) DOCUMENTS AND TANGIBLE OBJECTS. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) REPORTS OF EXAMINATIONS AND TESTS. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief 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 his testimony.

(2) *Information Not Subject to Disclosure.* Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by

prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) CONTINUING DUTY TO DISCLOSE. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) REGULATION OF DISCOVERY.

(1) *Protective and Modifying Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement 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.

(2) *Failure To Comply With a Request.* 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, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) ALIBI WITNESSES. Discovery of alibi witnesses is governed by rule 12.1.

[16-1] Comment and History of Rule.

Rule 16 stood as originally promulgated until 1966, when it was completely rewritten. The amended Rule greatly expanded the scope of discovery available to a defendant, and also granted for the first time a lim-

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1987 EDITION

FEDERAL CRIMINAL CODE and RULES

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Rules of Criminal Procedure
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by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdi-

vision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief 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.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement 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.

(2) Failure To Comply With a Request. 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, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, § 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F.2d 74, C.C.A.2d, certiorari denied, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed.Supp. 523, 534, E.D.Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

1966 AMENDMENT

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash.U.L.Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb.L.Rev. 127 (1962); Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Calif. L.Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand.L.Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant? 51 A.B.A.J. 64 (1965); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (1953) and *State* v. *Johnson*, 25 N.J. 133, 145 A.2d 313 (1958); cf. *State* v. *Murphy*, 34 N.J. 172, 175 A.2d 622 (1961); *State* v. *Moffa*, 36 N.J. 215, 176 A.2d 1 (1961). The rule has been revised to expand

the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a).—The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (*Ciccnia* v. *LaGay*, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See e.g., Del. Rules Crim. Proc., Rule 16; Ill.Stat. Ch. 38, § 729, Md. Rules Proc., Rule 728; *State* v. *McGee*, 91 Ariz. 101, 370 P.2d 261 (1962); *Cash* v. *Superior Court*, 53 Cal.2d 72, 346 P.2d 407 (1959); *State* v. *Bickham*, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); *People* v. *Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State* v. *Johnson*, supra; *People* v. *Stokes*, 24 Miss.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements. For state cases upholding the discovery of recordings, see, e.g., *People* v. *Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959); *State* v. *Minor*, 177 A.2d 215 (Del. Super. Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats. § 909.18; *State* v. *Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961); *People* v. *Cooper*, 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 157, 349 P.2d 1964, 973 (1960); *People* v. *Stokes*, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., *United States* v. *Johnson*, 215 F.Supp. 300 (D. Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b).—This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect the copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. *Palermo* v. *United States*, 360 U.S. 343 (1959); *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500.

Subdivision (c).—This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as antitrust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See *Jones* v. *Superior Court*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.Rev. 828 (1963).

Subdivision (d).—This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e).—This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is

necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals.

For an example of a use of a protective order in state practice, see *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant, Cf. 18 U.S.C. § 3500.

Subdivision (f).—This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g).—The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

1974 AMENDMENT

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States* v. *Diliberto*, 264 F.Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States* v. *Louis Carreau, Inc.*, at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States* v. *Wallace*, 272 F.Supp. 838 (S.D.N.Y. 1967); *United States* v. *Wood*, 270 F.Supp. 963 (S.D.N.Y. 1967); *United States* v. *Leighton*, 265 F.Supp. 27 (S.D.N.Y. 1967); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States* v. *Aadal*, 280 F.Supp. 859 (S.D.N.Y. 1967); *United States* v. *Federmann*, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal § 253 (1969, Supp. 1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276 (1966); Fla.Stat.Ann. § 925.05

(Supp. 1971-1972); N.J.Crim.Prac. Rule 35-11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.'" *Cicenia* v. *La Gay*, 357 U.S. 504, 511, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). See also *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States* v. *Projansky*, supra. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40-43 (Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal § 253, pp. 505-506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States* v. *Scharf*, 267 F.Supp. 19 (S.D.N.Y. 1967); Summaries of the defendant's statements, *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); and statements discovered by means of electronic surveillance, *United States* v. *Black*, 282 F.Supp. 35 (D.D.C. 1968). The court in *United States* v. *Iovinelli*, 276 F.Supp. 629, 631 (N.D.Ill.1967), declared that "statements" as used in old rule 16 is not restricted to the "substantially verbatim recital of an oral statement" or to statements which are a "recital of past occurrences."

The Jencks Act, 18 U.S.C. § 3500, defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) a "written statement" signed or otherwise approved by a witness, (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e). The language of the Jencks Act has most often led to a restrictive definition of "statements," confining "statements" to the defendant's "own words." See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick* v. *United States*, 377 F.2d 586, 180 Ct.Cl. 131 (1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. § 3500(e), in the view that the defendant ought to be able to see his statement in whatever form it may have been preserved in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See *Campbell* v. *United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). The minority favored a restrictive definition of "statements" in the view that the use of other than "verbatim" statements would subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61-64 (Approved Draft, 1970). The draft of subdivision (a)(1)(A) leaves the matter of the meaning of the term unresolved and thus left for development on a case-by-case basis.

Subdivision (a)(1)(A) also provides for mandatory disclosure of a summary of any oral statement made by defendant to a government agent which the attorney for the government intends to use in evidence. The reasons for permitting the defendant to discover his own statements seem obviously to apply to the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. *United States* v. *Baker*, 262 F.Supp. 657 (D.C.D.C.1966); *United States* v. *Curry*, 278 F.Supp. 508 (N.D.Ill.1967); *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); *United States* v. *Reid*, 43 F.R.D. 520 (N.D.Ill.1967); *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); and *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of

disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. E.g., *United States* v. *Curry*, supra; *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and *United States* v. *Baker*, supra.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. *Dennis* v. *United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); and *Allen* v. *United States*, 129 U.S.App.D.C. 61, 390 F.2d 476 (1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States* v. *Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States* v. *United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D.Tex. 1966). Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iii) and Commentary pp. 64–66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L.Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable as statements of the defendant. *United States* v. *Hughes*, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1)(B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1)(C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967); *Gevinson* v. *United States*, 358 F.2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823, 87 S.Ct. 51, 17 L.Ed.2d 60 (1966); and *United States* v. *Tanner*, 279 F.Supp. 457 (N.D.Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), without an additional showing that the request is "reasonable." In *Brady* the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) and Commentary pp. 68–69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp. 1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal § 254 at p. 510 especially n. 58 (1969, Supp. 1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iv) and Commentary pp. 66–68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady* v. *Maryland*, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of these witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R.Crim.Proc. 7(c); Ariz.R.Crim.Proc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. § 43–1001 (1947); Cal.Pen.Code § 995n (West 1957); Colo. Rev.Stat.Ann. §§ 39–3–6, 39–4–2 (1963); Fla.Stat.Ann. § 906.29 (1944); Idaho Code Ann. § 19–1404 (1948); Ill. Rev.Stat. ch. 38, § 114–9 (1970); Ind.Ann.Stat. § 9–903 (1956), IC 1971, 35–1–16–3; Iowa Code Ann. § 772.3

(1950); Kan.Stat.Ann. § 62-931 (1964); Ky.R.Crim. Proc. 6.08 (1962); Mich.Stat.Ann. § 28.980, M.C.L.A. § 767.40 (Supp. 1971); Minn.Stat.Ann. § 628.08 (1947); Mo.Ann. Stat. § 545.070 (1953); Mont.Rev. Codes Ann. § 95-1503 (Supp. 1969); Neb.Rev.Stat. § 29-1602 (1964); Nev.Rev. Stat. § 173.045 (1967); Okl.Stat. tit. 22, § 384 (1951); Ore.Rev.Stat. § 132.580 (1969); Tenn. Code Ann. § 40-1708 (1955); Utah Code Ann. § 77-20-3 (1953). For examples of the ways in which these requirements are implemented, see *State* v. *Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State* v. *Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips* v. *State*, 157 Neb. 419, 59 N.W. 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial: 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499-500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e.g., *United States* v. *Estep*, 151 F.Supp. 668, 672-673 (N.D. Tex. 1957):

> Ninety percent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviaro* v. *United States*, 353 U.S. 53, 66-67, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co.* v. *Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial § 2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal § 254 n. 92 (1969, Supp. 1971); *United States* v. *Rothman*, 179 F.Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash. U.L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 2.6(a) (Approved Draft, 1970); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the

government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43–46 (Approved Draft, 1970). It is sometimes asserted that making the government's right to discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971); Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Cr.L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendants being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277–278 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. E.g., Ariz.R.Crim.P. 162(B), 17 A.R.S. (1956); Ind.Ann.Stat. § 9–1631 to 9–1633 (1956), IC 1971, 35–5–1–1 to 35–5–1–3; Mich.Comp.Laws Ann. §§ 768.20, 768.21 (1968); N.Y. CPL § 250.20 (McKinney's Consol.Laws, c. 11–A, 1971); and Ohio Rev.Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State* v. *Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People* v. *Rakiec*, 260 App.Div. 452, 23 N.Y.S.2d 607, aff'd, 289 N.Y. 306, 45 N.E.2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv. L.Rev. 838 (1963). The courts in *Jones* v. *Superior Court of Nevada County*, supra, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif.L.Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the defendant shall disclose any documents and tangible objects which he has in his possession, custody, or control and which he intends to introduce in evidence in his case in chief.

Subdivision (b)(1)(B) provides that the defendant shall disclose the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence in his case in chief or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U.Intra.L.Rev. 268 (1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call in his case in chief. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, supra, and *People* v. *Lopez*, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor* v. *State*, 31 Wis.2d 684, 143 N.W.2d 489 (1966); *People* v. *Mancini*, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); and *State* v. *Cocco*, 73 Ohio App. 182, 55 N.E.2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16(g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See *Will* v. *United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

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The language "by the judge alone" is not meant to be inconsistent with *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman* v. *United States*, 394 U.S. at 182 n. 14, 89 S.Ct. 961.

Subdivision (d)(2) is a restatement of part of old rule 16(g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. . . ."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents . . . made in connection with the investigation or defense of the case. . . ."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action. The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases. [Section 3432 of title 18 of the United States Code provides: A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery. As stated in the Advisory Committee Note,

> broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or inno-

cence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. [These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93-292, at 60.] The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation. [See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order. [Hearings II, at 42.]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant. [Hearings I, at 109.]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas. [See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule, however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (e.g., report), rather than in terms of the content (e.g., legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note [House Document 93-292, at 59], items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convic-

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tions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.] Second, it must determine whether a protective or modifying order shall issue.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. Reciprocal vs. Independent Discovery for the Government.—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. Rule 16(a)(1)(A).—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, so situated as an officer or employee as to have been legally to bind the defendant in respect to the activities involved in the charges.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grand jury testimony of a witness who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. Rules 16(a)(1)(E) and (b)(1)(C) (witness lists).—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. Rules 16(a)(2) and (b)(2).—Rules 16(a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is

labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of the Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

1983 AMENDMENT

Rule 16(a)(3)

The added language is made necessary by the addition of Rule 26.2 and new subdivision (i) of Rule 12, which contemplate the production of statements, including those made to a grand jury, under specified circumstances.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

EDITORIAL NOTES

1975 Amendments. Subd. (a)(1). Pub.L. 94-64 amended subpars. (A), (B), and (D) generally, and deleted subpar. (E).

Subd. (a)(4). Pub.L. 94-149 deleted par. (4) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness."

Subd. (b)(1). Pub.L. 94-64 amended subpars. (A) and (B) generally, and deleted subpar. (C).

Subd. (b)(3). Pub.L. 94-149 deleted par. (3) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for a comment upon a failure to call a witness."

Subd. (c). Pub.L. 94-64 amended subd. (c) generally.

Subd. (d)(1). Pub.L. 94-64 amended par. (1) generally.

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. A subpoena shall be issued by a United States magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) 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.

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

(e) Place of Service.

(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

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(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(29), 89 Stat. 375, Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure, 28 U.S.C. Appendix.

Note to Subdivision (b). This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U.S.C. former § 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U.S.C. former § 656.

Note to Subdivision (c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (d). This rule is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e). (1) This rule continues existing law, 28 U.S.C. § 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U.S.C. former § 654; Rule 45(e)(1) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

(2) This rule is substantially the same as Rule 45(e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. See *Blackmer* v. *United States*, 284 U.S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f). This rule is substantially the same as Rule 45(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1948 AMENDMENT

The amendment is to substitute proper reference to Title 28 in place of the repealed act.

1966 AMENDMENT

Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40-41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith* v. *United States*, 312 F.2d 867 (D.C. Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell* v. *United States*, 317 F.2d 108 (D.C. Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An ex parte application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d).—The subdivision is revised to bring it into conformity with 28 U.S.C. § 1825.

1972 AMENDMENT

Subdivisions (a) and (g) are amended to reflect the existence of the "United States magistrate," a phrase defined in rule 54.

1974 AMENDMENT

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, Federal Practice and Procedure: Criminal § 278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

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Model Rules of Professional Conduct and Code of Judicial Conduct

American Bar Association

As amended August, 1984

conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has 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.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "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 "knows" is false.

There was no counterpart in the Model Code to paragraph (d).

RULE 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 Rule 4.2.

Model Code Comparison

With regard to paragraph (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 "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(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 upon 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; [or] (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."

Paragraph (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."

Paragraph (d) has no counterpart in the Model Code.

Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 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 paragraph (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."

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official 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.

Model Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore 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) provided that during the trial of a case a lawyer "shall not communicate with . . . any member of the jury." 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."

Appendix C:

Response to International Survey PAGE

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Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

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ATTORNEY GENERAL'S CHAMBERS,
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JUN 24 1988

15th June 1988

Dear Mr. Proudfoot,

CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL, Jnr

Your letter of 25 May 1988 addressed to the Attorney General has been passed to me for reply.

I enclose a copy of guidelines which were issued by the Attorney General in December 1981. The guidelines deal with the disclosure of information to the defence, and in particular "unused material", in cases which are to be tried on indictment. I believe that these guidelines are the type of material to referred to in the final paragraph of the first page of your letter. I trust that they will be of some assistance to you.

I suspect you will understand that criminal offences in England and Wales are divided into three categories. First the most serious offences are described as triable only upon indictment. This means the case can only be tried by a Crown Court judge sitting with a jury. The second category of offences are described as cases triable summarily only. Such offences may only be tried by magistrates and generally involve a wide range of less serious criminal conduct. The third category of offences falls between those triable only on indictment and those triable only summarily. These are referred to as either way offences. This third group can be tried either by the magistrates or on indictment by a judge and jury at the Crown Court. The actual venue for the hearing is determined by the Magistrates' Court. If it is felt that the allegation is serious or complicated the magistrates may direct the case to be dealt with on indictment by a judge and jury, although even if they feel it is suitable for the Magistrates' Court the defendant may exercise his right to elect for a trial on indictment in

Crown Court.

It has been a long established principle of criminal law in England and Wales that the prosecution must disclose copies of the statements of witnesses upon whom it intends to rely in cases tried on indictment. The Attorney General's guidelines deal specifically with material which is not disclosed as part of the prosecution case.

In 1985 new rules of advance disclosure for cases tried either way in the Magistrates Court were made. I enclose a copy of the Magistrates' Courts (Advance Information) Rules 1985. These rules extended the right of a defendant to receive details of the evidence against him in either way cases heard by the Magistrates' Court. The rules provide for disclosure in the form of copies of the prosecution witness statements or a precis of the case against the defendant. Although the advance disclosure rules do not apply to cases which are triable only summarily, informal disclosure often takes place between the prosecuting lawyers and those representing the defence.

Although the Attorney General's guidelines on unused material were issued specifically in respect of cases tried on indictment, generally speaking these principles are applied where necessary to all criminal prosecutions.

I do hope that the information in this letter and the enclosures are helpful to you in the preparation of your brief to the Royal Commission. If I can be of any assistance to you or if you require any further information please do not hesitate to contact me.

Yours sincerely,

Michael G Kennedy

M G KENNEDY

Practice Note

Criminal evidence – Prosecution evidence – Disclosure of information to defence – Trial on indictment – Unused material – Guidelines for disclosure.

The Attorney General has issued the following guidelines on the disclosure of information to the defence in cases to be tried on indictment:

1. For the purposes of these guidelines the term 'unused material' is used to include the following: (i) all witness statements and documents which are not included in the committal bundles served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles.

2. In all cases which are due to be committed for trial, all unused material should normally (ie subject to the discretionary exceptions mentioned in para 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3.—(a) If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important (and might even justify delay) if the material might have some influence on the course of the committal proceedings or the charges on which the justices might decide to commit. (b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unused material does not exceed about 50 pages, disclosure should be by way of provision of a copy, either by post, by hand or via the police.

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in para 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with.

6. There is a discretion not to make disclosure (at least until counsel has considered and advised on the matter) in the following circumstances. (i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him. (ii) The statement (eg from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence. (iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant. If called as a defence witness on the basis of this second account, the statement to the police can be of use in cross-examination. (iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulness, eg 'I saw nothing of the fight' or 'He was not at home that afternoon'. There are however grounds to believe that the witness might change his story and give evidence for the defence, eg purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination. (Note: in cases (i) to (iv) the name and address of the witness should normally be supplied.) (v) The statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements

LAW OFFICERS' DEPARTMENT ROYAL COURTS OF JUSTICE

ing sensitive material are as follows: (a) it deals with matters of national security; is by, or discloses the identity of, a member of the security services who would be no further use to those services once his identity became known; (b) it is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served on the supplier, e g a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him; (g) It contains details of private delicacy to the maker and/or might create risk of domestic strife.

7. If there is doubt whether unused material comes within any of the categories in para 6, such material should be submitted to counsel for advice either before or after committal.

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt on his guilt or on some material part of the evidence on which the Crown is relying) there must be either full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in para 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material but also the name and address of the maker.

9. Any doubt whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in para 6 should be disclosed to the defence until (a) the investigating officer has been asked whether he has any objections and (b) it has been the subject of advice by counsel and that advice has been considered by the prosecuting solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to counsel, the Director of Public Prosecutions should be consulted.

11. In all cases counsel should be fully informed of what unused material has already been disclosed. If some has been withheld in pursuance of para 10, he should be informed of any police views, his instructions should deal (both generally and in particular) with the question of 'balance' and he should be asked to advise in writing.

12. If the sensitive material relates to the identity of an informant, counsel's attention should be directed to the following passages from the judgments of (a) Pollock CB in *A-G v Briant* (1846) 15 M & W 169 at 185, 153 ER 808 at 814–815:

> '... the rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience ... and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer ...'

(b) Lord Esher MR in *Marks v Beyfus* (1890) 25 QBD 494 at 498:

> '... if upon the trial of a prisoner the judge should be of opinion that the

disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.'

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example. (i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested, and subsequently, if so desired, to arrange for his attendance at court. (ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials. (iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out. (iv) Disclosure of all or part of a sensitive statement or document may be possible on a counsel-to-counsel basis, although it must be recognised that counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case. (v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission in accordance with s 10 of the Criminal Justice Act 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for counsel, if in doubt, to consult the trial judge.

15. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, prosecuting solicitors are advised to consult the Director of Public Prosecutions.

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the prosecuting solicitor on receipt of these guidelines. It should also be adopted as regards cases already submitted, so far as is practicable.

December 1981.

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Your reference

Our reference
AGTT/NJ

Date
14 September 1988

Dear Sir

CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL, Junior

I refer to your letter of 25 May 1988 to the Lord Advocate who has asked me to reply. My apologies for the delay in providing you with a reply and I hope that this letter reaches you prior to the presentation of your brief to the Royal Commission.

While there is no legislation requiring the Crown to provide the defence with any exculpatory statements that have been acquired in the course of a criminal investigation, there exists an underlying principle of fairness to the accused in the Scottish legal system of which prosecutors are reminded in the written regulations issued to them. In particular, they are reminded that such a duty will involve disclosure to the defence of any information which supports the defence, even although it may be damaging to the Crown case. This duty stems from the fact that the Crown prosecutes in the public interest and consequently it would be completely unjustifiable if it were to conceal exculpatory evidence from the defence, or indeed from the court.

Yours faithfully

A G T TURNBULL
for Crown Agent

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA 2600

18 JUL 1988

88/525:AO:DPP

JUL 20 1988

Dear Mr Proudfoot

I refer to your letter of 25 May 1988 in which you requested information as to whether there are, in Australia, any laws, guidelines issued by government or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defence counsel at the earliest moment.

There is no legislation of the Parliament of the Commonwealth of Australia (i.e. the Australian Federal Parliament) requiring prosecution lawyers to acquaint defence counsel with exculpatory material of which the prosecution is aware. However, there is a certain amount of case law having a bearing on the issue. In R v Lucas [1973] VR 693 (Full Court of the Supreme Court of the State of Victoria) Newton J and Norris AJ commented:

> "It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professsional rivalry, and that it is their duty to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State. Consistently with these principles, it is the duty of prosecuting counsel not to try to shut out any evidence which the jury could reasonably regard as credible and which could be of importance to the accused's case. We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown, whose function it is to prepare the Crown case in criminal prosecutions." (at page 705)

Similar points were made by Smith ACJ in that case at pages 696-698.

The obligation on prosecuting lawyers to be "ministers of justice" with a "duty to assist the court .....to make

certain that justice is done as between the subject and the State" would, in my view, go beyond not withholding credible evidence from a jury which could be of importance to the accused's case and would include a positive obligation to disclose to the defence any exculpatory material available to the prosecution. This obligation was supported by the Supreme Court of South Australia (In Banco) In the Matter of a Petition by Frits Van Beelen (1974) 9 SASR 163. While acknowledging that a discretion vests in the Crown not to call witnesses for the Crown, the Court in Van Beelen pointed out that this discretion is circumscribed by a number of rules, one of which was this:

> "Where the Crown has in its possession a statement of a credible witness who can speak of material facts 'which tend to show the prisoner to be innocent', it must either call that witness or make his statement available to the defence". (per Walters, Wells and Jacobs JJ at page 249)

In stating this rule, the Supreme Court of South Australia was adopting the views of the English Court of Appeal in Dallison v Caffrey [1965] 1 QB 349 (see Denning MR at page 369 and Diplock LJ at pages 375-376). However, to fall within this rule, the Court pointed out that the evidence must possess three qualities:

- it must be credible, in the sense of having the appearance of truth, reasonableness and worth and of being capable of belief;
- it must be material in the sense of being admissible and relevant to the issues or the vital facts in issue; and
- it must tend to establish the innocence of the prisoner. (see page 249)

I would point out that the Bar Rules of the Bar Association of the State of New South Wales are to similar effect as those obligations imposed by the Courts. Rules 20 and 20A provide as follows:

> "20. A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be

of substance or any argument of fact that does not carry weight in his mind.

20A. A barrister appearing for the prosecution before any court whether briefed by the Crown or privately is obliged to comply mutatis mutandis with rule 20 and to inform defence counsel of the existence, identity and whereabouts (if known) of any witness whom he does not propose to call in the prosecution case but whose evidence he considers is relevant to the case for the defence."

With respect to offences against the laws of the Commonwealth of Australia, the Commonwealth Director of Public Prosecutions (a statutory office established by the Director of Public Prosecutions Act 1983) has responsibility for conducting Commonwealth prosecutions. As the Director (Mr I D Temby Q.C.) has pointed out, one of the reasons for establishing the office was to ensure that key decisions in relation to enforcement of the criminal law of the Commonwealth be made on an objective and professional basis. It is implicit in the Director's requirement that lawyers acting for him do so on a professional basis and that prosecutors consider themselves as "ministers of justice" and conduct themselves accordingly. In short, it is both a legal requirement (from the above cited case law) and a professional standard that Commonwealth prosecutors disclose exculpatory material of which they are aware to the defence.

Finally, I would note that, unlike Canada, responsibility for the enforcement of the criminal law is primarily a matter for the States and the Northern Territory (a self-governing Territory). While I entertain no doubt that State and Northern Territory prosecutors would act in the same way as Commonwealth prosecutors, this is a matter on which you may wish to seek the views of the State and Northern Territory Attorneys-General.

I attach to this reply copies of the following material which relate to your request, or are of background interest:

- "Lawyers", Disney and others, 2nd Edition 1986, pages 910-918;
- "The Criminal Injustice System", edited by Basten and others, 1982, Chapter 7;
- "Practical Advocacy", Mr Justice J H Phillips, (1988) 62 ALJ 64;
- R v Apostilides (1984) 154 CLR 563 (High Court of Australia); and

. "The Prosecution Policy of the Commonwealth", January 1986.

I hope the above will be of some assistance to you.

Yours sincerely

(Lionel Bowen)

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C. ACTING FOR THE PROSECUTION

1. INTRODUCTION

■ In this section we consider a number of special duties which apply to lawyers acting for the prosecution. We begin with the formal rules which have been made in this area by professional associations. We then look at particular areas, namely:

- deciding to prosecute, and plea-bargaining;
- calling witnesses and disclosing potential evidence.

The principal formal rules made by professional associations in Australia are as follows. ■

BAR RULES

New South Wales Bar Association

20. A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth. It is not his duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He shall not press for a conviction beyond putting the case for the Crown fully and firmly. He shall not by his language or conduct endeavour to inflame or prejudice the jury against the prisoner. He shall not urge any argument of law that he does not believe to be of substance or any argument of fact that does not carry weight in his mind.

20A. A barrister appearing for the prosecution before any court whether briefed by the Crown or privately is obliged to comply mutatis mutandis with rule 20 and to inform defence counsel of the existence, identity and whereabouts (if known) of any witness whom he does not propose to call in the prosecution case but whose evidence he considers is relevant to the case for the defence

. . .

57. Where in criminal proceedings a barrister appearing for the prosecution reasonably believes that a document or record included in his brief or instructions may have been unlawfully obtained, he shall in the interests of justice

(a) inform his opponent of his intention to use such document or record; and/or

(b) make a copy of such document or record available to his opponent.

57A. A barrister appearing for the prosecution should not act as an advocate in order to attempt to persuade a court to impose a harsh sentence, but nevertheless should be prepared to correct any error or misstatement made by counsel for the defence, refer the court to any relevant authority which would have a bearing on the appropriate penalty and generally to assist the court to avoid appealable error.

PROFESSIONAL CONDUCT RULES

Law Society of Western Australia

15.1. Prosecuting Counsel shall not seek to obtain a conviction by any improper means. It is his duty to present before the jury the case for the prosecution fairly, impartially and in a competent manner.

15.2. (1) If Prosecuting Counsel knows of the existence of a person who may be able to give evidence relevant to the case, but who is not proposed to be called by the prosecution, he shall cause the defence to be informed of the identity and location (if known) of that person prior to the trial.

(2) Where a witness called by the prosecution gives evidence on a material issue in substantial conflict with a prior statement made by him Prosecuting Counsel shall so inform the defence.

15.3. Prosecuting Counsel shall assist the Court at all times before the verdict is returned by drawing attention to any apparent errors or omissions of fact or law or procedural irregularities which, in his opinion, ought to be corrected.

15.4. If an accused person is unrepresented, it is proper for Prosecuting Counsel to inform the Court of any mitigating circumstances as to which he is instructed.

2. DECIDING TO PROSECUTE AND PLEA-BARGAINING

■ It is not within the scope of this book to consider in detail the principles which must be observed by authorities responsible for instituting prosecutions, or for plea-bargaining. In Australia, these decisions are often taken by the police, rather than by a lawyer. However, in many other cases they are taken by lawyers, whether they be Law Officers of the Crown (or their legal staff) or more rarely, private practitioners. Moreover, the recent appointment of Directors of Public Prosecutions at the Commonwealth level and in Victoria has expanded the role played by lawyers in the commencement and conduct of prosecutions.

The following statement about the principles to be observed when deciding to prosecute or engaging in plea-bargaining was made by the Commonwealth Attorney-General in 1986. It is the most comprehensive public statement on these questions in Australia, but internal guidelines also exist in State Crown Law offices. ■

Lionel Bowen (1986), paras. 2.11, 2.14-16, 2.18, 2.23, 4.4-4.8

The decision to prosecute

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. . .

A decision whether or not to prosecute must clearly not be influenced by

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;

(b) personal feelings concerning the offender or the victim; or

(c) a possible political advantage or disadvantage to the Government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision. . .

The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account, many of which are referred to below. Dominant in this context is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility

of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact. It may also be relevant that the particular offence or offender has characteristics which motivate juries towards acquittal.

Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

(b) any mitigating or aggravating circumstances;

(c) the youth, age, physical health, mental health or special infirmity of the alleged offender or a witness;

(d) the alleged offender's antecedents;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) the effect on public order and morale;

(h) the obsolescence or obscurity of the law;

(i) whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;

(j) the availability and efficacy of any alternatives to prosecution;

(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(m) whether the alleged offence is of considerable public concern;

(n) any entitlement of the Commonwealth or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(o) the attitude of the victim of the alleged offence to a prosecution;

(p) the likely length and expense of a trial;

(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(s) whether the alleged offence is triable only on indictment; and

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

Care must therefore be taken to choose the charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence. Charges should not be laid with the intention of providing scope for subsequent "charge-bargaining".

Charge-bargaining

"Charge-bargaining" involves discussions between the defence and the prosecution in relation to the charges to be proceeded with. Such discussions may result in the defendant pleading guilty to fewer than all of the charges he is facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

Charge-bargaining is to be distinguished from consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in *R. v. Marshall* [1981] V.R. 725 at 732 said:

> "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."

This statement has earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

(a) a charge-bargaining proposal should not be initiated by the prosecution; and

(b) such a proposal should not be entertained by the prosecution unless:

- the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
- those charges provide the basis for an appropriate sentence under all the circumstances of the case; and
- there is evidence to support the charges.

Any decision . . . must take into account all the circumstances of the case and, in particular:

(a) whether the defendant is willing to co-operate with regard to the investigation or prosecution of others;

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) whether it is in the public interest that the case should be publicly tried so as to ensure fuller publicity rather than be terminated by a guilty plea;

(g) the likelihood of adverse consequences to witnesses;

(h) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or made arrangements for restitution;

(i) the need to avoid delay in the despatch of other pending cases; and

(j) the time and expense involved in a trial and any appeal proceedings.

In no circumstances should the prosecution entertain a charge-bargaining proposal initiated by the defence if the defendant maintains his innocence with respect to a charge or charges to which he has pleaded guilty.

NOTES

1. For further consideration of these issues, see, for example, A. F. Wilcox, *The Decision to Prosecute* (1972); I. Potas (ed.), *Prosecutorial Discretion* (1984); and I. Temby, "Prosecution Discretions and the Director of Public Prosecutions Act 1983" (1985) A.L.J. 197. See also the discussion of defence lawyers' roles in plea-bargaining, in Chapter 18 above.

2. For a shameful example of prosecution lawyers in England prosecuting a man they knew to be innocent, see G. Robertson, *The Reluctant Judas* (1976). The misconduct was part of an ill-conceived and inept attempt to "shield" a police informer by prosecuting him but then withholding evidence against him. He was duly acquitted but was murdered a few days later.

3. A person who brings a prosecution without both reasonable cause and proper motive is liable to a tortious action for malicious prosecution (see, for example, J. Fleming, *The Law of Torts* (6th ed., 1983) pp. 576-588).

3. CALLING WITNESSES AND DISCLOSING POTENTIAL EVIDENCE

■ We mentioned in an earlier chapter that, generally speaking, lawyers are under no obligation to call particular witnesses or to disclose information which may assist the other party to gather evidence helpful to its case. As the following extracts indicate, however, special principles apply to prosecution lawyers in these respects.[6] ■

R. v. LUCAS

[1973] V.R. 693 at 697 (Supreme Court of Victoria)

[Lucas was involved in a fatal car accident and was charged with culpable driving. He alleged in his defence that he had been driving fast because he was in fear of the occupants of a pursuing car. An independent witness, Woods, told the police that a car travelling at high speed had passed the scene of the accident immediately after it occurred. This statement was given by the police to the coroner conducting an inquest into the death. Before the trial, the defence asked for Woods to be subpoenaed by the prosecution but a delay in attempting to serve the subpoena had the result that Woods was interstate and unavailable for the trial. The prosecution neither called Woods as a witness at Lucas' trial nor told the defence that he was unavailable. The prosecution did not refer to Woods' statement, and it called another eyewitness who said that there was no sign of a pursuing car. Lucas was convicted, but on appeal the Full Court held that the prosecution's actions meant that the trial was unsatisfactory and unfair, there was a miscarriage of justice, and accordingly a new trial must be ordered.]

SMITH A.C.J: The Crown's duty to act with fairness, and with the single aim of establishing the truth, denies to it the right to pick and choose as between independent and apparently credible witnesses for merely tactical reasons, such as a desire to be able to cross-examine those who are unfavourable, or less favourable than others, to the Crown case: or a desire to force the defence to call evidence and thereby lose the right of the last address. [A]ll those witnesses whose testimony is necessary to put before the court the complete story of the events on which the prosecution is based ought in general to be called by the Crown. . . . And in particular all eyewitnesses to the doing of the acts charged as criminal ought in general to be so called. . . . This general duty is subject to the qualification that the Crown, in its discretion, may properly decline to call any such person as its witness when it has strong and satisfactory reasons for doing so, as for example when the witness is clearly untruthful or unreliable . . . or where the numbers

6. For a general discussion of issues raised in this section, see, for example, W. B. Lane, "Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors", in J. Basten et al. (ed.), *The Criminal Injustice System* (1982), Ch. 7.

to be called would be unreasonably great having regard to the importance of the point to which they can speak. But this discretion is to be exercised in furtherance of justice and with fairness to the defence.

RICHARDSON v. R.

(1974) 131 C.L.R. 116 at 121 (High Court of Australia)

[Richardson was convicted of assault. He appealed on the ground that the prosecution should have called Miss Gardiner as a witness. She was an eye-witness and her evidence was in Richardson's favour.]

BARWICK C.J., MCTIERNAN and MASON JJ.: Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few. . . . [The] prosecutor has [a discretion] not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

It follows that a failure on the part of the Crown prosecutor to call in the Crown case an eye-witness of the incidents giving rise to the offence charged does not of itself constitute a ground for setting aside a conviction and ordering a new trial. Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if it constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice.

RE VAN BEELEN

[1974] S.A.S.R. 163 at 248
(Supreme Court of South Australia)

WALTERS, WELLS and JACOBS JJ.: [T]he discretion which vests in the Crown not to call witnesses for the Crown case at the trial is circumscribed by the following rules:

(1) Where the Crown calls a witness who did not give evidence at the committal proceedings, the accused should be given reasonable notice of the Crown's intention to call that witness and should be furnished with a proof of the witness's proposed evidence.

(2) Where the Crown does not propose to call a witness who gave evidence at the committal proceedings, it should, unless there are strong and satisfactory reasons to the contrary, have the witness available in court so that the counsel may have the opportunity of calling him, as his own witness, if he so wishes.

(3) Where the Crown has in its possession the statement of a person who can give material evidence, but decides not to call him, it must make him available as a witness for the defence, but need not supply the defence with a copy of the statement taken.

(4) Where the Crown has in its possession a statement of a credible witness who can speak of material facts "which tend to show the prisoner to be innocent", it must either call that witness or make his statement available to the defence (*Dallison v. Caffery* [1965] 1 Q.B. 348 at 369 per Lord Denning M.R.).

NOTE

Rule (1) raises the general issue of prior disclosure of statements (or proofs) by witnesses which the Crown intends to call at committal or trial. We do not consider that issue in this chapter. But see, for example, *Maddison v. Goldrick* [1976] 1 N.S.W.L.R. 651; *R v. Charlton* [1972] V.R. 758.

LAWLESS v. THE QUEEN

(1978) 53 A.L.J.R. 733 at 736, 742 (High Court of Australia)

[Lawless was charged with killing Fitzgerald. He pleaded an alibi as his defence. A key prosecution witness, Mrs Joyce, testified that Lawless had killed Fitzgerald outside a car in which she was sitting. The police did not inform Lawless or his lawyers that another person, Mrs Telford, had told them that she had seen two men outside the car after the shooting, whereas Mrs Joyce testified that there had been only one. After conviction and unsuccessful appeal, the matter was referred by the Attorney-General to the Court of Criminal Appeal to consider whether a new trial should be ordered. The court refused to order such a trial, and Lawless sought leave to appeal to the High Court.]

BARWICK C.J.: Some point was sought to be made of the fact that the Crown Prosecutor was in possession of Mrs Telford's statement to the police officer and that he failed to alert the defence to Mrs Telford's existence, let alone to the relevant contents of her statement. But even if the Crown Prosecutor was at fault in either respect, no ground would thereby be made for the grant of a new trial: this is particularly so having in mind what I have said as to the knowledge of the applicant and his advisers of Mrs Telford's existence and of her possible opportunity to have observed something of what went on outside her residence.

However, as much has been sought to be made of the Crown Prosecutor's conduct, I ought to say, first, that it was a matter for him to decide which witnesses he should call for the prosecution. I cannot see, for myself, any reason why he should have called Mrs Telford particularly as the applicant's defence was an alibi and Mrs Telford could not aid in establishing the applicant's presence at the scene.

In the second place, I am of opinion that it would have been better for the Crown Prosecutor to have informed the defence that Mrs Telford claimed to have seen something of the events of the evening. But I can quite understand, having regard to the nature of the eye-witnesses' evidence and of the applicant's defence, that the Crown Prosecutor might properly conclude that Mrs Telford's statement did not carry any further the Crown's case or that of the defence. It is good practice, in my opinion, in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained. But, clearly, in my opinion, there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such a statement.

[I]t is clear that the prosecutor had in his possession . . . as a part of the police brief, Mrs Telford's statement and that he failed to make its existence known to the defence. However, I am not satisfied that his failure to do so was a conscious act designed to prejudice the defence, still less that it constituted an impropriety or any misconduct such as to give rise to any miscarriage of justice. The immediate purpose for which Mrs Telford's evidence might have been used by the defence, to suggest that Mrs Joyce's description of events immediately after the shooting was incorrect, was in part achieved by the cross-examination of other Crown witnesses and this was much relied upon by the defence at the trial. Thus Mrs Telford's evidence would not have disclosed any new fact or circumstance but would only have added weight to matter already in evidence and upon which the defence relied. Mrs Telford's evidence, while in part of assistance to the defence, was in part adverse to it. Because it covered ground already dealt with by other Crown witnesses it may well have been regarded by the prosecutor as mere surplusage. Although it would certainly have been better had its existence been disclosed to the defence, the failure to do so may well have been no more than an oversight and, having regard to the foregoing and in particular to what I have said earlier as to the cogency of this evidence, what occurred cannot be regarded as involving any miscarriage of justice.

MURPHY J. (dissenting): The prosecution conceded that Mrs Telford's evidence was credible (but not that it would necessarily be accepted by a jury). The Court [of Criminal Appeal] concluded that it qualified as fresh evidence because ". . . reasonable diligence on the part of Lawless and his legal advisers would not have discovered the evidence before the second trial was concluded". I agree. They also held that Mrs Telford's evidence was "inconsistent", "impossible to reconcile", with Mrs Joyce's evidence concerning the number of persons present at the scene. I agree. Mrs Telford's evidence goes to the issue of Mrs Joyce's credibility (as the . . . court held) but it is not restricted to that. The question whether there were two men outside the car after the shooting (as stated by Mrs Telford) or one (as stated by Mrs Joyce) goes directly to the circumstances of the murder. Mrs Telford was an eye-witness to events immediately after the murder. If there were two people outside the car after the shots were fired, then, in a very material respect, Mrs Joyce's account of the circumstances of the murder was false.

The applicant contended that the prosecution caused a miscarriage of justice by suppression of credible material favourable to the applicant on a critical issue in the trial. Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution's suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. Even if the prosecution could be excused for not making Mrs Telford's statement available to the applicant earlier, it could not be excused for failing to do so after the applicant had attempted to show . . . that another person was present.

In my opinion, the verdict of guilty was brought about by conduct which departed from the standard required of those prosecuting on behalf of the community.

The outcome might well have been affected if the jury knew not only the suppressed evidence but also the fact that the prosecution was suppressing it, especially because the applicant claimed he was being framed. Evidence of suppression would have strengthened what otherwise may have seemed fantastic claims—that Mrs Joyce was lying under police pressure, and that the fingerprint evidence was concocted.

NOTES

1. Mason, Stephen and Aickin JJ. concurred with Barwick C.J. in rejecting the appeal.

2. Lawless was subsequently released.

3. For a criticism of the decision, and the majority's reasoning, see W. B. Lane, "Prosecutors: Non-disclosure of Exculpatory Evidence" [1981] 5 Crim. L.J. 251.

4. Several years after the decision in *Lawless*, two professional associations made formal rules requiring prosecution counsel to disclose to the defence the identity of witnesses who can give relevant evidence but whom the prosecution does not intend to call (see New South Wales Bar Association, Bar rule 20A; and Law Society of Western Australia, Professional Conduct Rule 15.2(1), extracted earlier in this chapter).

5. For an example of a successful appeal on the ground of the prosecution's failure to call certain witnesses, and a discussion of the trial judge's power to remedy such failure by calling the witnesses himself or herself, see *R v. Apostilides* (1984) 58 A.L.J.R. 371.

6. For further discussion of prosecutor' duties in relation to the calling of witnesses, see *R v. Whitehorn* (1983) 57 A.L.J.R. 809 esp. at 811 per Deane J. and at 815 per Dawson J.

D. ASSISTING ILLEGAL OR IMPROPER CONDUCT

1. INTRODUCTION

■ In this section we are concerned with the principles governing conduct by lawyers which might assist their clients, or other persons, to engage in illegal or improper conduct. ■

(1) Assistance

■ There is a wide range of ways in which lawyers might assist these types of conduct. At one end of the spectrum there is active and conscious assistance of such a kind as to fall within the ambit of such criminal offences as "aiding and abetting" or being an "accessory after the fact".[7] This includes, for example, a lawyer purchasing a gun for his or her client knowing that it is to be used to kill someone, or hiding a gun which he or she knows has been used to kill someone. There is no doubt that assistance of this kind by a lawyer is not only illegal in itself but also a ground for professional discipline.

At the other end of the spectrum is a lawyer's mere non-disclosure of past or proposed conduct by a client or some other person. We have seen in previous chapters that if the information was obtained by the lawyer in such circumstances that it falls within the ambit of legal professional privilege, then he or she is under a duty not to disclose it unless, for example, it relates to a proposed crime or fraud and some form of compulsory inquiry on the matter is directed towards the lawyer. If the information is not within the privilege but is obtained in the course of professional work, the lawyer is under no duty to disclose it save in response to a compulsory inquiry.

We are principally concerned in this section with conduct which falls between these two ends of the spectrum. This includes, for example, a lawyer giving legal advice which he or she knows, or ought to know, will enable a client to concoct a defence to a charge, or to act illegally without being detected. ■

7. See, for example, G. Williams, *Textbook of Criminal Law* (1978) Ch. 13; and A. Bates, et al., *The System of Criminal Law* (1979), Ch. 9.

(2) Illegal or Improper Conduct

■ We are concerned here not only with assistance for illegal conduct but also with assistance for conduct which, though not illegal, may be widely regarded as improper because it is:

- contrary to the spirit and intention of a law; or
- contrary to the public interest.

As will be seen, there is considerable debate about the extent to which the principles applicable to illegal conduct should apply also to improper conduct. ■

(3) The Cab-Rank Rule

■ In Chapter 17 we discussed the cab-rank rule, which imposes a duty on lawyers to accept work irrespective of whether they approve of the client's conduct. We pointed out, first, that the rule is of limited application. For example, it applies only to barristers, and to matters in courts in which the barrister in question professes to practise. It does not, therefore, apply to any non-litigious work or to any work by solicitors. Secondly, the rule is subject to certain overrriding duties, such as the duties not to accept work when one has a conflict of interest which we discussed in Chapters 21 and 22.

The basic issue in the present discussion is whether lawyers are under a duty in some circumstances *not* to undertake work which is likely to assist illegal or improper conduct. Where such a duty exists, it will override any duty to accept work which may arise from the cab-rank rule. ■

2. GENERAL PRINCIPLES

■ Formal rules stating general principles applicable in this context are given in the first extract below. The second extract is a discussion of general issues and principles in this area. ■

PROFESSIONAL CONDUCT RULES

Law Society of Western Australia

7.1. Subject at all times to the duty of practitioners to the court a practitioner shall give undivided fidelity to his client's interest, unaffected by the practitioner's perception . . . of the public interest.

12.1. A practitioner shall not advise a client to engage in conduct which he considers may be illegal except in good faith to test the validity or scope of the law and provided that prior to so doing he informs the client of the consequences and likelihood of the conduct being found to be illegal and the client is given complete freedom of choice whether or not so to act.

12.2. A practitioner shall draw his client's attention to the possible effect of any proposed course of action which may adversely affect his client's credit or honour.

12.3. Counsel whose client behaves in an illegal, offensive or improper manner shall nevertheless continue to act for him unless:

(a) he is justified in assuming that his instructions have been withdrawn; or

(b) he finds that his professional conduct is being or is likely to be impugned and he can withdraw from the case or matter at that stage without jeopardising his client's interests.

Practical Advocacy

Mr Justice
JOHN H PHILLIPS

The present notes touch on the duties of the Crown Prosecutor in relation to:

(1) the calling of witnesses as part of the case for the prosecution;
(2) prior inconsistent statements made by prosecution witnesses; and
(3) sentence.

The general nature of the responsibilities of a Crown Prosecutor are set out in the words of Newton J and Norris AJ in *R v Lucas* ([1973] VR 693 at 705):

> "It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the Court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State."

Further, Deane J observed of the Crown Prosecutor in *Whitehorn v The Queen* ((1983) 57 ALJR 809 at 811):

> "The accused, the court and the community are entitled to expect that in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."

1. The calling of witnesses as part of the case for the prosecution

". . . the prosecutor's role in this regard is a lonely one." By the High Court, *R v Apostilides* ((1984) 58 ALJR 371 at 376).

During the last fifteen years the High Court has moved to a definitive statement on this matter. In *Richardson v The Queen* ((1974) 131 CLR 116), counsel for the Crown was not prepared to call an alleged eyewitness to the offence charged because he took the view that she was not a truthful witness. In the course of their joint judgment, Barwick CJ, McTiernan and Mason JJ said this:

> "Any discussion on the role of Crown Prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused."

The Court went on to observe that the Crown Prosecutor's decision in this respect may involve consideration of a multiplicity of factors including the credibility of the witness's account and its significance in the presentation of the Crown case. The Court took the view that the Crown Prosecutor had a discretion but that it was a discretion dissimilar from a judicial discretion in that it

> "signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities we have already mentioned" (ibid, at 119).

The Court next considered this particular aspect of the Crown Prosecutor's duty in *Whitehorn v The Queen*, ante, where Dawson J observed (ibid, at 816):

> "All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eyewitnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However a Prosecutor is not bound to call a witness, even an eyewitness, whose evidence he judges to be

unreliable, untrustworthy or otherwise incapable of belief. And if the number of witnesses available for the proof of some matter is such that in the circumstances it would be unnecessarily repetitious to call them all, then a selection may be made. All witnesses whose names are on the indictment, presentment or information should nevertheless be made available by the prosecution in order that they may be called by the defence and should, if practicable, be present in Court."

Finally, five members of the High Court (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ) made a definitive statement on this point in *R v Apostilides* ((1984) 58 ALJR 371 at 376) in these terms:

"We have come to the conclusion that the following general propositions are applicable to the conduct of criminal trials in Australia:

(1) The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

(2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which led the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

(3) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as they then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

(4) When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

(5) Save in the most exceptional circumstances the trial judge should not himself call a person to give evidence.

(6) A decision by the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice."

The Court later added:

"A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call a witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor to simply call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined."

2. Prior inconsistent statements made by prosecution witnesses

Such statements are not infrequently found in the Crown Prosecutor's brief. In some instances the discrepancies between their contents and the sworn evidence of their makers when called as witnesses for the prosecution, may be inconsequential, or irrelevant to the issues raised in the trial, but, when real inconsistency is apparent, the duty of the Prosecutor is clear, namely, he or she is obliged to inform the accused's counsel of the circumstance of inconsistency and disclose the prior statement. The disclosure should be made to the Court if the accused be unrepresented. This obligation is implicit in the decision of the Court of Criminal Appeal in *R v Clarke* ((1931) 22 Cr App Rep 58) where the Court held that counsel for an accused was entitled to see a statement made by a police officer and containing a description of his client for the purpose of considering whether or not to cross-examine as to possible discrepancies between that statement and the witness's sworn evidence.

In *Baksh v The Queen* ([1958] AC 167) statements made to the police by the three main prosecution witnesses had not been available at trial. This led Bernard Gillis QC and J Lloyd-Eley for the appellant to submit:

> "The appellant has been denied the substance of a fair trial. There was in the possession of the Prosecution at the time of his trial evidence of a most cogent character to the effect that the witnesses had given false evidence; he was therefore deprived of the strongest possible weapon when he was seeking to challenge the honesty of the witnesses for the Prosecution. It must be admitted that as soon as counsel and the authorities were aware of the discrepancies proper facilities were given for the production of the statements. If material is in the Prosecution's possession which will destroy their case it is their duty to disclose it."

Lord Tucker, speaking for the Judicial Committee of the Privy Council, observed (ibid, at 172):

> "If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the Prosecution it follows that by cross-examination — or by proof of the statements if the witnesses denied making them — the Defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis."

3. Sentence

Over thirty years ago Christmas Humphries wrote of the Crown Prosecutor (in "The Duties and Responsibilities of Prosecuting Counsel" (1955) *Criminal Law Review* 739):

> ". . . in the matter of sentence he will exercise no grain of pressure towards severity, and will leave his opponent to say what he may in the matter of mitigation."

Such a view is no longer accepted in this country by reason of a gradual change in judicial attitudes in a setting where the Crown, both in the right of the Commonwealth and of the States, has statutory rights touching appeals against sentence (see *R v Tait and Bartley* ((1979) 24 ALR 473)).

The door appears to be shut in the face of persuasive advocacy by the Crown on sentence. In *R v Gamble* ([1983] 3 NSWLR 356) Street CJ (with whom Lee and Enderby JJ agreed) said (ibid, at 359):

> "The further question arises, however, regarding the existence of the duty on the Crown to press upon the sentencing judge forensic considerations adverse to the person standing for sentence. It has not been the practice in this State to impose upon the Crown such an obligation."

His Honour later referred to

> ". . . the traditional and proper role of the Crown, that is to say, a role of abstention from forensic urging upon the Court of considerations adverse to the person standing before it for sentence".

In *R v Burchielli* (Unreported, Court of Criminal Appeal of Victoria, judgment delivered 10 June 1977) Young CJ and Lush J in a joint judgment observed:

> "the general practice in this State is that prosecuting counsel will assist the Judge on matters of law relevant to his sentencing powers but do not offer submissions as to the manner in which a discretion in the choice of courses should be exercised."

Nevertheless, consistently with authority, the Crown Prosecutor must stand ready to assist the sentencing judge in a variety of ways. This assistance may include some or all of the following:

(a) presentation of facts sufficient to properly convey to the judge the nature of the relevant offence or offences and the prisoner's role therein;
(b) the maximum penalty for the offence and the sentencing options available;
(c) the antecedents of the prisoner;
(d) the putting right of any errors of fact or law involved in the presentation of the prisoner's case;
(e) the disclosure of any mitigating circumstance to which the Court's attention has not been drawn on behalf of the prisoner;
(f) the sentences (and the reasons therefor)

imposed on co-accused or upon accused in comparable cases;

(g) the provision of objective information touching on aspects of the case which are technical or unusual.

The consequences of failure to render relevant assistance may be grave indeed; in *DPP v Casey & Wells* (Unreported, Court of Criminal Appeal of Victoria, judgment delivered 20 March 1986) the Court considered appeals by the DPP against sentence, the ground being in each case of manifest inadequacy. The respondents had been convicted of trafficking in a drug of dependence, namely ephedrine; which substance, while proscribed, was non-addictive but was material from which amphetamine can be manufactured. The sentencing judge made it clear he knew nothing about this drug and requested assistance from counsel. The judge was then told, in effect, that ephedrine was more dangerous than marijuana and less dangerous than heroin and that amphetamine use produced adverse psychological effects. The judge then asked for assistance on the appropriate range of sentence, but was told by counsel for the Crown that he felt he was "precluded from making comment". The members of the Full Court (Crockett, McGarvie and Southwell JJ) said this:

> "We do not think it was appropriate for either counsel to suggest precise periods as being appropriate terms of imprisonment but if the prosecution wanted a higher penalty than that imposed — as it now complains it should have got — it ought to have done very much more than it did to allow the Judge to form an accurate appreciation of the nature and extent of the heinousness involved in the offence."

The Court also said:

> "Put another way, if the Prosecution fails to do what is expected of it at the sentencing hearing thus allowing the Judge to fall into error, it cannot expect on its appeal to have that error corrected by an appellate court."

The Court dismissed the appeals although it felt suspicion that "the sentences are probably too light. Perhaps far too light."

Finally, Burt CJ speaking for the Court of Criminal Appeal of Western Australia in *R v Jones* ([1984] WAR 175 at 179) said:

> ". . . notwithstanding error an appeal court on a Crown appeal may decline to intervene and correct it and so decline to displace 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal' — *Whittaker v The King* (1928) 41 CLR 230 per Isaacs J at 248 — if the Crown has failed in its duty to assist the sentencing judge to avoid the error, a fortiori if the Crown with knowledge of what the sentencing judge intended to do has, by its counsel, acquiesced in, and to that extent encouraged him, to do what he did."

JHP

H. C. OF A. 1984.

STATE GOVERNMENT INSURANCE COMMISSION v. STEVENS BROS. PTY. LTD.

Dawson J.

practicality in favour of subtlety: cf. *Fawcett v. B.H.P. By-Products Pty. Ltd.* (26).

It may probably be conceded that the compressor was not in use whilst it was being conveyed upon the truck rather than upon its own wheels. It may be that if it had not been provided with the means by which it could be lifted from the truck so that it had to be lifted by means of a sling or other lifting equipment it could not be said that it was being used in the relevant sense whilst it was being lifted. It is unnecessary to decide that point. But when the lug, which formed part of the compressor, was being used to convey it, it was being used, in my view, no less than when it was being conveyed by the use of its tow-bar and wheels. It was not merely freight; part of its very equipment was being used for the purpose for which it was designed. Had the lug broken whilst the compressor was being lifted and injuries been inflicted as a consequence it would, I think, have been a necessary conclusion that the injuries arose out of the use of the compressor. It is a conclusion which follows no less, in my view, when, as in this case, arising out of the lifting of the compressor by the same means, injuries were caused by a different action on the part of the compressor. I think that the Full Court was correct in concluding that those injuries were injuries arising out of the use of the vehicle within the meaning of the policy of insurance under the *Motor Vehicles Act*. The first respondent was entitled to judgment against the appellant as a third party in the action. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Ward & Partners*.
Solicitors for the respondents, *Baker McEwin & Co.*

R.A.S.

(26) (1960) 104 C.L.R., at p. 87.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN . . . . . APPLICANT;

AND

APOSTILIDES . . . . . RESPONDENT.

H. C. OF A. 1984.

May 5, *June* 19.

Gibbs C.J., Mason, Murphy, Wilson and Dawson JJ.

Criminal Law — Practice — Trial — Evidence — Crown Prosecutor — Discretion in conduct of case — Failure to call witness — Whether ground for setting aside conviction — Trial judge — Power to direct prosecutor to call witness — Power to call witness of own volition.

Per curiam. (1) In a criminal trial the Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

(2) The judge may, but is not obliged to, question the prosecutor to ascertain the reasons that led the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

(3) Whilst at the close of the Crown case the judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as appear to the judge at that stage of proceedings, he cannot direct the prosecutor to call a particular witness.

(4) When charging the jury, the judge may make such comment as he thinks appropriate about the effect that the prosecutor's failure to call a particular person as a witness would appear to have had on the course of the trial.

(5) Save in the most exceptional circumstances, the judge should not himself call a person to give evidence.

(6) A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial as a whole, it is seen to give rise to a miscarriage of justice.

Reg. v. Evans, [1964] V.R. 717; *Reg. v. Lucas*, [1973] V.R. 693; and *Reg. v. Eastwood and Boland*, [1973] V.R. 709, approved.

Titheradge v. The King (1917), 24 C.L.R. 107; *Shaw v. The Queen* (1952), 85 C.L.R. 365; *Richardson v. The Queen* (1974), 131 C.L.R. 116; and *Whitehorn v. The Queen* (1983), 152 C.L.R. 657, considered.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

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Nicholas John Apostilides was tried before the County Court at Melbourne on four counts of rape. Earlier on the night of the alleged rapes, Apostilides and the prosecutrix had been accompanied by two other persons, Tibballs and Brodie. The names of Tibballs

and Brodie appeared on the presentment but they were not called as witnesses for the prosecution. The prosecutor made available to Apostilides' counsel copies of statements Tibballs and Brodie had made to the police. They were called by the defence and were cross-examined by the prosecutor. Apostilides was convicted. An appeal against conviction to the Full Court of the Supreme Court (Young C.J., Kaye and Tadgell JJ.) was allowed. A new trial was ordered. The Crown applied special leave to appeal to the High Court. Further facts are set out in the judgment.

F. G. Fitzgerald Q.C. (with him *J. T. Hassett*), for the applicant. A criminal trial is an adversary proceeding. Each party is free to decide the ground on which he will contest the issues and the evidence he will call: *Ratten v. The Queen* (1). It is for the prosecutor to decide whether he will call a particular witness. A conviction will be set aside for the prosecutor's failure to call a witness only if that failure constitutes misconduct which gives rise to a miscarriage of justice: *Richardson v. The Queen* (2); *Lawless v. The Queen* (3); *Whitehorn v. The Queen* (4). Even if the prosecutor should have called Brodie and Tibballs, there was no miscarriage of justice: *McInnes v. The Queen* (5). The judge was under no duty to ask for the prosecutor's reasons for not calling them as witnesses: *Whitehorn v. The Queen. Reg. v. Lucas* (6) is to the contrary and is wrong. The judge has no power to call a witness of his own volition: *Titheradge v. The King* (7); *Shaw v. The Queen* (8).

[MASON J. referred to *Reg. v. Damic* (9).]

A. J. Kirkham Q.C. (with him *J. H. Barnett*), for the respondent. A trial judge should ask for the prosecutor's reasons for not calling witnesses whose names appear on the presentment: *Reg. v. Lawson* (10); *Reg. v. Lucas*. The judge's failure to do that gave rise to a miscarriage of justice because the defence had to call them itself and was deprived of the opportunity of cross-examination. It is not contended that the judge could direct the prosecutor to call a witness or that he could call the witness himself. [He referred to *Reg. v. Teitler* (11).]

(1) (1974) 131 C.L.R. 510, at p. 517.
(2) (1974) 131 C.L.R. 116, at pp. 119, 121.
(3) (1979) 142 C.L.R. 659, at p. 678.
(4) (1983) 152 C.L.R. 657.
(5) (1979) 143 C.L.R. 575, at p. 579.
(6) [1973] V.R. 693.
(7) (1917) 24 C.L.R. 107, at p. 116.
(8) (1952) 85 C.L.R. 365, at p. 379.
(9) [1982] 2 N.S.W.L.R. 750.
(10) [1960] V.R. 37.
(11) [1959] V.R. 321.

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J. T. Hassett, in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an application by the Crown for special leave to appeal from a judgment of the Full Court of the Supreme Court of Victoria in its criminal jurisdiction whereby the Court (Young C.J., Kaye and Tadgell JJ.) set aside convictions of the respondent on four counts of rape and ordered a new trial. The case, which was fully argued as if it were an appeal, raises important issues touching the responsibility and powers of a trial judge when a Crown prosecutor declines to call as a witness a person whose name appears on the indictment and who would be expected to be able to give evidence which is material to the matters in issue in the trial. It is not concerned with the related, but nevertheless distinct, topics of the responsibility and powers of a trial judge with respect to the recall of a witness after the party calling him has closed his case or the calling of evidence in rebuttal.

The following passage taken from the reasons for judgment of Kaye J. conveniently outlines the facts of the case and the course of relevant events at the trial:

> "The relevant facts as verified by Crown witnesses were as follows.
>
> On Saturday evening, 4 December 1982, the prosecutrix, then aged thirty-two years, and Julie Anne Tibballs were in a section of an hotel bar in Richmond. While they were awaiting the arrival of their friend Anne Lorna Jeffrey, the applicant invited the two women to have a drink with him and his friend, Robert Brodie. They refused because they were about to go in to dinner, having reserved a table in the restaurant of the hotel. Some minutes later the prosecutrix told the men that they could join them for a drink in the restaurant if they wished. When Jeffrey arrived, the three women took their table in the restaurant and commenced to dine. While doing so, the applicant and Brodie joined them at their table. The applicant sat next to the prosecutrix and Brodie next to Tibballs. Conversation between the party was pleasant and about general matters. At one stage the applicant put his arm around the prosecutrix and under her T-shirt, whereupon she quickly removed his arm. The two couples, however, became increasingly friendly, Tibballs and Brodie more so than the applicant and the prosecutrix. There were at least two occasions when the applicant gave the prosecutrix a quick hug.
>
> At closing time the party, except Jeffrey, set off for the prosecutrix's home on her invitation, the prosecutrix driving the applicant in his car and Tibballs travelling in Brodie's car. After their arrival, they drank coffee and port in the lounge

room while listening to records. Twice, when the applicant pulled her onto his knee, the prosecutrix stood up. On the other hand, Tibballs and Brodie became increasingly familiar with each other, from time to time kissing and cuddling. Later, at about 2.00 a.m. while the two men were in the bathroom, the prosecutrix and Tibballs washed up the coffee cups. When the party reassembled the prosecutrix told them to drink up as it was time for them to go. The applicant asked whether that included him, to which she replied, 'Yes, you too.' Tibballs then led the way to the front door, from where the prosecutrix saw Brodie and Tibballs leave her home. The applicant asked whether the prosecutrix was sure she wanted him to go; she replied that she had only just met him and that the most she would give him was her telephone number.

The applicant returned to the lounge room, where he poured himself a glass of port, and then with the bottle in his hand walked towards the front door, the prosecutrix preceding him. While standing at the front door, the applicant grabbed the prosecutrix, slammed shut the front door, and pushed her backwards into the nearby bedroom, saying that he intended to have his way whether she wanted it or not. He then pushed the prosecutrix backwards onto a single bed and lay on top of her. With one hand on her chin, the applicant pushed the prosecutrix's head back and sideways while continuing to apply pressure until she was fearful that her neck might break. He acceded to her plea to allow her to go to the toilet, gripping her arm as they proceeded to the bathroom. When she emerged from the toilet, the applicant dragged the prosecutrix backwards into the bedroom and pushed her onto the single bed. There he raped her four times, twice vaginally as well as manually and by forcing his penis into her mouth. (The prosecutrix swore that he also raped her per anum; this was the subject of the count on which he was found not guilty.) From the single bed the applicant compelled the prosecutrix to lie with him on the double bed in the other bedroom. There he fell into deep sleep. While he was sleeping the prosecutrix went to a neighbour's house where she complained that she had been raped. The neighbour summoned police.

Two police officers found the applicant asleep in the double bed. After awakening him, one of the policemen told the applicant that the owner of the house alleged that he had raped her in the house that evening. He replied, 'Well, then, this is a job for the judge and jury. I'm not saying any more.' After some conversation about his clothing, the police officer asked the applicant whether he believed she had any grounds for making the complaint. He replied, 'She may have, mate, but I want my solicitor present.' To the police officer's further question whether he and the prosecutrix had engaged in any sexual activity, the applicant answered that they had done everything.

A short time later at police headquarters, Senior Detective Ryan told the applicant that he was investigating a complaint

that he had raped a woman in Prahran on the previous evening. Throughout the ensuing interrogation and taking of a record of interview, the applicant insisted that the prosecutrix had been a willing and consenting party to acts of intercourse with him during the previous evening. He said that after they had intercourse an argument developed between them because she wanted him to leave as she was expecting friends from Portsea, and that he refused to go, calling her insulting and offensive names. During the argument she tried to push him out of bed, whereupon he grabbed her around the throat and pushed her. After she left the room, he fell off to sleep."

His Honour then described the relevant ground of appeal as

> "that the Crown's conduct in failing to call as witnesses Brodie and Tibballs and the manner in which the trial judge dealt with the Crown's failure were prejudicial to the applicant causing the trial to miscarry"

and continued:

> "It is necessary to consider the course which the trial took.
>
> The names of Brodie and Tibballs appeared on the presentment as additional witnesses. The prosecutrix was the first witness called. At the commencement of the second day of the trial and before Mr. Barnett, counsel for the accused, resumed his cross-examination of the prosecutrix, the Crown prosecutor announced that he had formed a judgment that Brodie and Tibballs should not be called as witnesses and that he had so informed defence counsel. Following the announcement, Mr. Barnett drew the trial judge's attention to the omission of the Crown prosecutor to advance any reason for his decision. Mr. Barnett stated that much of the cross-examination of the prosecutrix had been based on the contents of statements made by the two witnesses. Counsel submitted that, unless reasons for not calling the witnesses were disclosed, the Crown should be obliged to call them. During the course of discussion, counsel abandoned his submission but stated that he wished to consider whether the trial judge should call the witnesses on his (counsel's) application, so that he might cross-examine them. His Honour expressed doubt whether he had power to call witnesses. He advised counsel to conduct the defence case on the assumption that the likelihood of him (the trial judge) calling the witnesses was extremely remote. Mr. Barnett then resumed his cross-examination of the prosecutrix.
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> The Crown made available to the applicant's legal advisers copies of statements of both Brodie and Tibballs taken from them by police officers. Outside the Court, the applicant's legal advisers checked with each witness the contents of their respective statements.
>
> When the Crown case closed, Mr. Barnett did not renew the application which he had foreshadowed. The applicant gave sworn evidence verifying and expanding the contents of his record of interview. Brodie, when called by the applicant's

counsel, gave evidence substantially in accord with the contents of his police statement. During the course of cross-examination of Brodie by the Crown prosecutor, the applicant's counsel made application that he should be at liberty to cross-examine the witness by way of re-examination and that the trial judge should call Tibballs so that the witness might be cross-examined by both counsel. Disallowing the application, his Honour stated that he was not satisfied the interests of justice made it necessary for him to call either of the witnesses. The prosecutor continued cross-examining Brodie, adducing from the witness that, inter alia, eleven years previously in the County Court he was convicted of conspiracy and released on a bond to be of good behaviour.

Tibballs was then called in the applicant's case. She was cross-examined but briefly by the Crown prosecutor without any challenge being made to the veracity of her evidence. Neither in evidence in chief nor in cross-examination did she depart in any material particular from the matters set out in her police statement.

Brodie and Tibballs and the applicant were the only witnesses called by defence counsel.

During the course of the Crown prosecutor's final address to the jury the foreman asked a question. The discussion which followed and his Honour's answer to the question are matters which are not relevant to this appeal. What is significant in connexion with this ground of appeal is that, after replying to the jury's question and in their absence, his Honour, addressing the Crown prosecutor, expressed concern about the course the trial had taken. He drew attention to the circumstances that the Crown prosecutor, after cross-examining her, had described to the jury Tibballs' evidence as 'a very credible account of the whole evening'. His Honour reminded the Crown prosecutor that, by failing to call her as a Crown witness, the accused's counsel had been deprived of an opportunity to cross-examine Tibballs whose evidence the Crown had commended to the jury. After repeating that he had been left in a state of considerable unease about the way the trial had developed, his Honour volunteered that his decision to disallow the accused's counsel to cross-examine Tibballs might have been wrong. Counsel for the accused then made application that the jury be discharged. In the course of further discussion, his Honour said to the Crown prosecutor: '. . . I think Tibballs should have been called by the Crown and that statement is in accord with the longstanding tradition that has applied, as you know, and I know, and everybody else knows, that witnesses who give a creditable [sic] account of the events, at least of significant events, would ordinarily be called by the Crown.'

A short time later his Honour, again addressing the Crown prosecutor, said: 'I must say that my present state of mind is that I think it would have been a fairer trial for the accused had Tibballs, at any rate, been called by the Crown. To say

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otherwise would be a misstatement of my feelings in the matter.'

Following further protracted discussion the Crown prosecutor disclosed to the Court information upon which he had decided not to call as witnesses in the Crown case Tibballs and Brodie. Those reasons were as follows: first, the prosecutor had been informed by a member of counsel, who had a previous professional association with her, that the prosecutrix had been told by Tibballs that she had put herself into the defence camp and that she was inflamed by any attempt to get her to give evidence for the prosecution. The Crown prosecutor added that he suspected, as it had been subsequently confirmed in evidence by her, that Tibballs had maintained a romantic attachment with Brodie. Secondly, as a result of his enquiries made on the first morning of the trial, the Crown prosecutor had learnt that Brodie had engaged in schoolboy theft, that eight counts of false pretences preferred against the witness had been adjourned, and that he had been convicted of a charge of conspiracy.

In the absence of the jury, Senior Detective Ryan was then called as a witness. He swore that during the first day of the trial, while standing together outside the Court, Brodie had told him that the trial was more or less a foregone conclusion, that he knew the outcome, and that the accused would be found not guilty. Ryan further swore that when asked what made him say that, Brodie, smiling, said he would tell the police officer after the trial.

Further discussion between his Honour and the counsel ensued. His Honour refused the application to discharge the jury, adding that he did not consider that a high degree of need to do so had arisen."

It is clear from the judgments the subject of the present application that their Honours held a clear view of the way in which the learned trial judge should have handled the situation that was presented during the trial. The primary question was seen to be whether there were sufficient reasons for the prosecutor's decision not to call Brodie and Tibballs, it being implicit in such a question that the Crown can be required immediately after the close of the Crown case to defend its decision by expounding its reasons. After careful consideration, Kaye J. (with whose reasons the Chief Justice and Tadgell J. were in substantial agreement) concluded that the Crown's reasons were insufficient to justify its decision and that in the proper performance of his role the prosecutor ought to have called both Tibballs and Brodie as witnesses in the Crown case. His Honour considered that if the trial judge had followed the correct procedure he would have established that insufficiency at the close of the Crown case. Having invited the Crown, without avail, to call them, he would then himself have called and sworn both Brodie and

Tibballs in turn and so made them available for cross-examination by the accused's counsel: see *Reg. v. Lucas* (12); *Reg. v. Evans* (13). Because the prescribed procedure had not been followed defence counsel was constrained to call Brodie and Tibballs as his own witnesses, thereby losing the right to cross-examine them and exposing them to cross-examination by the Crown. In the result, Kaye J. concluded that the accused had been unduly prejudiced in the conduct of his defence and that a substantial miscarriage of justice had occurred. It should be added that there is no suggestion that the trial judge was empowered to *direct* the prosecutor to call the witnesses. The existence of that power was denied by the Full Court in *Evans* and the Court was correct in taking that view. As Gowans J. observed in *Reg. v. Eastwood and Boland* (14): "It is apparent from the authorities that there can be no direction to the Crown to call the witness": cf., also, *Skubevski v. The Queen* (15).

The practice which was so clearly laid down by the Full Court in *Lucas* finds some support in the practice in criminal trials in common law jurisdictions overseas. In England, recent decisions confirm that if the prosecution appears to be exercising its discretion with respect to the calling of a witness improperly, the trial judge may intervene and invite the prosecution to call the witness. If the prosecution refuses to do so, the judge himself may call the witness without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice: *Oliva* (16); *Reg. v. Tregear* (17). The discretion to call a witness should be exercised with caution: *Reg. v. Cleghorn* (18).

The English practice is followed in Canada: *R. v. Skelly* (19); *Reg. v. Bouchard* (20); *Reg. v. Talbot* [No. 2] (21). In *Lemay v. The King* (22), it was held explicitly that the trial judge cannot direct the Crown to call a witness whom the Crown considers to be unreliable.

In New Zealand, in *Reg. v. Fuller* (23) the Court of Appeal observed, when dealing with the question of the duty of the Crown with respect to the calling of witnesses, that New Zealand practice conformed with that of England as outlined by the Court of Criminal Appeal in *Oliva*. However, it may be noted that s. 368(2) of the *Crimes Act* 1961 (N.Z.) empowers the court to "require the

(12) [1973] V.R. 693, at pp. 698, 706.
(13) [1964] V.R. 717, at p. 719.
(14) [1973] V.R. 709, at p. 714.
(15) [1977] W.A.R. 129, at pp. 138-140.
(16) (1965) 49 Cr.App.R. 298.
(17) [1967] 2 Q.B. 574.
(18) [1967] 2 Q.B. 584.
(19) (1927) 61 O.L.R. 497.
(20) (1973) 12 C.C.C. (2d) 554.
(21) (1977) 38 C.C.C. (2d) 560.
(22) [1952] 1 S.C.R. 232 [(1951) 102 C.C.C. 1].
(23) [1966] N.Z.L.R. 865.

prosecutor to call" a witness whom the court thinks should have been so called.

In the United States there is support for the proposition that it is within the discretion of the court to call a witness for whom neither the prosecutor nor the defence is willing to vouch and who appears to possess material evidence. The right is to be exercised with caution: 23 *Corpus Juris Secundum*, "Criminal Law", §.1017; Rogers, "Court's witnesses (other than expert) in criminal prosecution", *American Law Reports* (2d), vol. 67 (1959), p. 539.

From this brief review of criminal trial practice in overseas common law jurisdictions it may be seen that, speaking generally, there is broad support for the twin principles of prosecutorial discretion as to the calling of witnesses and a power in the court to call a witness. That power, however, is in the nature of an ultimate sanction and is to be exercised with caution. In *Cleghorn* (24), the Court of Appeal referred with approval to the statement of Erle J. in the early case of *Reg. v. Edwards* (25):

> "There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but, generally speaking, we ought to be careful not to overrule the discretion of counsel, who are, of course, more fully aware of the facts of the case than we can be."

Nevertheless, the court then added its own comment that there clearly are cases in which the judge is justified in calling a witness.

There is limited authority in this Court dealing with the power of the trial judge in a criminal case to call a witness. The only case in which that question actually fell for decision was *Titheradge v. The King* (26). In that case, after all the evidence called by both the prosecution and the defence had been given, the judge not only called a witness whose evidence seemed to him to be indispensable, but also, being informed by the Crown prosecutor of statements allegedly made by the witness which were inconsistent with his testimony, then recalled two other witnesses to whom those statements were said to have been made. Neither the accused nor the prosecutor consented to this course, although apparently no objection was raised. It was held that there was a substantial miscarriage of justice. However, there was no clear statement of the principles involved which commanded the assent of a majority of the Court. Isaacs and Rich JJ. were of the opinion that a judge in a criminal trial cannot call evidence of his own motion except where the Crown raises no objection and the accused consents. They

(24) [1967] 2 Q.B., at p. 588.
(25) [1848] 3 Cox C.C. 82, at p. 83.
(26) (1917) 24 C.L.R. 107.

simply applied the decision of the English Court of Appeal in a civil case, *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (27), saying that the observations of Moulton L.J. in that case are of general application to the administration of justice both civil and criminal (28). It is to be noted that this view of that decision has not been taken in England. In *R. v. Dora Harris* (29), it was said that it was clearly established that the rule in *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* "does not apply to a criminal trial where the liberty of a subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the State" and as we have already indicated subsequent authorities in England have confirmed that the rule in criminal cases is not the same as that in civil cases. The development of the law in this way in England may have been influenced by the absence prior to 1968 of any power in the Court of Criminal Appeal to order a new trial in any event including a case where the failure of the Crown to call a witness may be found on appeal to have resulted in a miscarriage of justice. The other members of the Court in *Titheradge v. The King* were Barton and Gavan Duffy JJ. The latter contented himself by saying that there had been a miscarriage of justice (30). Barton J. said (31):

> "No one, then, will doubt that there are instances, not numerous, in which in furtherance of justice and in exceptional circumstances presiding judges have rightly taken it upon themselves to actually examine a witness, and, of course, it happens every day that a Judge, in order to understand what a witness has said, asks him a question. But that is a very different matter from the assumption by the Court of the conduct of the case. A trial is a proceeding inter partes, whether the Crown is a party or not, and the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties. Where departures from the rigid observance of this principle have occurred, it has, I think, been upon necessity, as, for instance, in the case where, the parties having definitely closed their evidence, the jury wish a person present to be called for their better information. But the right, where it exists, of a judge to take the conduct of the examination of persons not called by either party must be used with extreme caution. In a civil case there must either be the consent of the parties or an acquiescence on their part from which the strong inference is consent. I have already pointed out that the sections of the *Evidence Act* cited at the Bar are framed, save in a sole particular, upon the assumption that the parties themselves will lead the evidence. That is the normal and proper

(27) [1910] 1 K.B. 327.
(28) (1917) 24 C.L.R., at p. 118.
(29) [1927] 2 K.B. 587, at p. 594.
(30) (1917) 24 C.L.R., at p. 119.
(31) (1917) 24 C.L.R., at pp. 116-117.

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> practice, and any deviation from it must be safeguarded by every precaution. This is especially true in a criminal case. . . . It seems to me that in a criminal case the defence ought to be asked whether the accused consents to the course which the judge proposes to take when he desires (for strong cause) to examine a witness, and the examination ought not to take place without such consent. No such consent was asked or given here. That was, I think, a substantial irregularity."

In *Shaw v. The Queen* (32), Dixon, McTiernan, Webb and Kitto JJ. said:

> "The decisions in England allow the presiding judge at a criminal trial to call a witness if he thinks the imperative demands of justice require it. This view was acted on in Victoria (*R. v. Collins* (33)). But in *Titheradge v. The King* (34) this Court denied the power."

In *Shaw* the Court was concerned with the circumstances in which the Crown might be allowed to call evidence in rebuttal of evidence given during the defence case. In that context the reference to *Titheradge* may have been no more than a passing reference by way of narrative without intending either to approve or disapprove of it. Fullagar J., who delivered a separate judgment, also referred to *R. v. Collins*, which was a case in which Cussen J. had exercised the power to call a witness of his own motion, although not requested by either party to do so; Fullagar J. said (35) that he could not feel the slightest doubt that the course taken by Cussen J. in that case was "entirely correct and proper".

Two further authorities remain to be mentioned. *Richardson v. The Queen* (36) was a case where the prosecutor declined to call an eyewitness to the alleged offence because he considered her to be neither a credible nor truthful witness. The Court comprised Barwick C.J., McTiernan and Mason JJ. Their Honours, in a joint judgment, discussed, in relation to the calling of witnesses, both the role and responsibility of a prosecutor and the powers of a trial judge. With respect to the former topic, their Honours said (37):

> "Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the

(32) (1952) 85 C.L.R. 365, at p. 379.
(33) [1907] V.L.R. 292.
(34) (1917) 24 C.L.R. 107.
(35) (1952) 85 C.L.R., at p. 383.
(36) (1974) 131 C.L.R. 116.
(37) (1974) 131 C.L.R., at p. 119.

Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.

What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. But to say this is not to give the prosecutor's decision the same character as the exercise of a judicial discretion or the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable. In the context the word 'discretion' signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities which we have already mentioned."

With respect to the powers of a trial judge, their Honours said (38):

"In argument it was submitted that the trial judge had power to direct the Crown prosecutor to call a witness or that he had power to call a witness of his own motion (see *Reg. v. Lawson* (39)). For the disposition of this application it is unnecessary to decide whether a trial judge possesses either of the suggested powers. It is sufficient to say that we remain to be persuaded of the correctness of the submission. It does not seem to accord with the adversary procedure which has hitherto been followed. If the power should be held to exist, the occasions for its exercise should be rare and infrequent, because all too often the trial judge lacks that knowledge and information about the witness, his relationship to the parties and to the evidence to be presented which is essential to the making of a decision whether the witness should be called in the Crown case. The trial judge should be astute to acknowledge the nature of the discretion which is reposed in the prosecutor and the limitations attaching to his judicial knowledge of material circumstances."

In this passage the Court expressed no concluded opinion on the question whether a judge in a criminal case could call a witness of his own motion, but made it clear that if the power does exist it should be rarely and cautiously exercised.

Finally, in *Whitehorn v. The Queen* (40) Dawson J., in the course of a discussion of the authorities in England and Australia, said that there is "a clear divergence in this aspect of criminal law and

(38) (1974) 131 C.L.R., at p. 122.
(39) [1960] V.R. 37, at p. 40.
(40) (1983) 152 C.L.R. 657, at p. 681.

procedure between England and this country" and that "Since *Titheradge v. The King* (41) it has been established here that the rule is the same in civil and criminal cases and that a witness cannot be called by the judge save with the consent of both parties and then only in exceptional circumstances." However, Gibbs C.J. and Brennan J. (42) expressly reserved their opinion on this question and the other members of the Court, Murphy and Deane JJ., did not find it necessary to discuss it.

We have come to the conclusion that the following general propositions are applicable to the conduct of criminal trials in Australia:

1. The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.

6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

We have not attempted in our first proposition to deal exhaustively with the responsibility of the prosecutor. The description of that responsibility, which we have cited from *Richardson*, emphasizes that the prosecutor's role in this regard is a lonely one, the nature of which is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system. It is not only a lonely responsibility

(41) (1917) 24 C.L.R. 107.
(42) (1982) 152 C.L.R., at p. 660.

but also a heavy one. A decision whether or not to call a person whose name appears on the indictment and from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined.

In the formulation of the fifth proposition we have allowed for the possibility that circumstances may arise when the trial judge will be constrained to call a person to testify. The circumstances which would justify such a course would be rare. It is clear to us that more would be required to establish "most exceptional circumstances" than the refusal of the prosecutor, for reasons which the judge thinks insufficient, to call a witness. Some of the reasons for the need for the extreme reluctance with which the trial judge should even consider usurping the responsibility of the parties with respect to the calling of witnesses appear in the following passage from the judgment of Dawson J. in *Whitehorn* (43):

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. . . . As was pointed out in *Richardson v. The Queen* (44), he frequently lacks that knowledge and information about the witness or his relationship to the parties and to the evidence to be presented which is essential in making such a decision. If he calls a witness himself he will almost always have to do so in the dark, not knowing with any certainty what the witness is going to say or whether he can be relied upon: cf. *R. v. Collins* (45). If the witness is unreliable (and if neither party has seen fit to call him, that is more likely than not), the fact that he is called by the judge may give his evidence an undesirable aspect of objectivity. There can be no assurance that his credit will be tested by either side but, if it is, the judge has no means whereby he can ensure that any necessary steps to re-establish the witness's credit are taken.

(43) (1983) 152 C.L.R., at pp. 682-683.
(44) (1974) 131 C.L.R. 116.
(45) [1907] V.L.R. 202.

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> Because the judge does not know what a witness called by him may say, he may by calling him necessitate the calling of further evidence so that the trial takes a turn which was not intended and which further involves the judge in a function not appropriately his.
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> Moreover, evidence called by a trial judge may have the effect of shifting the ground upon which the parties have determined to contest the issue; indeed it may have the effect of altering the issue itself."

His Honour illustrated the final comment in the passage we have cited by referring to the recent case of *Reg. v. Damic* (46).

It remains to offer a comment on the sixth proposition. In *Richardson* (47), the Court said:

> "Once it is acknowledged that the prosecutor has a discretion and that there is no rule of law requiring him to call a particular witnesses, it becomes apparent that the decision of the prosecutor not to call a particular witness can only constitute a ground for setting aside a conviction and granting a new trial if it constitutes misconduct which, when viewed against the conduct of the trial taken as a whole, gives rise to a miscarriage of justice."

In our formulation of the sixth proposition we have omitted the reference to misconduct, intending thereby to broaden the approach so as to focus directly on the consequences, objectively perceived, that the failure to call the witness has had on the course of the trial and its outcome. It is not necessary to postulate misconduct of the prosecutor as an essential condition precedent to a miscarriage of justice. No doubt in the great majority of cases of this kind an appellate tribunal which finds a miscarriage of justice to have occurred will trace that miscarriage to a wrong exercise of judgment by the prosecutor which led to the witness not being called. In cases where there has been no error of judgment there will be less likelihood of a miscarriage resulting from the failure to call the witness. Nevertheless, the absence of testimony from a witness may lead to a miscarriage of justice without any error having occurred. *Whitehorn* (48) was regarded as such a case, by some at least of the members of the Court who took part in that decision. The absence, for whatever reason, of any evidence from the complainant was the basic reason, in the light of such evidence as was called, for the Court's conclusion that the verdict was unsafe and unsatisfactory. So, if a prosecutor fails to call a witness whose evidence is essential to the unfolding of the case for the Crown the central question is not

(46) [1982] 2 N.S.W.L.R. 750.
(47) (1974) 131 C.L.R., at pp. 121-122.
(48) (1983) 152 C.L.R. 657.

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whether his decision constitutes misconduct but whether in all the circumstances the verdict is unsafe or unsatisfactory.

The questions which we have discussed are of such importance that, if there were nothing more in the case, they would require special leave to appeal to be granted. However, the Full Court, after a full and careful consideration of the course taken at the trial, reached the conclusion that a substantial miscarriage of justice had occurred. They came to this conclusion after expressing the opinion that the prosecutor's decision not to call Tibballs was not made for satisfactory reasons and that, in the proper performance of his role, he ought to have called both Tibballs and Brodie as witnesses in the Crown case. Although their Honours took a different view of the law from that which we have stated, in the end the question for their decision was whether the failure of the prosecutor to call Tibballs and Brodie, and the fact that the respondent (the accused) was obliged to call them, so prejudiced the respondent in the conduct of his defence that a substantial miscarriage of justice resulted. This is a matter on which opinions might readily differ, but it would be an unusual and in general an undesirable course for this Court to grant special leave to appeal simply to enable the prosecution to seek to overturn an order for a new trial made by a Court of Criminal Appeal which has unanimously decided that, having regard to the circumstances of the particular case, a substantial miscarriage of justice has occurred. We have taken the opportunity to state, so far as is necessary for the present case, the correct practice to be applied, and there remains no sufficient justification for us to grant special leave to appeal.

Special leave to appeal is accordingly refused.

Application for special leave to appeal refused.

Solicitor for the applicant, *J. M. Buckley*, Solicitor for the Director of Public Prosecutions.

Solicitor for the respondent, *J. R. Gardner*, Legal Aid Commission of Victoria.

R.A.S.

[HIGH COURT OF AUSTRALIA.]

STATE BANK OF NEW SOUTH WALES . . . . . PLAINTIFF AND FIRST CROSS-DEFENDANT;

AND

THE COMMONWEALTH SAVINGS BANK OF AUSTRALIA . . . DEFENDANT AND FIRST CROSS-CLAIMANT;

AND

THE STATE OF NEW SOUTH WALES SECOND CROSS-DEFENDANT.

H. C. OF A. 1984.

SYDNEY, July 13, 20

Gibbs C.J.

High Court — Practice — Federal jurisdiction — Action commenced in High Court — Action in which Commonwealth party — Power to remit to another court — Specific power to remit to Federal Court — Alternative power to remit to other federal court or State court — Significance of applicable law upon selection of court — Judiciary Act 1903 (*Cth*), s. 44.

Section 44(1) of the *Judiciary Act* 1903 (Cth) provides that any matter other than a matter to which sub-s. (2) applies that is at any time pending in the High Court may be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties. Sub-section (2) provides that where a matter referred to in s. 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may remit the matter to the Federal Court of Australia or any court of a State or Territory. Sub-section (2A) provides that where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may remit the matter to the Federal Court of Australia.

Held that s. 44(2A) is not an exhaustive statement of the power to remit matters of the kind to which it refers, and matters that fall within sub-ss. (1) or (2) can be remitted to courts other than the Federal Court even though they fall also within sub-s. (2A).

Per curiam. Where the High Court is called on to decide to which of two courts a remitter should be made, if the law to be applied in one of the competing jurisdictions is the same as, and that in the other is materially

Magistrates' Courts (Advance Information) Rules 1985 (a)

(SI 1985 No 601)

5–312 **1.** These Rules may be cited as the Magistrates' Courts (Advance Information) Rules 1985 and shall come into operation on 20th May 1985

(a) Made by the Lord Chancellor in exercise of the power conferred on him by s 144 of the Magistrates' Courts Act 1980, as extended by s 48 of the Criminal Law Act 1977.

5–313 **2.** These Rules apply in respect of proceedings against any person ("the accused") for an offence triable either way other than proceedings where the accused was charged or an information was laid before the coming into operation of these Rules.

5–314 **3.** As soon as practicable after a person has been charged with an offence in proceedings in respect of which these Rules apply or a summons has been served on a person in connection with such an offence, the prosecutor shall provide him with a notice (a) in writing explaining the effect of Rule 4 below and setting out the address at which a request under that Rule may be made.

(a) A suggested form of notice was annexed to Home Office Circular No 26/1985, dated 26 April 1985.

5–315 **4.**—If, in any proceedings in respect of which these Rules apply, either before the magistrates' court considers whether the offence appears to be more suitable for summary trial or trial on indictment or, where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court, before he is asked whether he pleads guilty or not guilty, the accused or a person representing the accused requests the prosecutor to furnish him with advance information, the prosecutor shall, subject to Rule 5 below, furnish him as soon as practicable with either—

(*a*) a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings, or

(*b*) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings.

(2) In paragraph (1) above, "written statement" means a statement made by a person on whose evidence the prosecutor proposes to rely in the proceedings and, where such a person has made more than one written statement one of which contains information as to all the facts and matters in relation to which the prosecutor proposes to rely on the evidence of that person, only that statement is a written statement for purposes of paragraph (1) above.

(3) Where in any part of a written statement or in a summary furnished under paragraph (1) above reference is made to a document on which the prosecutor proposes to rely, the prosecutor shall, subject to Rule 5 below, when furnishing the part of the written statement or the summary, also furnish either a copy of the document or such information as may be necessary to enable the person making the request under paragraph (1) above to inspect the document or a copy thereof.

5–316 **5.**—(1) If the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements imposed by Rule 4 above might lead to any person on whose evidence he proposes to rely in the proceedings being intimidated, to an attempt to intimidate him being made or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that fact or matter.

(2) Where, in accordance with paragraph (1) above, the prosecutor considers that he is not obliged to comply with the requirements imposed by Rule 4 in relation to any particular fact or matter, he shall give notice in writing to the person who made the request under that Rule to the effect that certain advance information is being withheld by virtue of that paragraph.

5–317 **6.**—(1) Subject to paragraph (2) below, where an accused appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before it considers whether the offence appears to be more suitable for summary trial or trial on indictment, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

(2) Where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before the accused is asked whether he pleads guilty or not guilty, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

5–318 **7.**—(1) If, in any proceedings in respect of which these Rules apply, the court is satisfied that, a request under Rule 4 of these Rules having been made to the prosecutor by or on behalf of the accused, a requirement imposed on the prosecutor by that Rule has not been complied with, the court shall adjourn the proceedings pending compliance with the requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Where, in the circumstances set out in paragraph (1) above, the court decides not to adjourn the proceedings, a record of that decision and of the reasons why the court was satisfied that the conduct of the case for the accused would not be substantially prejudiced by non-compliance with the requirement shall be entered in the register kept under Rule 66 of the Magistrates' Courts Rules 1981.

Prosecution Policy of the Commonwealth

Guidelines for the making of decisions in the prosecution process

Presented to the Parliament by the Attorney-General,
the Hon. Lionel Frost Bowen M.P.

Prepared by the Office of the Director of Public Prosecutions
January 1986

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Attorney-General's Department

PROSECUTION POLICY OF THE COMMONWEALTH

Guidelines for the making of decisions
in the prosecution process

Australian Government Publishing Service
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FOREWORD

In December 1982 a statement concerning the prosecution policy of the Commonwealth was presented to the Parliament on behalf of the then Attorney-General. It gathered together for the first time the guidelines to be followed in the making of decisions relating to the prosecution of Commonwealth offences. That statement reflected the significant role of the Attorney-General in the prosecution process at that time. Apart from the Attorney-General's accountability to Parliament in relation to prosecutions generally - which continues to be the case - he was frequently required to be involved directly in prosecution decisions.

The Director of Public Prosecutions Act 1983 effected a number of significant changes in the Commonwealth prosecution process. The Office of the Director of Public Prosecutions has now prepared a new statement which reflects those changes, as well as the Office's experience to date. This statement, which supersedes the 1982 statement, will provide DPP lawyers and other Commonwealth officers engaged in law enforcement with clear guidelines for the making of the various decisions which arise in respect of prosecutions. It will also inform the public generally of the considerations upon which those decisions are made.

(Lionel Frost Bowen)
Attorney-General of Australia

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PROSECUTION POLICY OF THE COMMONWEALTH

1. INTRODUCTION

1.1 On 5 March 1984 the Director of Public Prosecutions Act 1983 ("the Act") came into operation. It established an Office of the Director of Public Prosecutions ("D.P.P.") controlled by the Director of Public Prosecutions ("the Director").

1.2 The Act effected a number of significant changes in the Commonwealth prosecution process. Perhaps the most significant change is the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General as First Law Officer is responsible for the Commonwealth criminal justice system. He remains accountable to Parliament for decisions made in the prosecution process notwithstanding that those decisions are now in fact made by the Director and lawyers of the D.P.P., subject to any guidelines or directions which may be given by the Attorney-General pursuant to section 8 of the Act. Such guidelines or directions may only be issued after consultation with the Director, and must be published in the Gazette and tabled in each House of the Parliament. Although the power under section 8 may be exercised in relation to particular cases, in his second reading speech the then Attorney-General, Senator Evans Q.C., indicated that it would be very unusual for that to be done in relation to a particular case. No directions or guidelines under section 8 have been issued to date.

1.3 In its 1981 report the U.K. Royal Commission on Criminal Procedure stated that the prosecution system should be judged by the broad standards of fairness, openness and accountability, and efficiency:

> "Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted ..., and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and

> accountable in the sense that those who make the decisions to prosecute or not can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? Each of these standards makes its own contribution to what we see as being the single overriding test of a successful system. Is it of a kind to have and does it in fact have the confidence of the public it serves?" (Cmnd 8092, Report, p.127-8)

These are useful standards for assessing the operation of the Commonwealth prosecution system in Australia; they also afford worthy objectives for the D.P.P.

1.4 At the time of publication of this statement branch offices of the D.P.P., each headed by a Deputy Director of Public Prosecutions, have been established in Victoria, New South Wales, Queensland, the Australian Capital Territory and Western Australia. In those States and the Northern Territory where no D.P.P. branch has been established prosecutions are conducted by the relevant Director of Legal Services on behalf of the Director pursuant to an arrangement made with the Secretary of the Attorney-General's Department under section 32 of the Act. References in this statement to a Deputy Director include a reference to a Director of Legal Services in a State or the Northern Territory where no D.P.P. branch has been established.

2. THE INSTITUTION OF COMMONWEALTH PROSECUTIONS

Who may institute Commonwealth prosecutions

2.1 As a general rule any person has the right at common law to initiate a prosecution for a breach of the law. That right is recognised by section 13 of the Crimes Act 1914 and is expressly preserved by sub-section 10(2) of the D.P.P. Act. Nevertheless, while that is the position in law, in practice all but a very small number of prosecutions are instituted by Commonwealth officers.

2.2 The decision to initiate investigative action in relation to alleged criminal conduct ordinarily rests with the Department which is responsible for administering the relevant Act or regulation. The D.P.P. is not usually involved in such decisions although occasionally it may be called upon to provide legal advice or legal policy guidance, for example, where the facts of the matter are unlikely to be in dispute but there is doubt whether they disclose a breach of Commonwealth law.

2.3 The actual investigation is usually carried out by the Australian Federal Police ("A.F.P.") except where the Department or agency concerned has its own investigative arm. Generally speaking, the D.P.P. is not involved in investigations although from time to time it may be called upon to provide legal advice or legal policy guidance during the investigation stage. In major or very complex investigations such an involvement may occur at an early stage and be of a fairly continuous nature.

2.4 If as a result of the investigation an offence appears to have been committed a brief of evidence should be forwarded to the D.P.P. where it will be examined to determine whether a prosecution should be instituted. Although an A.F.P. or other Commonwealth officer may make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution should proceed. It is therefore generally inappropriate that a prosecution be commenced by an officer without this prior determination by the D.P.P. The Director possesses sufficient powers under section 11 of the Act to require prior consultation in appropriate cases.

2.5 There are circumstances, however, where consultation with the D.P.P. before a prosecution is commenced is either unnecessary or not feasible. First, it is the practice that certain summary prosecutions are conducted by lay persons within particular Commonwealth Departments or agencies where there is a right of audience before the courts. That is acceptable provided the offences are of a routine nature, devoid of difficulty (where, for example, pleas of guilty are common or averment provisions can be relied upon) and are unlikely to result in imprisonment. It is expected that those responsible for such prosecutions will observe these guidelines and that the D.P.P. will be consulted when difficult questions of fact or law arise.

2.6 Secondly, the Director may enter into arrangements with the Australian Government Solicitor for the latter to conduct proceedings for certain types of offences or offences under certain Acts. This may occur, for example, where summary prosecutions under an Act are closely connected with proceedings under another Act to recover a pecuniary penalty and the Director does not have a function to conduct the latter proceedings.

2.7 Finally, cases will inevitably arise where it will be necessary and appropriate that a prosecution be instituted without prior consultation with the D.P.P. One example is where an alleged offender is arrested without warrant. It is also recognised that a significant number of prosecutions for offences against Australian Capital Territory, as opposed to Commonwealth, law are of such a nature that prior consultation with the D.P.P. is either unnecessary or not feasible. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there should be consultation before the institution of the prosecution provided the exigencies of the situation permit.

2.8 The Director has a statutory function of instituting proceedings for an offence, but in practice prosecutions arising out of investigations conducted by the A.F.P. or Commonwealth Departments or agencies are almost always commenced by officers within those organisations with the Director carrying on the proceedings once commenced. There is no legal requirement that a prosecution, once commenced, must be carried on by the Director. Nevertheless, it is most unusual for that not to happen except in the limited circumstances mentioned above. The Director possesses sufficient statutory powers to assume control of prosecutions sought to be carried on by others. The nature of those powers is dealt with later in this statement.

2.9 Mention should be made of a prosecution for a Commonwealth offence instituted by a State police officer. While ordinarily such prosecutions should be carried on or, if necessary, taken over by the Director, there are exceptions to

that general rule. If a person has been charged with both State and Commonwealth offences it may be appropriate for the matter to remain with the State authorities. That will require consideration of (a) whether the prosecution in respect of the Commonwealth offence should in any event proceed, (b) the relative seriousness of the State and Commonwealth charges, (c) the degree of inconvenience or prejudice to either the accused or the prosecution if the proceeding is split and (d), if the offences are indictable, any arrangements between the Director and the relevant State authorities making provision for a "joint trial" on an indictment containing both Commonwealth and State counts. There may also be cases when the balance of convenience dictates that a prosecution for a Commonwealth offence should remain with State authorities notwithstanding that no State charge is involved, for example, when the prosecution relates to a minor Commonwealth offence brought in a remote locality and it would be impracticable for a D.P.P. lawyer to attend.

The decision to prosecute

2.10 Sir Hartley Shawcross Q.C., then Attorney-General, stated to the House of Commons on 29 January 1951:

> "The truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions ... It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.... (T)he public interest... is still the dominant consideration." (See H.C. Debates, Vol. 483, col. 681).

This statement is equally applicable to the position in Australia. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

2.11 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

2.12 It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

2.13 In deciding whether or not a matter should be prosecuted any views put forward by the A.F.P., or the Department responsible for the administration of the law in question, are carefully taken into account. Ultimately the decision is to be made having regard to the considerations referred to below.

2.14 The initial consideration in the exercise of this discretion is whether the available evidence establishes a prima facie case; that is to say, on the basis that the available evidence is accepted without reservation by a jury it could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt. In this regard, if a prosecution has already commenced but on an objective assessment there is not, nor will there be, a prima facie case, the prosecution should not proceed.

2.15 The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account, many of which are referred to below. Dominant in this context is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact. It may also be relevant that the particular offence or offender has characteristics which motivate juries towards acquittal. This assessment may be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In such cases of doubt it may still be appropriate to proceed with the prosecution when regard is had to any other relevant public interest factors, provided a conviction is reasonably open on the available evidence. On the other hand, the public interest may require that a prosecution not be brought although a conviction is more likely than not.

2.16 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:-

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

(b) any mitigating or aggravating circumstances;

(c) the youth, age, physical health, mental health or special infirmity of the alleged offender or a witness;

(d) the alleged offender's antecedents;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) the effect on public order and morale;

(h) the obsolescence or obscurity of the law;

(i) whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;

(j) the availability and efficacy of any alternatives to prosecution;

(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(m) whether the alleged offence is of considerable public concern;

(n) any entitlement of the Commonwealth or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(o) the attitude of the victim of the alleged offence to a prosecution;

(p) the likely length and expense of a trial;

(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(s) whether the alleged offence is triable only on indictment; and

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

2.17 Special considerations apply to the prosecution of persons under the age of 16 years. Prosecution action against children should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as the sentencing alternatives available to the relevant Childrens' Court if the matter were to be prosecuted. The practice of the D.P.P. is that any decision to prosecute a child under 16 years of age should be taken by a senior lawyer, usually the Deputy Director of the Branch Office concerned.

2.18 A decision whether or not to prosecute must clearly not be influenced by:-

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;

(b) personal feelings concerning the offender or the victim;

(c) possible political advantage or disadvantage to the Government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Consent to prosecution

2.19 A number of Commonwealth Acts provide that a prosecution for an offence under the Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister or some specified officer. There are a variety of reasons for the inclusion of such consent requirements in legislation but all are basically intended to ensure that prosecutions are not brought in inappropriate circumstances.

2.20 By various means, principally sub-section 6(4) of the Act, the Director has been authorised to give consent to prosecutions for offences under a number of Acts. In appropriate cases the Director has delegated his power of consent to senior D.P.P. lawyers where that course has been available.

2.21 Often the reason for the requirement for consent is a factor which will ordinarily be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account or to prevent trivial prosecutions. In such cases the question of consent is really bound up in the decision whether to prosecute. Other cases, however, require special care. In some cases the consent provision will have been included as it was not possible to so precisely define the offence that it covered the mischief aimed at and no more. Other cases may involve a use of the criminal law in sensitive or controversial areas, such as censorship, or must take account of important considerations of public policy. In appropriate cases the decision whether to consent to a prosecution is made after consultation with the relevant Department or agency.

2.22 Mention should be made of those prosecutions which require the consent of a Minister or some officer other than the Director. Although there are unlikely to be any differences of view between the person authorised to give consent and the Director on a question whether a prosecution is required in the public interest, it is clearly desirable that there be prior consultation with the D.P.P. where there appear to be difficult questions of fact or law involved.

Choice of charges

2.23 In many cases the same conduct constitutes an offence against several different laws. Care must therefore be taken to choose the charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence. Charges should not be laid with the intention of providing scope for subsequent "charge-bargaining". The decision as to the choice of appropriate charges may also involve consideration as to whether the case should proceed summarily or upon indictment. This aspect is dealt with later.

2.24 A choice of charges will often arise where the general provisions of the Crimes Act 1914 cover the same ground as the provisions of a specific Act. One example is section 138 of the Social Security Act 1947 which overlaps with sections 29A, 29B, 29C, 29D and 67(b) of the Crimes Act. The penalties on summary disposition may be similar but the penalties for Crimes Act offences when prosecuted on indictment are often higher. In addition, a prosecution under a specific Act may be subject to a time limit where a prosecution under the Crimes Act would not. Ordinarily the provisions of a specific Act should be applied unless to do so would not adequately reflect the nature and extent of the criminal conduct disclosed by the evidence. Again, ordinarily the provisions of the Crimes Act should not be invoked to avoid a time limit for a prosecution under the specific Act, particularly where the responsible investigative body has been dilatory in making enquiries in respect of suspected criminal conduct. However, resort to the Crimes Act provisions for such a purpose may be justified in special circumstances, for example, where the defendant has substantially contributed to the lapse of time.

2.25 A number of recent decisions have highlighted the need for restraint in laying conspiracy charges. Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of defendants jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to defendants.

3. CONTROL OF COMMONWEALTH PROSECUTIONS BY DIRECTOR

Background

3.1 As indicated earlier, most prosecutions for Commonwealth offences are instituted by an A.F.P. or other Commonwealth officer and only rarely is a prosecution instituted by a private citizen. Such a prosecution is often referred to as a "private prosecution" but every informant is a private individual in the eyes of the court even if that informant holds an official position (see generally per Fox J. in R v. Kent, Ex parte McIntosh (1970) 17 F.L.R. 65 at 70-73).

3.2 Prior to the Act an A.F.P. or other Commonwealth officer who instituted a proceeding for summary conviction or commitment for trial was usually represented by the Crown Solicitor. The relationship between the Crown Solicitor and such an officer was one of solicitor and client. While the Crown Solicitor could advise as to how or whether the prosecution should proceed, as a matter of strict law so long as he represented that officer in the proceeding he was bound to act in accordance with the instructions he received provided, of course, that they were consistent with the Crown Solicitor's duty to the court. Upon a committal for trial being obtained it was for the Attorney-General to ultimately determine whether a prosecution on indictment should proceed (sections 69 and 71 of the Judiciary Act 1903). However, it is extremely doubtful whether the Attorney-General had power to intervene in committal proceedings before commitment or in proceedings for summary conviction.

3.3 The Act has significantly altered the position just outlined. The Director is given a supervisory role as to the prosecution of offences against Commonwealth law and is empowered to intervene at any stage of a prosecution for a Commonwealth offence instituted by another person, except a prosecution on indictment instituted by the Attorney-General or a Special Prosecutor. Pursuant to sub-section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction. Having taken over the proceeding the Director may continue it with himself as informant or he may decline to carry it on further. Pursuant to sub-section 9(4) of the Act the Director may decline to proceed further in the prosecution of a person under commitment or who has been indicted.

The power to intervene in summary or committal proceedings

3.4 If a prosecution is instituted by an A.F.P. or other Commonwealth officer by far the most usual situation is that the Director carries on the prosecution once commenced. If there has been consultation with the D.P.P. prior to the institution of the prosecution there is unlikely to be any differences of view between such an informant and the D.P.P. as to the conduct of the prosecution. However, there may have been no prior consultation and, upon receipt of the brief of evidence, it may appear, having regard to the criteria to be applied in deciding whether to prosecute, that the prosecution should be brought to an end. Alternatively, events may have occurred or new evidence become available which makes it no longer appropriate for the prosecution to proceed. In that event instructions are sought from the informant to bring the prosecution to an end. If those instructions are forthcoming no necessity arises for the Director to exercise the power under sub-section 9(5). However, if the informant declines to give the instructions sought the Director, after considering any reasons advanced by the informant for the matter proceeding, will determine whether the prosecution should be taken over with a view to declining to carry it on further.

3.5 In exceptional circumstances it may be appropriate for the Director to exercise the power under sub-section 9(5) to take over a proceeding instituted by an A.F.P. or other Commonwealth officer with a view to continuing the proceeding with the Director as informant, for example, where there are irreconcilable differences of opinion as to how the prosecution should be conducted.

3.6 Different considerations apply to the exercise of the power under sub-section 9(5) to take over a proceeding instituted by a private citizen with a view to either continuing it or bringing it to an end. The right of a private citizen to institute a prosecution for a breach of the law has long been regarded as "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in Gouriet v. Union of Post Office Workers [1977] 3 All ER 70 at 79). On the other hand, that right may be employed to bring groundless, oppressive or frivolous prosecutions. A balance must therefore be struck between, on the one hand, the private citizen's rights under section 13 of the Crimes Act and, on the other hand, the Director's statutory duty implicit in sub-section 9(5) to ensure that unworthy prosecutions do not proceed.

3.7 A question whether the power under the sub-section should be exercised may arise at the instance of a party to the "private prosecution". Alternatively, the Director of his own motion may determine that the prosecution should not be

left in the hands of a "private informant". To enable the Director to determine whether he should exercise his powers under the sub-section in respect of such a prosecution the Director may require the person who instituted or is carrying on the proceeding to furnish him with a full report of the circumstances of the matter the subject of the proceeding together with other relevant information or material (section 12 of the Act).

3.8 Any consideration whether the power under the sub-section should be exercised with a view to bringing a "private prosecution" to an end ordinarily would not involve as rigid an application of the above criteria to prosecute as would occur in the case of a prosecution instituted by an A.F.P. or other Commonwealth officer. However, the power will be exercised where there is clearly insufficient evidence available to support the charge or continuation of the prosecution is clearly contrary to the public interest.

3.9 On the other hand, where it is proposed that the Director take over a "private prosecution" with a view to carrying it on, ordinarily the Director will determine whether it is appropriate that he do so having regard to the criteria to prosecute that would apply if the prosecution had been commenced by an A.F.P. or other Commonwealth officer.

Declining to proceed further after commitment

3.10 After the defendant has been committed for trial the question may arise, either on the initiative of the D.P.P. lawyers involved in the prosecution or as a result of an application by the defendant or his legal representatives, whether the defendant should be indicted. In this regard, while certain senior D.P.P. lawyers have been authorised pursuant to paragraph 9(2)(b) of the Act to sign indictments, at the present time only the Director or the Senior Deputy Director as the Director's delegate can exercise the power under sub-section 9(4) to decline to proceed further in a prosecution on indictment.

3.11 Where the D.P.P. was involved in the decision to prosecute and conducted the proceedings leading to the commitment, it will be a most exceptional course for a decision to be made not to file an indictment. However, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may have to be reassessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under sub-section 9(4) it is determined on the criteria set out earlier on the decision to prosecute. In the normal course the A.F.P. or relevant Commonwealth Department or agency is consulted before any decision is made.

3.12 Special mention should be made of no bill applications addressed to the Attorney-General. The Attorney-General has indicated to the Director that they should be determined by the Director and further stated that he would consider such applications addressed to him following an earlier refusal by the Director only in exceptional circumstances and only after consultation with the Director. This approach was approved by the Federal Court in Clyne v. Attorney-General (1984) 55 A.L.R. 92 at 99 in which Wilcox J. said:-

> "Parliament has given to the Director the power to determine for himself whether an indictment shall be filed and whether a prosecution shall be discontinued.

> The evident intention was to divorce the Government, and the Attorney-General in particular, from day-to-day decision making in those areas".

4. SOME OTHER DECISIONS IN THE PROSECUTION PROCESS

Mode of trial

4.1 Where an indictable offence can be determined by a court of summary jurisdiction the prosecution plays a major role in the decision as to mode of trial; indeed, under some Acts the request or the consent of the prosecution is a pre-condition to summary disposition.

4.2 In determining whether or not a case is appropriate for trial on indictment regard should be had to all the circumstances of the case including:

(a) any implied legislative preference for a particular mode of trial;

(b) the adequacy of sentencing options if the case were determined summarily;

(c) the delays, cost and adverse effect on witnesses likely to be occasioned by proceeding on indictment;

(d) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions in order to deter similar breaches;

as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.

4.3 A decision whether to insist upon or seek (as the case may be) trial on indictment should be made and communicated to the defendant and the court at the earliest possible stage.

Charge-bargaining

4.4 "Charge-bargaining" involves discussions between the defence and the prosecution in relation to the charges to be proceeded with. Such discussions may result in the defendant pleading guilty to fewer than all of the charges he is facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

4.5 Charge-bargaining is to be distinguished from consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in R. v. Marshall [1981] VR 725 at 732 said:

> "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does

not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."

4.6 This statement has earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

(a) a charge-bargaining proposal should not be initiated by the prosecution; and

(b) such a proposal should not be entertained by the prosecution unless -

(i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;

(ii) those charges provide the basis for an appropriate sentence in all the circumstances of the case; and

(iii) there is evidence to support the charges.

4.7 Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter proposal to the defence, must take into account all the circumstances of the case and, in particular:-

(a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) the likelihood of adverse consequences to witnesses;

(g) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;

(h) the need to avoid delay in the despatch of other pending cases; and

(i) the time and expense involved in a trial and any appeal proceedings.

4.8 In no circumstances should the prosecution entertain a charge-bargaining proposal initiated by the defence if the defendant maintains his innocence with respect to a charge or charges to which he has offered to plead guilty.

4.9 Where the relevant legislation permits an indictable offence to be dealt with summarily, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the proposed charges be dealt with summarily and that the prosecution either consent to or not oppose (as the legislation requires) summary disposition of the matter. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the matter is dealt with summarily. While the decision of the prosecution in respect of such a request should be determined having regard to the above considerations reference should also be made to the considerations set out in the earlier sub-heading "Mode of Trial".

4.10 Any participation of the prosecution in charge-bargaining discussions should be cleared by a senior D.P.P. lawyer, preferably the relevant Deputy Director. Where such discussions take place following a committal for trial the defence is to be informed in writing that any agreement which may be reached is subject to the approval of the Director.

4.11 Where a charge-bargaining proposal is made in connection with a proceeding for commitment or for summary conviction, the informant should be consulted and his instructions sought to proceed with any proposed agreement. If the informant declines to give the instructions sought and it is considered that in the interests of justice the proposed agreement should still be entered into, the matter should be referred to the Director to determine whether he should exercise his power under sub-section 9(5) of the Act to take over the proceeding.

Indemnification of witnesses

4.12 In principle it is desirable that the criminal justice system should operate without the need to grant an indemnity or immunity against prosecution to persons who participated in offences in order to secure their evidence against the principal offenders. However, it has long been recognised that in some cases this course may be necessary in the interests of justice.

4.13 Sub-section 9(6) of the Act provides, in effect, that where the Director considers it appropriate to do so he may give a person an undertaking that the evidence the person gives in specified proceedings for an offence against Commonwealth law will not be used in evidence against the person. Where the Director gives such an undertaking the person's evidence, by force of sub-section 9(6), is not admissible against the person "in any civil or criminal proceedings in a federal court or in a court of a State or Territory other than proceedings in respect of the falsity of evidence given by the person".

4.14 Sub-section 9(6) of itself does not provide any immunity against prosecution and a person who is given an indemnity under the sub-section may still claim privilege against self-incrimination should he so choose (see generally Sorby v Commonwealth (1983) 57 ALJR 248). Accordingly, if the co-operation of a

prospective accomplice/witness is to be secured for the prosecution the decision whether or not to indemnify him will often essentially involve consideration whether it is in the interests of justice that he not be prosecuted in respect of some or all of the offences which can be established against him. It is for this reason that, as a general rule, an indemnity under this sub-section is only given as a last resort in order to secure for the prosecution the testimony of a relatively minor participant in the criminal activity which is the subject of the charges against a principal offender. Strong justification is required for any departure from this general rule. In particular, where the prospective accomplice/witness cannot be regarded as a minor participant yet his evidence may be necessary to secure the conviction of a principal offender, it may not be appropriate for that accomplice to be indemnified unless he is prosecuted in respect of at least some of the offences committed by him or some lesser charge or charges.

4.15 On the other hand, an indemnity under sub-section 9(6) will be given more readily where, disregarding the witness' co-operation or likely co-operation with the authorities, his prosecution would not be warranted when regard is had to other public interest factors.

4.16 Set out below is the list of matters on which information is ordinarily required to be furnished to the Director in support of a request for a witness to be given an indemnity under sub-section 9(6). The list should not be regarded as exhaustive. Further, it should not be assumed that because satisfactory information is provided in respect of the matters listed that the indemnity will be granted as a matter of course.

The Facts

(a) (i) A summary of the relevant facts indicating in particular the full extent of the involvement of the person proposed to be indemnified ("the witness") with the principal offender.

(ii) Whether the participation in the offence by the witness was in any way prompted by the police or some other authority.

(iii) Whether the available evidence (including that expected from the witness proposed to be indemnified) establishes prima facie the offences alleged against the principal offender.

The Principal Offender

(b) The charges preferred against the principal offender in the subject proceedings.

(c) Whether the public interest requires that the case proceed against the principal offender.

(d) Whether all possible alternatives to secure the conviction of the principal offender have been pursued so that indemnification of any accomplice is a matter of last resort.

The Person for Whom Idemnification is Proposed

(e) Particulars of the general character of the witness and a full account of any prior criminal history together with details of any charges pending against the witness in respect of criminal conduct unrelated to the subject proceedings against the principal offender.

(f) Whether the witness is a principal in the criminal activity which is the subject of the proceedings or only a minor offender.

(g) The offences it is considered the witness has committed in respect of the criminal activity which is the subject of the proceedings against the principal offender. Whether there is sufficient admissible evidence available to establish prima facie any or all of those offences and, if so, whether it is intended to prosecute the witness for any such offence.

(h) Whether any reward or inducement other than an agreement to seek an indemnity was offered to the witness either as a condition of his being prepared to give evidence or otherwise.

(i) A full statement, that has been signed by the witness if possible. If necessary, recourse should be had to obtaining a statement that is clearly inadmissible against the witness. Whether it is likely that the witness will give evidence in accordance with the statement once indemnified.

(j) The value of the witness'likely evidence in the proceedings against the principal offender. Whether it is available from other sources.

(k) The effect, if any, the proposed indemnity under sub-section 9(6) and other indemnities (if any) will have upon the weight of the evidence the witness will be able to give having regard to any inducement given, previous denials by the witness, the present relationship of the witness to the principal offender etc.

(l) Whether counsel (if briefed) agrees that the indemnity should be granted.

(m) Whether the witness' likely testimony will disclose the commission of an offence under State or foreign law and, if so, whether it is considered necessary to obtain an indemnity from the State or foreign authorities concerned.

(n) Details of any protection or special privileges to be provided to the witness and, if so, for what duration.

(o) Any other matters which may be thought relevant to a decision in the particular case.

5. CONCLUSION

5.1 These guidelines do not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. It is presently sufficient to state that throughout a prosecution the prosecutor must conduct himself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of Government or of individuals - he is a servant of justice. At the same time it is important not to lose sight of the fact that the prosecutor discharges his responsibilities in an adversarial context and seeks to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigourously and skilfully.

5.2 It is intended that this statement will be kept under review. Any changes will be made public.

JUN 30 1988

OFFICE OF THE

MINISTER OF JUSTICE

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23 June 1988

Mr Gordon F Proudfoot
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CANADA

Dear Mr Proudfoot

I have your letter of 25 May 1988 regarding the Canadian Bar Association's submission to a Royal Commission of Enquiry.

The issue of disclosure in criminal cases was the subject of the Criminal Law Reform Committee's final report. I attach a copy of the report which canvasses the present law in New Zealand, reviews current legal practice, and makes recommendations for legislative change. I can tell you that the report will form the basis of Government legislation on the topic.

The current position in New Zealand law is that the prosecution has a duty to disclose to the defence the name and address of any person interviewed by the Police (but not to be called as a prosecution witness) who can give evidence on a material subject, whether or not the prosecution considers the person creditworthy. This statement of the law derives from R v Mason [1975] 2 NZLR 289; [1976] 2 NZLR 122 (CA). There is no general duty to go further and disclose the actual information tendered to the Police. However, the court recognised that there may be exceptional circumstances in which a failure to disclose the substance of the information could give rise to a miscarriage of justice.

Disclosure of statements taken from a defendant is reasonably common practice, but by no means automatic. The Criminal Law Reform Committee recommended that any such statements, or other records of interviews with a defendant, should be disclosed on request before the defendant is asked to plead to the charge.

These matters are all canvassed in the Committee's report. In particular, I refer you to paragraphs 13-20, 50-60, 115-156 and to Part IV, which contains the Committee's proposed legislative scheme.

I trust these comments will be of some assistance in the preparation of your brief.

Yours sincerely

Minister of Justice

REPORT
on
DISCOVERY IN CRIMINAL CASES

Criminal Law Reform Committee
New Zealand

12 We have also considered whether disclosure should be required of the defence. In this regard, we accept that there should be no duty to disclose material which may assist the prosecution to prove its case. More generally, while the diminution of surprise is a desirable object, we do not think, for other reasons, that mandatory disclosure by the defence can be sustained in principle or in practice except in respect of "expert" evidence. This would include evidence of a medical, technical or scientific nature which the defence proposes to use at the trial.

PART I

CURRENT LAW AND PRACTICE

BACKGROUND

13 New Zealand criminal law has never provided for a general scheme of pre-trial disclosure. Subject to a small number of common law rules and statutory provisions, disclosure is based principally on the prosecution's discretion in the conduct of its case. The exchange of information on a counsel-to-counsel basis is typically an informal process. The extent of pre-trial disclosure may hinge on a number of factors including the degree of trust between counsel, the seriousness of the charge, the perceived credibility of witnesses, and also of some significance, the respective views of counsel about the nature of the criminal process.

14 The prosecutor performs the pivotal function in a criminal trial. His or her objective is to present "a precisely formulated case for the Crown against the accused, and to call evidence in support of it."[2] It is for the prosecutor to determine what evidence will be adduced; no duty is owed to the defence to call every witness who can testify to the events giving rise to the offence charged.[3] Nevertheless, it is widely accepted that the prosecutor must present the Crown case with fairness to the accused.

15 Generally, it is for the prosecutor to determine whether fairness requires disclosure of information or elements of the Crown case. Not surprisingly, in an adversary system there is a diversity of opinion amongst prosecutors as to the scope and form of disclosure which should be allowed. There are, however, a minimal number of legal obligations with which the prosecution must comply.

FORMAL DISCLOSURE

16 The leading New Zealand case is R v Mason,[4] which concerned the duty of the prosecution to disclose information which it did not intend to produce in evidence. In Mason, defence counsel, after depositions, sought production of copies of statements made by witnesses who were not to be called. Moller J applied English authority[5] in finding that "if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him creditworthy or not, it must make his name and address available to the defence".[6] It is for the prosecutor to decide whether the evidence is "material" but that decision must be reached with "complete fairness"[7] to the defence. It is not clear whether the rule in Mason applies prior to depositions.

17 As to statements made by such witnesses, Moller J concluded:[8]

> I find that there is no general duty placed upon the prosecution to make available to the defence the written statements that the police have obtained from the persons who, in this case, will come within the ambit of my order [to supply their names, addresses and phone numbers].

18 His Honour suggested that production of such statements may be required in the exceptional case:[9]

> At the same time I am inclined to the view, although I make no decision upon the matter, that in truly exceptional cases, a refusal by the prosecution to comply, at least to some carefully considered extent, with a request for the production of statements of this kind might result in unfairness to the defence, and even, perhaps, a miscarriage of justice.

19 The Court of Appeal[10] affirmed Moller J's decision, agreeing that there must be some circumstances which would justify more than the disclosure of the names of witnesses but declining to set limits on a Judge's discretion to make an order in favour of the defence.

20 There is one categorical exception to the general principle that there is no duty to disclose statements by persons interviewed but not to be called. The exception concerns identification evidence. Pursuant to section 344C of the Crimes Act 1961,[11] the prosecution must supply to the accused, on request, the name and address of any identification witness, a statement of any description of the offender given by the witness, and a copy of any identikit picture or drawing made by such a witness or from information supplied by him or her. Production of the name and address of the witness may be excused if the Judge is satisfied that such an order is necessary to protect the witness or any other person.

Statements of Witnesses Called by the Prosecution

21 There is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence.[12] One or two exceptions should be noted.

22 The first concerns previous inconsistent statements. Where the witness's statement is seriously at variance with his or her actual or intended testimony at trial, defence counsel is entitled to see the statement.[13] Although production has been ordered in a number of cases,[14] the duty to disclose will not extend to statements which exhibit only minor discrepancies with oral testimony.

23 The second exception applies to witness statements shown to the accused. In R v Church,[15] Chilwell J ordered production of statements which were "specifically shown to the accused for the precise purpose of noting his reaction thereto".[16] His Honour reasoned that the police had waived any "privilege" they had in the statements once they had been disclosed to the accused.

24 Barring these limited exceptions, defence counsel can assert no general right to inspect or obtain production of statements made by prosecution witnesses.

Character of Witness

25 The previous convictions of Crown witnesses may, in some circumstances, be subject to disclosure. While it seems clear that if the prosecution knows of a conviction going to the credit of a witness, it should be disclosed,[17] it is doubtful whether the prosecution has a duty to disclose all convictions of all witnesses, even on request.[18] On review, the conviction of the accused will stand unless it can be shown that the verdict was unsafe.[19]

Expert Evidence

26 There are no firm rules regarding the disclosure of "expert" evidence of a medical, scientific or technical nature. In the occasional case, the courts have found reason to require disclosure of evidence relating to the psychiatric disposition of the accused.[20] No general principle can be readily extracted from such decisions.

27 Rules providing a guide to access by the defence to forensic evidence prepared by the DSIR are found in the New Zealand Law Society's Code of Ethics[21] and, in the same terms, in Police General Instructions.[22] Under the rules which, it is stated, "cannot bind practitioners in the conduct of an individual case" the defence must request access to reports and information through the prosecution. On request, the prosecutor shall advise the defence of the general findings of an analysis or examination conducted by the DSIR. A copy of any written report or certificate will be supplied. A request as to the general technique employed by the analyst will be answered in written form. A DSIR analysis or test which favours the defendant shall be forwarded to the defence even if there is no request for it. The defence may ask that the DSIR perform a particular test on a prosecution exhibit or on material supplied by the defence, and the request shall be satisfied unless after consultation with the prosecutor "good reason" exists for refusal.

28 The ethical rules contained in the Code do not deal with disclosure by the defence, nor with access to evidence prepared by "experts" other than those employed by the DSIR.

witness statements and summaries of expected testimony, disclosure in general being less common. When asked whether they disclosed information of any kind which did not assist the prosecution but which might be helpful to the defence, only prosecutors in Toronto appeared to have a regular practice of disclosure.

The Institute's Survey

50 When we commenced consideration of this topic, it was apparent that we needed more information on the practice of disclosure in New Zealand. Apart from Dr Hodge's study, which was itself limited in its scope, the evidence before us was largely anecdotal. In order to approach our inquiry with any confidence, we arranged for the Institute of Criminology at Victoria University to conduct a survey of prosecutors and defence counsel, and that survey is being published[38] contemporaneously with this report.

51 The study, written by Dr M Stace of the Institute, was designed to obtain information of two kinds. First, we wanted to know the extent of disclosure in current practice. Second, we thought it useful to canvass opinion as to the scope and form of disclosure which should be required.

52 A series of questionnaires[39] was prepared for distribution to Crown solicitors, defence counsel in jury trials, police prosecutors, and defence counsel in summary hearings. Each questionnaire dealt with current practice and possible reform. The questionnaires focussed on disclosure at the following stages of the trial process: prior to plea; prior to a defended summary hearing; prior to the preliminary hearing; and before trial on indictment.

53 While we do not propose to discuss Dr Stace's findings in great detail here, a number of general matters should be mentioned. The study confirmed that the range of disclosure varied considerably between individual prosecutors. Also not surprisingly, the responses of prosecutors and defence counsel often differed as to the frequency of disclosure of particular categories of information. For instance, there was a reasonable consensus that the names and addresses of persons interviewed by the prosecution were usually disclosed but considerable disagreement about the freedom of access to exhibits held by the Crown.

54 Generally, both prosecutors and defence counsel confirmed that a relationship of trust was the most common basis for disclosure. As one prosecutor remarked, disclosure was "not based on type of case but type of defence counsel".[40] Additional factors influencing the prosecution approach included the willingness of defence counsel to reciprocate by disclosing information about the defence case, the likelihood of a guilty plea being forthcoming, the seriousness of the charge(s), the perception that information could be used to manufacture a defence or would lead to perjury or intimidation

of witnesses, and a desire to protect the privacy of persons who supplied information in confidence.

55 In some instances, the practice was said by defence counsel to vary between prosecution agencies, although the variation was not consistent. As between the police, Crown Solicitors and the Ministry of Transport, opinion was often divided as to which agency was more helpful.

56 It is at least clear that the exercise of prosecutorial discretion presently holds the key to disclosure between the parties. This observation is particularly important in respect of material which the prosecution is legally required to disclose. A number of the rules of law require the prosecution to make an assessment of the "materiality" or "relevance" of evidence which could be given by persons interviewed by the prosecution. Dr Stace found, however, that prosecutors frequently take other matters (such as those mentioned in paragraph 54) into account. He also found that at least some prosecutors do not comply with Mason in that the names and addresses of potential witnesses are often disclosed only on request.

57 Moreover, the responses from both prosecutors and defence counsel indicate that the notions of "materiality" and "relevance" are susceptible to differing interpretations. The majority of Crown Solicitors confirmed that fairness and possible assistance to the defence were the central criteria in determining materiality, while one or two others implied that the only material evidence was that which supported, or at least did not undermine, the Crown case. The difficulty of subjectively assessing what material would be relevant to the defence was freely acknowledged.

58 At the same time, the prosecution often makes available material it has no duty to disclose, albeit on request. For instance, a summary of facts is usually made available to defence counsel, if requested, before a plea is entered in the District Court. Likewise, prior to a defended summary hearing, the names of prosecution witnesses, copies of forensic reports and the defendant's statement are commonly disclosed.

59 Both prosecution and defence counsel confirmed that such disclosure is by no means automatic. For reasons which have already been mentioned, prosecutors are equally likely to withhold the information. In respect of most categories of information, prosecutors exhibit a wide variation of practice.

60 Prosecutors are particularly cautious about disclosing material to an unrepresented defendant. In Dr Stace's study, a substantial minority of respondents said that at all stages of proceedings prosecution practice differed if the defendant had no counsel. It is apparently rare for the unrepresented defendant to request information and prosecutors seldom initiate contact. In many cases, the caution arises from

that a general notion of privacy attaches to information supplied to the Police. This cannot be so because any person who is interviewed may be required to give evidence, irrespective of his or her wishes. That person does not retain property in the information. There is then a difficulty in reasoning that because a person is not called, his or her consent must first be obtained before the information can be handed over. Indeed, some might think that disclosure of names and addresses only will result in greater, rather than less, infringement of privacy if it means that counsel will then feel bound to approach every person so named.

153 On balance, the majority of the Committee would not place a restriction on the disclosure of statements by persons who have supplied information about particular matters nominated by the defence. We all accept that there is a potential for defence counsel to embark on so-called "fishing" expeditions and agree that requests framed in this way would go beyond the purpose of the disclosure scheme. Most of us consider that the prosecution would be perfectly justified in declining a request which appeared to be either frivolous or vexatious. The merits of the request could then be determined by a Judge, if the defence decided to dispute non-disclosure.

154 As to "statements", we would not restrict disclosure to formal signed statements. Unsigned statements and records of interviews would also be subject to the disclosure rules. If the information is "material" or of particular interest to the defence, access to it should not be denied merely because of the form in which it is recorded.

(vi) Exhibits collected by the prosecution but not to be produced in evidence

155 A similar procedure is recommended for disclosure of exhibits collected by the prosecution. We envisage a duty to notify the defence of any exhibit which is "material". On request, a list of other exhibits relating to particular matters nominated by the defence should be supplied. We also recommend a right to receive copies of, or to inspect, such exhibits if requested. If the articles in question are capable of being duplicated copies should be supplied. Otherwise, the parties should make suitable arrangements for supervised inspection.

156 Although such provisions would afford fairly comprehensive disclosure of information arising out of the police investigation, the proposal is so framed that the obligation to seek access to information other than that considered to be "material" rests with the defence. The sensible course, in our view, is to require the defence to request disclosure and to do so with a reasonable degree of particularity.

MODE OF DISCLOSURE

157 We have already commented, in particular instances, on the means by which disclosure should be effected. Subject to those specific recommendations, we propose that disclosure should usually involve copies of the relevant documents being made available to the defence. In respect of those categories of information which must be supplied automatically at the pre-trial stage, we envisage a standard procedure whereby the prosecution notifies the appropriate court that the disclosure requirements have been satisfied.

158 In all cases, the responsibility for provision of documents and making any other arrangements for disclosure should rest with whoever is to conduct the prosecution. Requests for information should always be forwarded to the prosecutor and not, for instance, to instructing agencies or particular witnesses. It should be the duty of the officer in charge of each case to draw the prosecutor's attention to any and all information which is subject to the rules. It is then for the prosecutor to make disclosure as required, which will in many cases entail the exercise of judgment as to the materiality or relevance of particular information (on this point see paragraphs 163-168). A similar arrangement should apply to prosecutions initiated by other Government departments or local bodies, or to any private prosecution.

159 Except where specifically mentioned, we do not favour a strict timetable for disclosure, incorporating a statutory period of notice. Such a requirement would be quite impractical in many cases, particularly those summary prosecutions which entail an early court appearance. A more flexible approach is required. There will, for instance, be information which does not become available to the prosecution until shortly before a hearing. There is the possibility that the defence itself may not request, at the one time, all the information it is entitled to receive. The preferable course, in our view, is to allow counsel to make their own arrangements for disclosure. While there will need to be provision for adjournment if disclosure has not been made or if the defence has not received sufficient opportunity to assess the material disclosed, a trial should be allowed to continue where an unreasonably late request is made and no injustice would result from proceeding.

160 It follows that there will be a continuing obligation to disclose information. In any case where there is a duty to disclose or where a request has been made for information governed by the rules, any information which falls within the terms of the duty or request should be disclosed as and when it come to the attention of the prosecutor.

161 We have one further recommendation under this head, concerning the defendant who appears without legal representation. That person should have the same rights to request and receive information as would counsel on his or her behalf.

JUN 2 8 1988

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Uw brief:
Onderwerp:

Ons kenmerk: DIDO/APP-127
Datum : 21 June 1988
Doorkiesnummer: 070-70 68 50

Dear mr. Proudfoot,

In reply to your letter of 25 May 1988 concerning the Canadian Bar submission to the Royal Commission on the prosecution of Donald Marshall Jr, I would inform you as follows.

Under Articles 30 et seq. of the code of Criminal Procedure (*Wetboek van Strafvordering*, Sv.), the suspect is allowed access to the trial document. However, during the preliminary judicial examination the examining magistrate is authorised to withhold certain trial documents from the suspect and the defence counsel (Article 51, Sv). The Public Prosecutor is also entitled to do so.

In such cases the suspect must be informed in writing that the document to which he has been given access are incomplete (Article 30, paragraph 2, Sv.). He must be allowed to see the official record of his interrogation. The same applies to official records of the interrogations of other individuals, if their contents have been reported to the suspect by word of mouth. However, an exeption can legally be made with regard to the official reports of interrogations at which the suspect was not present (Article 31, paragraph 1 b, Sv.).

Once the examination has been concluded the suspect is entitled to see <u>all</u> of the trial documents (Article 33, Sv.), including statements by experts regarding the extent to which he may be held responsible for his actions.

Article 51 of the Sv. explicitly accords the defence counsel the same rights as those granted to the suspect by Articles 30-34 of the Sv. Naturally, this also applies to trial documents in cases where the suspects are not being held in custody. If documents are withheld from the suspect, he is entitled (under Article 32, Sv.) to submit a petition to the court to which the Public

Prosecutor or the examining magistrate is attached. It is only during the preliminary judidial examination that the law makes provision for the defence counsel to be present at the interrogations of witnesses (Article 186, Sv.). The suspect may not attend the interrogations of witnesses unless the circumstances for which provision is made in Article 187, Sv. obtain. However, he is informed of the statements made by witnesses as soon as he himself is interrogated. Here, too, the proviso that this must not conflict with the interests of the examination (Article 209, Sv.9) is applicable.

The Code of Criminal Procedure has little to say on the subject of the interrogation of witnesses by investigating officers. Article 159 of the Sv. requires the Assistant Public Prosecutors and the other investigating officers to wait for orders from the Public Prosecutor after drawing up their first official report. It is only if the importance of the investigation is such that further delay is impossible that they continue their investigation, collecting data which may help to advance the case and drawing up official reports on suspect or his lawyer to be present during this investigation. There are no provisions in the law which might imply or give rise to such an obligation. Nor is the Public Prosecutor obliged to allow the suspect or the defence counsel to be present on any occasions when he is questioning witnesses, which he may do on the basis of his personal competence to investigate offences. (Article 148, paragraph 3, Sv.).

Yours sincerely,

mr. M.H.J.M. van Hezik
Information Department

— 2. Hem wordt daartoe, telkens wanneer hij dit verzoekt, zooveel mogelijk de gelegenheid verschaft om zich met zijn raadsman of met zijne raadslieden in verbinding te stellen.

Art. 29. — 1. In alle gevallen waarin iemand als verdachte wordt gehoord, onthoudt de verhoorende rechter of ambtenaar zich van alles wat de strekking heeft eene verklaring te verkrijgen, waarvan niet gezegd kan worden dat zij in vrijheid is afgelegd. De verdachte is niet tot antwoorden verplicht.

— 2. Voor het verhoor wordt de verdachte medegedeeld dat hij niet verplicht is tot antwoorden.

— 3. De verklaringen van den verdachte, bepaaldelijk die welke eene bekentenis van schuld inhouden, worden in het proces-verbaal van het verhoor zooveel mogelijk in zijne eigen woorden opgenomen. De mededeling bedoeld in het tweede lid wordt in het proces-verbaal opgenomen.(*1)

Art. 30. — 1. Tijdens het gerechtelijk vooronderzoek staat de rechter-commissaris, en overigens tijdens het voorbereidende onderzoek het openbaar ministerie, aan den verdachte op diens verzoek toe van de processtukken kennis te nemen.

— 2. Niettemin kan de rechter-commissaris of het openbaar ministerie, indien het belang van het onderzoek dit vordert, den verdachte de kennisneming van bepaalde processtukken onthouden. In dit geval wordt den verdachte schriftelijk medegedeeld dat de hem ter inzage gegeven stukken niet volledig zijn.

Art. 31. Aan den verdachte mag niet worden onthouden de kennisneming van:

a. de processen-verbaal van zijne verhooren;

b. de processen-verbaal betreffende verhooren of handelingen van onderzoek, waarbij hij of zijn raadsman de bevoegdheid heeft gehad tegenwoordig te zijn, tenzij en voor zoover uit een proces-verbaal blijkt van eenige omstandigheid waarvan hij in het belang van het onderzoek tijdelijk onkundig moet blijven, en in verband daarmede een bevel als bedoeld in artikel 50, tweede lid, is gegeven;

c. de processen-verbaal van verhooren, van welker inhoud hem mondeling volledige mededeeling is gedaan.

Art. 32. Ingeval den verdachte de kennisneming van processtukken wordt onthouden, kan hij daartegen binnen drie dagen na de mededeeling vermeld in het tweede lid van artikel 30, een bezwaarschrift indienen bij het gerecht waartoe het openbaar ministerie of de rechter-commissaris behoort, dat binnen vijf dagen beslist.

Art. 33. De kennisneming van alle processtukken in het oorspronkelijk of in afschrift mag den verdachte niet worden onthouden zoodra de beschikking tot sluiting van het gerechtelijk vooronderzoek overeenkomstig artikel 238 voor den officier van justitie onherroepelijk is geworden, dan wel het gerechtelijk vooronderzoek met toepassing van artikel 258, tweede lid, is beëindigd, of, indien een gerechtelijk vooronderzoek niet heeft plaats gehad, zoodra de kennisgeving van verdere vervolging of de dagvaarding ter terechtzitting in eersten aanleg is beteekend.(*2)

Art. 34. — 1. De wijze waarop de kennisneming van processtukken mag geschieden, wordt geregeld bij algemeenen maatregel van bestuur.

— 2. De verdachte kan van de stukken waarvan hem de kennisneming is toegestaan, ter griffie afschrift krijgen; doch het onderzoek mag daardoor niet worden opgehouden.

— 3. Omtrent het verstrekken van afschriften en uittreksels worden regelen gesteld bij algemene maatregel van bestuur.(*3)

Art. 35. — 1. Het gerecht dat tot eenige beslissing in de zaak is geroepen, is bevoegd den verdachte in de gelegenheid te stellen om te worden gehoord.

— 2. Aan een daartoe strekkend verzoek van den verdachte wordt gevolg gegeven, tenzij het belang van het onderzoek dit verbiedt.

— 3. Artikel 23, laatste lid, is van toepassing.

Art. 36. — 1. Wordt eene vervolging niet voortgezet, dan kan het gerecht in feitelijken aanleg, voor hetwelk de zaak het laatst werd vervolgd, op het verzoek van den verdachte verklaren dat de zaak geëindigd is. De verdachte wordt gehoord, althans opgeroepen.

— 2. Het gerecht is bevoegd, de beslissing op het verzoek telkens gedurende een bepaalden tijd aan te houden, indien het openbaar ministerie aannemelijk maakt dat alsnog verdere vervolging zal plaats vinden.

— 3. De beschikking wordt onverwijld aan den verdachte beteekend.

(*1) Art. 29 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 33 is gewijzigd bij de Wet van 26 juni 1975, *Stb.* 340.
(*3) Art. 34 is gewijzigd bij de Wet van 28 maart 1963, *Stb.* 130.

7°. de door Onze Minister van Justitie aangewezen andere ambtenaren van het Korps Rijkspolitie en van gemeentepolitie;

8°. de door Onze Minister van Justitie aangewezen andere onderofficieren van de Koninklijke marechaussee.(*1)

Art. 155. De hulpofficieren van justitie bij de nummers 1-6 van artikel 154 vermeld, doen de processen-verbaal, bij hen ingekomen of door hen opgemaakt, en de inbeslaggenomen voorwerpen onverwijld toekomen aan de officier van justitie.(*2)

Art. 156. — 1. De hulpofficieren van justitie bij de nummers 7 en 8 van artikel 154 vermeld en de ambtenaren, bedoeld bij artikel 141, die geen hulpofficier van justitie zijn, doen hun processen-verbaal, de aangiften of berichten ter zake van strafbare feiten, met de inbeslaggenomen voorwerpen, onverwijld toekomen aan de hulpofficier van justitie, bedoeld bij artikel 155, onder wiens rechtstreeks bevel of toezicht zij staan voor zover Onze Minister van Justitie niet anders bepaalt.

— 2. De officier van justitie kan in bijzondere gevallen gelasten, dat een en ander hem, in afwijking van het voorafgaande lid, rechtstreeks zal worden toegezonden.(*2)

Art. 157. Onverminderd het bepaalde in bijzondere wetten doen de personen bedoeld bij artikel 142 hun processen-verbaal, de aangiften of berichten ter zake van strafbare feiten, met de inbeslaggenomen voorwerpen, onverwijld toekomen aan de officier van justitie, voor zover Onze Minister van Justitie niet anders bepaalt.(*2)

Art. 158. Kan het optreden van de officier van justitie niet worden afgewacht, dan heeft ook ieder zijner hulpofficieren de bevoegdheden bij de artikelen 150 en 151 omschreven.(*2)

Art. 159. Na overeenkomstig de voorgaande vier artikelen te hebben gehandeld, wachten de hulpofficieren van justitie en de overige opsporingsambtenaren de nadere bevelen van de officier van justitie af; gedoogt het belang van het onderzoek zodanig afwachten niet, dan zetten zij het onderzoek inmiddels voort en winnen zij de narichten in, die de zaak tot meer klaarheid kunnen brengen. Van dit onderzoek en de ingewonnen narichten doen zij blijken bij proces-verbaal, waarmede zij handelen overeenkomstig de artikelen 155, 156 of 157.(*2)

VIERDE AFDEELING

Aangiften en klachten

Art. 160. — 1. Ieder die kennis draagt van een der misdrijven omschreven in de artikelen 92-110 van het Wetboek van Strafrecht, in Titel VII van het Tweede Boek van dat Wetboek, voor zoover daardoor levensgevaar is veroorzaakt, of in de artikelen 287-299 van dat wetboek, van menschenroof of van verkrachting, is verplicht daarvan onverwijld aangifte te doen bij een opsporingsambtenaar.

— 2. De bepaling van het eerste lid is niet van toepassing op hem die door de aangifte gevaar zou doen ontstaan voor eene vervolging van zichzelven of van iemand bij wiens vervolging hij zich van het afleggen van getuigenis zou kunnen verschoonen.

— 3. Evenzoo is ieder die kennis draagt dat iemand gevangen gehouden wordt op eene plaats die niet wettig daarvoor bestemd is, verplicht daarvan onverwijld aangifte te doen bij een opsporingsambtenaar.

Art. 161. Ieder die kennis draagt van een begaan strafbaar feit is bevoegd daarvan aangifte of klachte te doen.

Art. 162. — 1. Openbare colleges en ambtenaren die in de uitoefening van hun bediening kennis krijgen van een misdrijf met de opsporing waarvan zij niet zijn belast, zijn verplicht daarvan onverwijld aangifte te doen, met afgifte van de tot de zaak betrekkelijke stukken, aan de officier van justitie of aan een van zijn hulpofficieren,

a. indien het misdrijf is een ambtsmisdrijf als bedoeld in titel XXVIII van het Tweede Boek van het Wetboek van Strafrecht, dan wel

b. indien het misdrijf is begaan door een ambtenaar die daarbij een bijzondere ambtsplicht heeft geschonden of daarbij gebruik heeft gemaakt van macht, gelegenheid of middel hem door zijn ambt geschonken, dan wel

c. indien door het misdrijf inbreuk op of onrechtmatig gebruik wordt gemaakt van een regeling waarvan de uitvoering of de zorg voor de naleving aan hen is opgedragen.

— 2. Zij verschaffen de officier van justitie of de door deze aangewezen hulpofficier desgevraagd alle inlichtingen omtrent strafbare feiten met de opsporing waarvan zij niet zijn belast en die in de uitoefening van hun bediening te hunner kennis zijn gekomen.

— 3. De bepalingen van het eerste en tweede lid zijn niet van toepassing op de ambtenaar die door het doen van aangifte of het verschaffen van inlichtingen gevaar

(*1) Art. 154 is gewijzigd bij de Wetten van 4 juli 1957, *Stb.* 244, 24 okt. 1979, *Stb.* 615.
(*2) De art. 155-159 zijn gewijzigd bij de Wet van 4 juli 1957, *Stb.* 244.

vooronderzoek geen grond bestaat, verklaart hij dit bij een met redenen omklede beschikking.

— 2. Onverminderd het bepaalde in artikel 181 kan de rechter-commissaris, zo de verdachte zich in voorlopige hechtenis bevindt en aan hem nog niet een dagvaarding ter terechtzitting of een kennisgeving van verdere vervolging is betekend, ambtshalve of op het verzoek van de verdachte een gerechtelijk vooronderzoek instellen ten aanzien van het feit waarvoor de voorlopige hechtenis is bevolen. Indien de rechter-commissaris oordeelt, dat grond tot gebruik van deze bevoegdheid bestaat, verklaart hij dit bij een met redenen omkleede beschikking. Een afschrift daarvan zendt hij aan de officier van justitie.

— 3. Zodra een overeenkomstig het voorgaande lid ingesteld gerechtelijk vooronderzoek moet worden uitgebreid tot andere strafbare feiten, dient de officier van justitie een daartoe strekkende vordering in.

— 4. Wanneer een meer nauwkeurige omschrijving van het feit mogelijk is geworden, dient de officier van justitie een dienovereenkomstige vordering in, zodra het belang van het onderzoek de indiening toelaat.

— 5. Artikel 182, tweede lid, en artikel 183 zijn van overeenkomstige toepassing.(*1)

TWEEDE AFDEELING

Instellen van het gerechtelijk vooronderzoek

Art. 185. — 1. Indien tot het instellen van het onderzoek wordt overgegaan, worden zo spoedig en zo dikwijls het belang der zaak dit vordert, verdachten, getuigen en deskundigen gehoord. Bestaat een redelijk vermoeden dat de verdachte op geld waardeerbaar voordeel van enig belang heeft verkregen door middel van of uit het feit ter zake waarvan het onderzoek wordt ingesteld, dan wordt dit mede in het onderzoek betrokken.

— 2. Op uitnodiging van de rechter-commissaris of voor zover deze op een schriftelijk daartoe gedaan verzoek verklaard heeft daartegen geen bezwaar te hebben, kan de officier van justitie de verhoren geheel of gedeeltelijk bijwonen. Hij is daartoe steeds bevoegd, indien de raadsman bij het verhoor tegenwoordig is. In dit geval bevordert de rechter-commissaris, op het verzoek van de officier van justitie, dat deze bij de verhoren tegenwoordig kan zijn, zonder dat het onderzoek daardoor mag worden opgehouden.

— 3. De officier van justitie kan, ook wanneer hij de verhoren niet bijwoont, de vragen opgeven, die hij wenst te zien gesteld.(*2)

Art. 186. — 1. Voor zoover het belang van het onderzoek dit naar het oordeel van den rechter-commissaris niet verbiedt, is de raadsman bevoegd de verhooren bij te wonen. De rechter-commissaris bevordert, op het verzoek van den raadsman, dat deze bij de verhooren tegenwoordig kan zijn, zonder dat het onderzoek daardoor mag worden opgehouden.

— 2. Indien de raadsman het verhoor bijwoont, noodigt de rechter-commissaris hem uit om in of buiten tegenwoordigheid van den te verhooren persoon de vragen op te geven, die hij wenscht te zien gesteld.

— 3. Indien de raadsman het verhoor niet bijwoont, kan hij de vragen opgeven, die hij wenscht te zien gesteld.

— 4. Het eerste lid is niet van toepassing ten aanzien van den raadsman van een verdachte die zich naar het oordeel van den rechter-commissaris desbewust en zonder dat van eene geldige reden van verhindering blijkt, aan zijne verschijning in het gerechtelijk vooronderzoek onttrekt.

Art. 187. Indien er naar zijn oordeel gegrond vermoeden bestaat dat de getuige of de deskundige niet ter terechtzitting zal kunnen verschijnen, noodigt de rechter-commissaris den officier van justitie, den verdachte en den raadsman tot bijwoning van het verhoor uit, tenzij het belang van het onderzoek geen uitstel van het verhoor gedoogd.

Art. 188. De rechter-commissaris neemt de noodige maatregelen om te beletten dat de ten verhoore verschenen verdachten, getuigen en deskundigen zich vóór of tijdens hun verhoor met elkander onderhouden.

Art. 189. — 1. De verdachten, getuigen en deskundigen worden ieder afzonderlijk verhoord.

— 2. De rechter-commissaris kan hen echter, hetzij ambtshalve, hetzij op de vordering van den officier van justitie of op het verzoek van den verdachte of diens

(*1) Art. 184 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 185 is gewijzigd bij de Wet van 31 maart 1983, *Stb.* 153.

— 2. Het bevel vermeldt de redenen welke tot de inverzekeringstelling hebben geleid.

Art. 207. — 1. Telkens ter gelegenheid van het eerste verhoor van de verdachte, nadat een vordering als vermeld in de artikelen 181, 182 en 184, derde en vierde lid, is ingekomen, dan wel een beschikking als bedoeld in artikel 184, tweede lid, is gegeven, wordt hem door de rechter-commissaris een afschrift van die vordering of beschikking ter hand gesteld.

— 2. De rechter-commissaris kan echter bevelen, dat de vordering of de beschikking reeds vóór het verhoor aan e verdachte zal worden betekend.(*1)

Art. 208. — 1. De verdachte kan bij zijn verhoor mondeling getuigen en deskundigen alsmede feiten ten onderzoek opgeven. Bij het proces-verbaal wordt voor zoover de opgave redelijke grenzen niet overschrijdt, van een en ander melding gemaakt, met korte aanduiding van hetgeen de getuigen en deskundigen volgens de opgave van den verdachte zouden kunnen verklaren.

— 2. Indien de rechter-commissaris bezwaar heeft, hetzij tegen het vermelden van een en ander in het proces-verbaal, hetzij tegen het hooren van de opgegeven getuigen of deskundigen, hetzij tegen het onderzoek naar de opgegeven feiten, deelt hij zijne weigering om tot een of ander over te gaan, bij het verhoor of het eerstvolgend verhoor aan den verdachte mede.

— 3. De verdachte kan binnen drie dagen daarna tegen die weigering een bezwaarschrift indienen bij de rechtbank die zoo spoedig mogelijk beslist.

Art. 209. Den verdachte wordt bij zijn verhoor mondeling mededeeling gedaan van de verklaringen van getuigen en deskundigen, die buiten zijne tegenwoordigheid zijn gehoord, voor zoover naar het oordeel van den rechter-commissaris het belang van het onderzoek dit niet verbiedt. Wordt den verdachte de wetenschap van bepaalde opgaven onthouden, dan geeft de rechter-commissaris hem dit mondeling te kennen.

VIERDE AFDEELING

Het verhoor van den getuige

Art. 210. De rechter-commissaris verhoort den getuige, wiens verhoor door hem wenschelijk wordt geoordeeld, door den rechter wordt bevolen of door den officier van justitie wordt gevorderd. Hij kan diens dagvaarding bevelen.

Art. 211. — 1. De eerste twee leden van artikel 201 alsmede de artikelen 203 en 204 vinden ten aanzien van het verhoor van getuigen, die zich in een ander kanton of arrondissement of in de Nederlandse Antillen of Aruba ophouden, overeenkomstige toepassing. Op den verhoorenden rechter binnen het rijk zijn dan de artikelen dezer afdeeling van toepassing, met uitzondering van de artikelen 221-225.

— 2. Houdt de getuige zich op in een ander arrondissement, dan beveelt de rechter-commissaris diens dagvaarding alleen, indien hij eene overkomst noodzakelijk of in het belang van den getuige oordeelt. Het bevel wordt gegeven, hetzij ambtshalve, hetzij op de vordering van den officier van justitie of op het verzoek van den verdachte of diens raadsman. In de dagvaarding wordt van de noodzakelijkheid der overkomst of van het belang van den getuige melding gemaakt.(*2)

Art. 212. — 1. Indien de getuige verhinderd is te verschijnen, kan zijn verhoor geschieden op de plaats waar hij zich ophoudt.

— 2. De rechter-commissaris kan daartoe met de personen door hem aangewezen, en met inachtneming van de bepalingen van artikel 192 elke plaats betreden.

Art. 213. — 1. Ieder die als getuige is gedagvaard, is verplicht voor den rechter-commissaris te verschijnen.

— 2. Indien de getuige niet op de dagvaarding verschijnt, kan de rechter-commissaris hem andermaal doen dagvaarden en daarbij voegen een bevel tot medebrenging of zoodanig bevel later uitvaardigen.

Art. 214. — 1. Indien dit in het belang van het onderzoek dringend noodzakelijk is, kan de rechter-commissaris bevelen dat de overeenkomstig het voorgaande artikel medegebrachte getuige gedurende ten hoogste vier en twintig uren in eene door hem aan te wijzen plaats in verzekering zal worden gesteld.

— 2. Het bevel vermeldt de redenen die tot de inverzekeringstelling hebben geleid.

Art. 215. De getuige verklaart de geheele waarheid en niets dan de waarheid te zullen zeggen.

Art. 216. — 1. De rechter-commissaris beëedigt, indien er naar zijn oordeel gegrond vermoeden bestaat dat de getuige niet op de terechtzitting zal kunnen verschijnen, of in geval de overlegging van beëedigde getuigenissen noodig is om de uitleve-

(*1) Art. 207 is gewijzigd bij de Wet van 26 okt. 1973, *Stb.* 509.
(*2) Art. 211 is gewijzigd bij de Wetten van 11 dec. 1980, *Stb.* 666, 12 dec. 1985, *Stb.* 662 (i.w.tr. 1 jan. 1986).

Der Bundesminister der Justiz
- 3262 - 1 - R2 0688/88 -
(Geschäftszeichen: bei Antwort bitte angeben)

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Dear Mr. Proudfoot,

Thank you for your letter of 25 May 1988, in reply to which I should like to give you the following information:

Pursuant to section 147 subsection 1 of the German Criminal Procedure Code, defence counsel is entitled to inspect those files which are available to the court as well as those which would have to be submitted to the court if an indictment were to be preferred, and to inspect items of evidence that are in official custody. However, according to subsection 2 of this provision, defence counsel may be denied inspection of the files or of individual documents on file and may be denied inspection of the items of evidence in official custody where no note has yet been made in the files stating that investigations have been completed and where inspection of the files would jeopardise the purpose of the investigation. By virtue of subsection 3 of section 147 of the German Criminal Procedure Code the following exceptions are made in respect of the above restriction: inspection of written records made of the

examination of the accused and of those judicial investigatory acts in respect of which defence counsel's presence was permitted or should have been permitted.
Where a witness is examined by a judge defence counsel's presence is permitted pursuant to section 168 a subsection 2 of the German Criminal Procedure Code. On the other hand, however, defence counsel's right to be present does not apply where a witness is examined by the public prosecutor.

The interaction of these two provisions thus has the effect that on application defence counsel must be given access, at any stage, to the written record of a judicial examination of a witness, i.e. also where investigations are still in progress. On the other hand, under the conditions referred to, he may be denied inspection of the files until the investigations have been completed in a case where the witness was examined by the police or the public prosecution.

Furthermore, according to section 160 subsection 2 of the German Criminal Procedure Code the public prosecutor is obliged to investigate not only incriminating but also exonerating factors and, where there is a fear that any evidence may be lost, he has to make sure that such evidence is taken.

For your information, I am enclosing photocopies of sections 147 and 168 c of the German Criminal Procedure Code, to which reference has been made above.

Yours sincerely,
For the Federal Minister of Justice,

(Enge)

in the file; he also will be provided informally a copy of the decision.

Section 146. Common Defense Counsel.

(1) The defense of several accused by a common defense counsel is not permitted.

Section 147. Inspection of the Records.

(1) The defense counsel is entitled to inspect those files which are available to the court, those which would have to be submitted to the court if charges have been preferred, and to inspect officially secured pieces of evidence.

(2) If the termination of the investigations has not yet been noted in the file, the defense counsel may be refused inspection of the files of individual documents, as well as the inspection of officially secured pieces of evidence, if such may endanger the purpose of investigation.

(3) At no stage of the proceedings may the defense counsel be denied the inspection of the minutes concerning the examination of the accused, nor of such judicial acts of investigation to which the defense counsel has been or should have been admitted as well as the inspection of expert opinions.

(4) Upon motion, the defense counsel may be permitted to take the files, with the exception of pieces of evidence, to his office or to his apartment for inspection, unless there are significant reasons to the contrary. The decision is not subject to attack.

(5) Regarding the permission to inspect the files, the office of the public prosecutor will decide during the preliminary investigation; in other cases, the presiding judge of the court before which the case is pending is competent.

(6) If the reason denying the inspection of the files has not ceased to exist already before, the office of the public prosecutor must rescind the order no later than upon completion of the investigation. The defense counsel shall be notified as soon as the right to inspect the records exists again without restriction.

Section 148. Attorney-Client Communication.

(1) The accused, even if not at large, is entitled to communicate with the defense counsel in writing as well as orally.

The latter signs and certifies the correctness of the transcript. The proof of the incorrectness of the transcript is permitted.

Section 168b. Records of the Public Prosecutor.

(1) The result of investigation acts by the office of the public prosecutor shall be made part of the records.

(2) The examination of the accused, the witnesses and experts shall be recorded pursuant to Sections 168, 168a as far as this can be made without a considerable delay of the investigations.

Section 168c. Right to be Present.

(1) The prosecutor and the defense counsel are permitted to be present during the judicial examination of the accused.

(2) The prosecutor, the accused and the defense counsel are permitted to be present during the judicial examination of a witness or expert.

(3) The judge may preclude an accused from being present at the hearing if his presence would endanger the purpose of the investigation. This especially applies if it is expected that a witness will not tell the truth in the presence of the accused.

(4) If an accused, not being at liberty, has a defense counsel he is entitled to be present only at such hearings held at the court of that place where he is in custody.

(5) The persons entitled to be present shall be previously notified of the hearing date. The notification is not made if it would endanger the success of the investigation. The persons entitled to be present may not request postponement of a hearing when they are prevented from being present.

Section 168d. Judicial Inspection.

(1) The prosecutor, the accused and the defense counsel are permitted to be present at the hearing when a judicial inspection is made. Section 168c, paragraph (3), first sentence, paragraphs (4) and (5) apply mutatis mutandis.

(2) If at the judicial inspection experts are consulted, the accused may request that the experts to be recommended by him for the trial be summoned to the hearing and if the judge rejects the request,

Appendix D

Uniform Law Conference Disclosure Guidelines

It is recognized that there is a general duty upon Crown Counsel to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information, which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of the client;

(b) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(c) to encourage the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

Pursuant to this duty, upon request, the accused is entitled to full disclosure of the case in chief for the Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary of trial, as the case may be, of the following information:

(a) The circumstances of the offence. The method of providing the circumstances may include the provision of contents of the police report, the provision of a summary prepared by the investigating policy agency of the case as a whole, the provision of a summary of witnesses' statements or the contents of witnesses statements.

(b) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.

(c) A copy of the accused's criminal record.

(d) Copies of medical and laboratory reports.

(e) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.

(f) A copy of the information.

Additional disclosure beyond what is outlined above is to be at the discretion of the Crown Attorney responsible for the prosecution balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include the following:

(a) Copies of the Criminal records of witnesses.

(b) Names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

The method of disclosure of evidence to an unrepresented accused remains in the discretion of the Crown Attorney responsible for the prosecution.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

It is recognized that the precise mechanics or procedure for providing disclosure will vay from jurisdiction to jurisdiction throughout the country keeping in mind that full and fair disclosure whould be given unless there is a demonstrable need that such full and fair disclosure should not be given.

Appendix E

1981-Ontario Disclosure Guidelines

Guidelines To Crown Attorneys and Other Crown Counsel in the Ministry of the Attorney General with respect to Disclosure to the Crown in Criminal Cases

Introduction

1. It is recognized that generally there is a duty on the Crown:
(a) to disclose the Crown's case;
and (b) to make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the defence may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with the local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be formalized as with other indictable offences.

First Appearance Disclosure

5.(a)Where resources and personnel permit the accused should be provided at the time of his first appearance with a document similar in nature to Appendix "A" to these guidelines [not attached].

(b)Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date (which in some jurisdictions is referred to as an assignment court date), the Crown, at the request in writing of counsel for the accused or counsel's agent, should provide the following:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce them when available;

(c) disclosure of the accused's criminal record and where in the Crown counsel's view relevant, the criminal record of any witness;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to provide same when available;

(e) photos, films, and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copes at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure intends to call as part of the Crown's case-in-chief at trial; an oral outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purposes of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be: if a written outline or synopsis is available at this early stage, it may be provided in lieu of an oral outline or synopsis;

(g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact that witness to advise the witness of the fact that he or she may be contacted by the Defence and that it is up to the witness to decide, if he or she wishes to be interviewed.

<u>Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial</u>

7.(a)Fulfil any undertakings made pursuant to paragraphs 6(a),

(b), (d) and (e) above.

(b) In summary conviction and hybrid matters the oral outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6(f) above together with the disclosure provided pursuant to paragraph 5 shall, as a general rule, be sufficient if Defence counsel has been sufficiently informed in the manner prior to the setting of the date to proceed.

(c) In indictable (non-hybrid) matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure, copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although Defence counsel will use his own discretion as to what portion of the content of written disclosure he will communicate to his client, it is expected that he will refrain from providing such written disclosure or copies thereof to this client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

(a) Defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s. 10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and (b) if counsel chooses to cross-examine on the content of the document, he will refrain from doing so without first applying to the Court to have the jury excluded for the purpose of determining whether the "Will Say" statement is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness' present testimony so as to permit cross-examination pursuant to s. 11 of the Canada Evidence Act.

11. In indictable (non-hybrid) matters it is expected that after receiving the disclosure referred to above Devence counsel will advise the Court and the Crown, prior to the date set to preceed,

the form in which his client elects to be tried.

Appendix F

Model Rules of Professional Conduct and Code of Judicial Conduct

American Bar Association

As amended August, 1984

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conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has 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.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "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 "knows" is false.

There was no counterpart in the Model Code to paragraph (d).

RULE 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 Rule 4.2.

Model Code Comparison

With regard to paragraph (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 "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(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 upon 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; [or] (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."

Paragraph (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."

Paragraph (d) has no counterpart in the Model Code.

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Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 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 paragraph (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."

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official 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.

Model Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore 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) provided that during the trial of a case a lawyer "shall not communicate with . . . any member of the jury." 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."

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excessive bail to prevent release. Since eventually (if not immediately) counsel will usually represent the accused, the prosecutor should not communicate with the defendant until arrangements for legal representation have been made or counsel is waived, unless the prosecutor's reasons for doing so relate to obtaining counsel for the accused or assisting in arrangements for pretrial release. This is consistent with the spirit of the Code of Professional Responsibility, which prohibits counsel from communicating with a party known to be represented by another lawyer.[3]

In some jurisdictions a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Moreover, prosecutors sometimes seek postponement of the preliminary hearing in order to bring the case before the grand jury to obtain an indictment that renders the preliminary hearing moot. Although an adversary preliminary hearing is not a constitutional necessity,[4] these practices may deprive the defendant of valuable information without serving any important public interest. However, some situations may arise in which considerations of valid public policy exist for a continuance at the prosecutor's request; for example, there may be a genuine need to protect an undercover agent or the life or safety of a material witness.

Since the function of the preliminary examination is to determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. Postponement of such hearing should be sought only for good cause and never for the sole purpose of mooting the preliminary hearing by securing an indictment.

Standard 3-3.11. Disclosure of evidence by the prosecutor

(a) It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

3. *See* ABA, Code of Professional Responsibility DR7-110(B).
4. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

(b) The prosecutor should comply in good faith with discovery procedures under the applicable law.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

History of Standard

In paragraph (a), modifications have been made for reasons of style and the word "intentionally" has been added. In addition, there is a stylistic change in paragraph (c).

Related Standards

ABA, Code of Professional Responsibility DR7-103(B)

ABA, Standards for Criminal Justice 4-4.5, 11-2.1, 11-2.2, 18-6.3(d)(i), (ii)

NAC, Courts 3.6, 4.9

Commentary

Withholding Evidence of Innocence

The standard adopts the definition of exculpatory material contained in the Supreme Court's decision in *Brady v. Maryland,*[1] that is, material that tends to negate guilt or reduce punishment. Although the test necessarily presents some questions of relevance, prosecutors are urged to disclose all material that is even possibly exculpatory as a prophylactic against reversible error and possible professional misconduct. The Supreme Court has voiced a similar suggestion with its comment that because the standard for disclosure is "inevitably imprecise . . . the prudent prosecutor will resolve doubtful questions in favor of disclosure."[2]

Paragraph (a) is virtually identical to a provision in the chapter on Discovery and Procedure Before Trial,[3] except that (1) the instant standard refers to the prosecutor's failure to reveal as "unprofessional con-

1. 373 U.S. 83 (1963).
2. United States v. Agurs, 427 U.S. 97, 108 (1976).
3. *See* standard 11-2.1(c).

duct," and (2) the duty of the prosecutor to make disclosures to the defense is not conditioned upon a request by the defense.[4] In addition, paragraph (a) is similar to the Code of Professional Responsibility, which requires a prosecutor to "make timely disclosure . . . of evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[5]

Compliance with Discovery

The prosecutor should seek in good faith to make discovery procedures in criminal cases function fairly and effectively. To this end, the prosecutor should not compel the defense to resort to a court order for discovery in order to harass the defense, increase the costs of defense, or obstruct the flow of information when it is known that the information is discoverable.

Independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most if not all of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried. A defense preview of a strong prosecution case, for example, frequently strengthens the posture of a defense lawyer who is trying to persuade the defendant that a guilty plea is in the defendant's best interest. Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time.

Intentional Ignorance of Facts

Just as it is unprofessional conduct for defense counsel to adopt the tactic of remaining intentionally ignorant of relevant facts known to the accused in order to provide a "free hand" in the client's defense, it is similarly unprofessional for the prosecutor to engage in a comparable tactic. A prosecutor may not properly refrain from investigation in order to avoid coming into possession of evidence that may weaken the prosecution's case, independent of whether disclosure to the defense may be required. The duty of the prosecutor is to acquire all the relevant evidence without regard to its impact on the success of the prosecution.

4. For additional commentary pertaining to the substance of paragraph (a), *see* the commentary to standard 11-2.1(c).

5. ABA, Code of Professional Responsibility DR7-103(B).

Appendix H

England and Wales-Disclosure Guidelines-1982

1. For the purposes of these Guidelines the term 'unused material' is used to include the following: (i) All witness statements and documents which are not included in the committal bundles served on the defence; (ii) The statements of any witnesses who are to be called to give evidence at commital and (if not in the bundle) any documents referred to therein; (iii) The unedited version(s) of any edited statements or composite statement included in the committal bundles.

2. In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary expceptions mentioned in paragraph 6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3.(a)If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important - and might even justify delay - if the material might have some influence upon the course of the commital proceedings or the charges upon which the Justices might decide to commit. (b)If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unsued material does not exceed about 50 pages, disclosure should be by way of a copy - either by post, by hand, or via the police.

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in paragraph 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with.

6. There is a discretion not to make disclosure - at least until Cousel has considered and advised on the matter - in the following circumstances:

(i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at Court or otherwise to intimidate him.

(ii) The statement (e.g. from a relative or a close friend

of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

(iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor quite a different, and false, story favourable to the defendant. If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination.

(iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulness - e.g. 'I saw nothing of the fight' or 'He was not at home that afternoon'. There are however grounds to believe that the witness might change his story and give evidence for the defence - e.g. purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination.
(N.B. In cases (i) to (iv) the names and addresses of the witness should normally be supplied.

(v) The statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows: - (a) It deals with matters of national security; or it is by, or discloses the identity of a member of the Security Services who would be of no further use to those Services once his identity became known. (b) It is by, or discloses the identify of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger. (c) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known. (d) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime. (e) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplies - e.g. a bank official. (f) It relates to other offences by, or serious allegations against, someone who is not an accused or discloses previous convictions or other matters prejudicial to him. (g) It contains details of private delicacy to the marker and/or might create risk of domestic strife.

7. If there is doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to Counsel for advice either before or after committal.

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between

the degree of sensitivity and the extent to which the information might assist the defence. If, to take one extreme, that information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt upon his guilt or upon some material part of the evidence on which the Crown is relying) there must either be full disclousre or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in paragraph 13. If, to take the other extreme, the material supports the case for the prosecution or is neutral or for some reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material, but also the name and address of the maker.

9. Any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in paragraph 6 should be disclosed to the defence until (a) the investigating officer had been asked whether he has any objections, and (b) it has been the subject of advice by Counsel and that advice has been considered by the Prosecuting Solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to the Counsel, the Director of Public Prosecutions should be consulted.

11. In all cases Counsel should be fully informed as to what unused material has already been disclosed. If some has been withheld in pursuance of paragraph 10, he should be informed of any police views, his Instructions should deal - both generally and in particular - with the question of 'balance' and he should be asked to advise in writing.

12. If the sensitve material relates to the identity of an informant, Counsel's attention should be directed to the following passages from the judgements of (a) Pollock C.B. in Attorney General v. Briant (1846) 15 Meeson & Welsby's Reports 169 and (b) Lord Esher M.R. in Marks v. Beyfus (1890) 25 Q.B.D.:

(a) 'The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been the settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience...and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer.'

(b) 'If upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence,

then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with Counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence. These means may be many and various but the following are given by way of example:

(i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try and make the witness available for interview, if requested; and subsequently, if so desired, to arrange for his attendance at Court.

(ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials.

(iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(iv) Disclosure of all or part of a sensitive statement or document may be possible on a Counsel-to-Counsel basis although it must be recognized that Counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

(v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission with section 10 of the Criminal Justice Act 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would have normally been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for Counsel, if in doubt, to consult the trial judge.

15. If, either before or during a trial, it becomes apparent

that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, Prosecuting Solicitors are advised to consult the Director of Public Prosecutions.

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the Prosecuting Solicitor on receipt of these Guidlelines. It should be adopted as regards cases already submitted, so far as is practicable.

NOTE: Comprehensive though the above Guidelines are, it should be remembered that the word 'documents' embraces artists' impressions, photofits and notes of oral descriptions given by identifying witnesses.

Magistrates' Courts (Advance Information) Rules 1985 (a)

(SI 1985 No 601)

5–312 **1.** These Rules may be cited as the Magistrates' Courts (Advance Information) Rules 1985 and shall come into operation on 20th May 1985

(a) Made by the Lord Chancellor in exercise of the power conferred on him by s 144 of the Magistrates' Courts Act 1980, as extended by s 48 of the Criminal Law Act 1977.

5–313 **2.** These Rules apply in respect of proceedings against any person ("the accused") for an offence triable either way other than proceedings where the accused was charged or an information was laid before the coming into operation of these Rules.

5–314 **3.** As soon as practicable after a person has been charged with an offence in proceedings in respect of which these Rules apply or a summons has been served on a person in connection with such an offence, the prosecutor shall provide him with a notice (a) in writing explaining the effect of Rule 4 below and setting out the address at which a request under that Rule may be made.

(a) A suggested form of notice was annexed to Home Office Circular No 26/1985, dated 26 April 1985.

5–315 **4.**—If, in any proceedings in respect of which these Rules apply, either before the magistrates' court considers whether the offence appears to be more suitable for summary trial or trial on indictment or, where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court, before he is asked whether he pleads guilty or not guilty, the accused or a person representing the accused requests the prosecutor to furnish him with advance information, the prosecutor shall, subject to Rule 5 below, furnish him as soon as practicable with either—

(*a*) a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings, or

(*b*) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings.

(2) In paragraph (1) above, "written statement" means a statement made by a person on whose evidence the prosecutor proposes to rely in the proceedings and, where such a person has made more than one written statement one of which contains information as to all the facts and matters in relation to which the prosecutor proposes to rely on the evidence of that person, only that statement is a written statement for purposes of paragraph (1) above.

(3) Where in any part of a written statement or in a summary furnished under paragraph (1) above reference is made to a document on which the prosecutor proposes to rely, the prosecutor shall, subject to Rule 5 below, when furnishing the part of the written statement or the summary, also furnish either a copy of the document or such information as may be necessary to enable the person making the request under paragraph (1) above to inspect the document or a copy thereof.

5–316 **5.**—(1) If the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements imposed by Rule 4 above might lead to any person on whose evidence he proposes to rely in the proceedings being intimidated, to an attempt to intimidate him being made or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that fact or matter.

(2) Where, in accordance with paragraph (1) above, the prosecutor considers that he is not obliged to comply with the requirements imposed by Rule 4 in relation to any particular fact or matter, he shall give notice in writing to the person who made the request under that Rule to the effect that certain advance information is being withheld by virtue of that paragraph.

5–317 **6.**—(1) Subject to paragraph (2) below, where an accused appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before it considers whether the offence appears to be more suitable for summary trial or trial on indictment, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

(2) Where the accused has not attained the age of 17 years when he appears or is brought before a magistrates' court in proceedings in respect of which these Rules apply, the court shall, before the accused is asked whether he pleads guilty or not guilty, satisfy itself that the accused is aware of the requirements which may be imposed on the prosecutor under Rule 4 above.

5–318 **7.**—(1) If, in any proceedings in respect of which these Rules apply, the court is satisfied that, a request under Rule 4 of these Rules having been made to the prosecutor by or on behalf of the accused, a requirement imposed on the prosecutor by that Rule has not been complied with, the court shall adjourn the proceedings pending compliance with the requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Where, in the circumstances set out in paragraph (1) above, the court decides not to adjourn the proceedings, a record of that decision and of the reasons why the court was satisfied that the conduct of the case for the accused would not be substantially prejudiced by non-compliance with the requirement shall be entered in the register kept under Rule 66 of the Magistrates' Courts Rules 1981.