

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2008-2487
Plaintiff-Appellee,	:	
	:	On Appeal from the Washington
vs.	:	County Court of Appeals
	:	Fourth Appellate District
MICHAEL LUPARDUS,	:	
	:	Case No. 08 CA 31
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT MICHAEL LUPARDUS

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FILED
AUG 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE CASE AND FACTS

Mr. Lupardus relies on the Statement of the Case and Facts set forth in his merit brief. Furthermore, Mr. Lupardus clarifies the following inaccuracies in the State's account of the facts.

The Officer did not follow procedures

The State did not act in accordance with its normal procedures when it destroyed the tape. The State never specifically requested that *Trooper Forshey* personally copy the videotape. Appellee's Merit Brief, p. 3, citing Tr. 25. Sergeant McDonald, the supervisor, instructed Trooper Forshey, a newly hired trooper, to have a more experienced trooper, Trooper Smith, handle the copying. Tr. 32. Against the direction of his supervisor, Trooper Forshey did the "copying" himself. Tr. 20. Trooper Forshey never before used the copying machine. Tr. 20. Against the orders of his supervisor, Trooper Smith only gave Trooper Forshey spoken instructions, but did not personally oversee the actual copying. Tr. 35. After leaving the Trooper to his own devices for twenty-five to thirty minutes, Trooper Smith returned, saw that there was clearly a problem as the screen was blank, and stopped the machine. Tr. 36. At that point, the error was complete and irreversible. Rather than copy the video, Trooper Forshey erased it. The machine performed in the manner in which Trooper Forshey operated it. Trooper Forshey disobeyed a direct order to have Trooper Smith handle the copying and Trooper Smith disobeyed the order to personally copy the videotape. Trooper Forshey was also the same officer who conducted the stop and field-sobriety tests on Mr. Lupardus, and testified against him at the Motion to Dismiss hearing. Tr. 4-25.

Mr. Lupardus made a specific request for the preservation and production of the videotape

The State had actual notice of the specific piece of evidence Mr. Lupardus requested. The State conceded it had actual notice of Mr. Lupardus' *specific* request for the videotape. Appellee's Merit Brief, p. 10. Mr. Lupardus filed a formal Crim.R. 16 Discovery Demand on June 26, 2006. On July 22, 2006, Mr. Lupardus requested a continuance for the *sole* purpose of reviewing the videotape, to which the State, through Assistant Law Director Amy Brown Thompson, agreed. 7/22/2006 Motion and Entry to Continue Pretrial Conference and ALS Hearing (continuance requested "for the reason that counsel has not reviewed the video in the case captioned above."), see also, 10/23/2006 Mtn. Hearing, Tr. pp. 10-11. Thus State had *actual notice* of Mr. Lupardus' specific request for the videotape.

APPELLANT'S PROPOSITION OF LAW

If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.

I. The evidence was materially exculpatory.

A. The burden-shifting remedy is the equitable remedy.

The State's argument opposing the burden-shifting remedy misses the point. First, the court would reach the question whether the State acted in bad faith only if it had first decided the evidence was *not* materially exculpatory. Appellee's Merit Brief, p. 11. Bad faith only applies to the destruction of potentially useful evidence. *Arizona v. Youngblood* (1988), 488 U.S. 51, 57. The burden-shifting remedy applies to the initial question of whether destroyed evidence was materially exculpatory or potentially useful.

Second, the State never successfully explains why shifting the burden would be unfair. When the State destroys evidence previously requested by the defendant, the State should have to prove that the evidence was not materially exculpatory. This is an equitable solution for two reasons: 1) the State has seen the evidence, but the defendant has not, and 2) the State destroyed the evidence.

The burden-shifting remedy is also consistent with *Youngblood*. *Youngblood* reinforced the rule that a due process violation occurs when the State destroys materially exculpatory evidence. *Youngblood*, 488 U.S. at 57. While *Youngblood* places the burden of proof on the defendant to show that the State acted in bad faith when it destroyed potentially useful information, *id.* at 58, it is silent as to who has the burden of proof to show the materially exculpatory value. In *Youngblood*, the exculpatory value of the evidence was not apparent

before the evidence was destroyed. *Id.* at 56. Here, as the trial court found, the exculpatory value of the video tape was apparent before the tape was erased.

B. The videotape was “materially exculpatory.”

The State erroneously maintains that the destroyed videotape was not materially exculpatory. Appellee’s Merit Brief, pp. 2, 14-15, 18, 22. For *Youngblood* purposes, evidence is materially exculpatory evidence, “if [it] creates a reasonable doubt that did not otherwise exist[.] If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.” *United States v. Agurs* (1976), 427 U.S. 97, 113. It “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 reasonably available means.” *California v. Trombetta* (1984), 467 U.S. 479, 489. The United States Supreme Court acknowledged in *Youngblood* that the blood samples were close to being the type of evidence that is materially exculpatory,¹ but at the end of the day, “no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Youngblood*, 488 U.S. at 57.

Mr. Lupardus’ case involves objective evidence that required no further testing, but that could have demonstrated on its face that he was not impaired on the night in question. The videotape would have contained exculpatory material that the officer did not write down. As a practical matter, after reviewing an OVI videotape, officers only will write down certain things. In general the officer will write down the facts - and his perception of the facts - that point

¹Despite the Court’s finding that the *Youngblood* evidence was, at the time, only potentially useful, developments in DNA technology later resulted in Larry Youngblood being exonerated and released 12 years later. Barbara Whitaker, [DNA Frees Inmate Years After Justices Rejected Plea](#), N.Y. Times, August 11, 2000.

toward guilt. The officer will not record other matters. Moreover, the officer may record that “defendant stepped off the line,” but that will not indicate how far off the line the defendant stepped, how many times, or what the defendant’s steps really looked like.

This Court addressed the distinction between materially exculpatory and potentially useful evidence in *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1. This Court said that the first step is to determine is whether the evidence *could* be deemed materially exculpatory. *Id.* at ¶12. This Court went on to observe that, in contrast to the portion of the destroyed videotape at issue in *Geeslin* that only showed the officer’s initial stop, a videotape of a field sobriety test “would presumably be used for exculpatory or inculpatory purposes[.]” *Id.* Logically it follows that because Mr. Lupardus’ case falls within the circumstances described in *Geeslin* as that type of evidence that could be deemed *materially exculpatory*, it should be subject to the burden-shifting approach.

The State cites to the per curiam decision in *Illinois v. Fisher* (2004), 540 U.S. 544, for the proposition that the United States Supreme Court would reject the burden-shifting approach Mr. Lupardus advocates. Appellee’s Merit Brief, pp. 12-14. The State’s reliance on *Fisher* is misplaced for two reasons. First, *Fisher* is factually distinguishable because it involved evidence that could only be categorized as potentially useful, not as materially exculpatory. *Fisher*, 540 U.S. at 548 (“The substance seized from respondent was plainly the sort of ‘potentially useful evidence’ referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady* and *Agurs*. At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him.”) The evidence at issue was a white powder substance. *Id.* In order for the evidence to possess exculpatory valuable, additional testing was required; thus, its exculpatory value was not apparent on its face. The United States

Supreme Court made clear that it was deciding *Fisher* based on its classification of the evidence as potentially useful, rather than materially exculpatory. *Id.* at 549. The discovery request had very little significance to the Court's decision. Thus the State's focus on the Court's limited response to the discovery request is an attempt to divert this Court's attention from the central point of *Fisher*: when the evidence is only potentially useful, the defendant must prove bad faith on the part of the state in order to establish a due process violation under *Youngblood*. The Court never added to or altered its precedence involving of the destruction of materially exculpatory evidence.

Second, Mr. Lupardus is not advocating a "pre se rule creating a due process violation every time evidence was destroyed after a discovery request had been made[.]" Appellee's Merit Brief, p. 13, citing *Fisher*, 540 U.S. at 548 (emphasis added). The burden of proof would only shift to the State if and when the court categorized the destroyed evidence as evidence that could have been materially exculpatory. Evidence that would not be material to the case, would not fall within this category, and therefore no due process violation would occur simply because the state destroyed evidence after the defendant requested it.

C. Other jurisdictions' approaches to achieving fairness in light of the state's destruction of evidence.

Amicus Ohio Attorney General maintains that "not a single court outside of Ohio has even discussed a similar rule [to the burden shifting approach]." Merit Brief of Amicus Ohio Attorney General, p. 8. The important fact that Amicus overlooks is that a number of states have recognized the unfairness of requiring the defendant to prove the evidence is antierially exculpatory. While other jurisdictions may not have specifically labeled their approach "burden-shifting," several other jurisdictions have developed procedures to achieve the fundamental fairness that due process requires when the state destroys evidence. In twelve other states, courts

have applied different approaches to achieve fundamental fairness when addressing the states destruction of evidence.² For example, in *Deberry v. State* (Del. 1983), 457 A.2d 744, 752, the Delaware Supreme Court determined that three factors should be weighed to determine whether a defendant's state constitutional due process rights have been violated by the State's failure to evidence:

- 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?

Id. at 750, citing *Brown v. United States*, D.C. Ct. App., 372 A.2d 557, 559 (1977) (footnote omitted).

With regard to the third element, the court observed:

[W]e draw a balance between the nature of the State's conduct and the degree of prejudice to the accused. The State must justify the conduct of the police or prosecutor, and the defendant must show how his defense was impaired by loss of the evidence. In general terms, the court should consider "(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction."

² See *Pena v. State*, 226 S.W.3d 634, 647 (Tex. App. Waco 2007), citing *Gurley v. State*, 639 So.2d 557, 567 (Ala. Crim. App. 1993); *Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326, 1331 (Alaska 1989); *State v. Estrella*, 277 Conn. 458, 893 A.2d 348, 363-64 (Conn. 2006); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992); *State v. Matafeo*, 71 Haw. 183, 787 P.2d 671, 673-74 (Haw. 1990); *State v. Fain*, 116 Idaho 82, 774 P.2d 252, 261-67 (Idaho), cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989); *Commonwealth v. Phoenix*, 409 Mass. 408, 567 N.E.2d 193, 196 & n.1 (Mass. 1991); *State v. Smagula*, 133 N.H. 600, 578 A.2d 1215, 1217-18 (N.H. 1990); *State v. Ware*, 118 N.M. 319, 881 P.2d 679, 682-83 (N.M. 1994); *State v. Ferguson*, 2 S.W.3d 912, 916-17 (Tenn. 1999); *State v. Delisle*, 162 Vt. 293, 648 A.2d 632, 642-43 (Vt. 1994); *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504, 511-14 (W. Va. 1995). See also, Daniel R. Dinger, Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in *Arizona v. Youngblood*, 27 AM. J. CRIM. L. 329, 356-57 (2000).

Id. at 752, citing *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (Kennedy, J., concurring), quoting *United States v. Higginbotham*, 539 F.2d 17, 21 (9th Cir. 1976).³

D. The burden-shifting approach is consistent with public policy and Constitutional principles and precedent.

Furthermore, Amicus argues, “where evidence is destroyed due to the State’s negligence, it is possible that telling the State to preserve evidence might affect its behavior, but any impact would be minimal. The official holding the evidence would have to conclude that stricter measures for protecting the evidence are warranted solely because, without them, the burden of proving whether the evidence was materially exculpable might shift to the State sometime in the future. It is unlikely that a law enforcement officer would be so prescient.” Merit Brief of Amicus Ohio Attorney General, p. 9. This line of reasoning is contrary to well-established United States’ history. The founders of this country were acutely aware that police officers needed limits and consequences in order to ensure they act fairly when the Constitution was drafted. See e.g., *Boyd v. United States* (1886), 116 U.S. 616, 624-27; *Elkins v. United States* (1960), 364 U.S. 206, 217 (“[The exclusionary rule’s] purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.”)

Police destruction of a unique piece of evidence has permanently prejudiced Michael Lupardus. Ironically, the same person whose testimony was seen as credible by the trial court

³Four other states have adopted a virtually identical balancing test. See *Gurley v. State*, 639 So.2d 557, 566-67 (Ala. Crim. App. 1993); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999); *State v. Delisle*, 162 Vt. 293, 648 A.2d 632, 642-43 (Vt. 1994); *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504, 511-12 (W. Va. 1995). See also, *State v. Matafeo*, 71 Haw. 183, 787 P.2d 671, 673 (Haw. 1990) (“The balancing test in Hawaii focuses on: (1) whether the state acted in bad faith in losing or destroying the evidence; (2) “the favorableness of the evidence”; and (3) “the prejudice suffered by the defendant as a result of its loss.”).

when it found that Mr. Lupardus did not prove that the evidence was exculpatory, destroyed the evidence which could have exonerated Mr. Lupardus. The State was rewarded by its agent's complete ineptness. What incentive does the State have to make sure that it has competent agents who follow procedures if, when a State agent blunders, there are no consequences? The State must follow the rules, and when it violates them, there must be consequences. In this case the consequence of the State's actions must be the dismissal of the charges against Mr. Lupardus.

II. The State acted in bad faith when it destroyed the videotape.

The State asserts that "under any standard of review, the evidence supports a finding that the video was not destroyed in bad faith." Appellee's Merit Brief, p. 2. Ignorance and ineptness amount to bad faith when they arise out of conduct that falls within the scope of a police officer's professional duties, especially when the officer is not acting within the normal procedures and policies. See *State v. Combs*, 5th Dist. No. 03CA-C-12-073, 2004-Ohio-6574. Trooper Forshey acted in bad faith when he destroyed the videotape. Despite the State's characterization of the destruction of the tape as an accident, "accidents" can still rise to the level of bad faith when coupled with gross negligence and affirmative malfeasance as existed here. *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234. Trooper Forshey disobeyed the orders of his supervising officer and destroyed key evidence.

Moreover, the State misconstrues the legal definition of bad faith in the context of the destruction of materially exculpatory evidence. When determining bad faith in this context, the analysis focuses not on how it was destroyed, but when. As noted by the court of appeals in *State v. Geeslin*, 3rd Dist. No. 10-05-06, 2006-Ohio-1261:

To be clear, bad faith in this context is not a matter *how* the police destroyed evidence, it is only a question of *when*. When examining bad faith in cases dealing with "potentially useful" evidence, a demonstration that the police failed to follow their own procedures may be sufficient to show they acted in bad faith.

When determining who has the burden of proving whether evidence is materially exculpatory, the only way of proving bad faith is establishing that the evidence was destroyed after a specific request by the defendant to preserve the evidence in question.

Geeslin at fn. 2. (Emphasis in original).

This is consistent with *Youngblood*, which set forth the standard for bad faith in the context of the destruction of evidence: “[t]he presence or absence of bad faith for the purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” *Youngblood*, 488 U.S. at 56 fn.1. The key fact in *Youngblood* is that the police did not affirmatively destroy any evidence; they merely failed to handle evidence properly, and this failure had the unintended effect of damaging the value of that evidence. *Id.* at 58.

Where the exculpatory value of evidence is “apparent,” the defendant does not need to demonstrate bad faith—it is implied when the evidence is destroyed. See *id.* at 56 fn. 1; *Trombetta*, 467 U.S. at 489. However, in *Youngblood*, the exculpatory value of the evidence was neither known to the police nor apparent from the evidence. Accordingly, there was no bad faith. In other words, whether “bad faith” exists does not turn on the subjective motivation for the loss or destruction of the evidence, but rather on the objective issue of whether the evidence destroyed had exculpatory value that was apparent or known at the time of its destruction. See, e.g., *Trombetta*, 467 U.S. at 489.

In *Geeslin* the State destroyed the tape before the defendant requested it. *Id.* at ¶5. In contrast, Mr. Lupardus requested the tape, and then the State destroyed it. Thus bad faith has been demonstrated. The Court of Appeals determined that the issue of bad faith was “invited” during the initial proceedings because during a motion hearing Mr. Lupardus’ trial attorney did not argue bad faith. *State v. Lupardus*, 4th Dist. No. 08CA31, 2008-Ohio-5960, ¶17. However,

the legal issue was still preserved as it was raised in Mr. Lupardus' motion to dismiss. It is true that the trial attorney did not have any evidence before him that the officer acted with ill will (a fact almost impossible to prove) and thus did not argue that the officer acted in actual bad faith, however –as discussed above- bad faith encompasses more than intentional acts of ill will. Here the facts show gross negligence. Under *Youngblood* and *Agurs* such negligence –in the face of a specific request for preservation and production- is tantamount to bad faith.

III. The Ohio Constitution provides greater protection than the United States Constitution.

Furthermore, Mr. Lupardus' constitutional rights under the Ohio Constitution were violated when the State destroyed the videotape. As noted by this Court:

The Ohio Constitution “is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides *a floor* below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according *greater civil liberties and protections* to individuals and groups.”

State v. Farris, 109 Ohio St. 3d 519, 2006-Ohio-3255, 849 N.E.2d 985, at ¶46 (emphasis added), citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, paragraph one of the syllabus.

If this Court is not persuaded that the United States Constitution endorses the burden-shifting remedy, this Court may do so under the Ohio Constitution. This Court has previously found that despite United States Supreme Court holdings to the contrary, the Ohio Constitution prohibits warrantless arrests for minor misdemeanors. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175. Furthermore, this Court held that not only were statements obtained in violation of *Miranda* inadmissible, evidence obtained as a direct result of a *Miranda* violation were also inadmissible. *Farris* at ¶49. “We believe that to hold otherwise would

encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution.” Id.

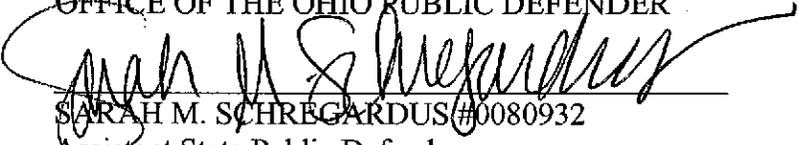
Here, to hold otherwise, would encourage the state to destroy, either carelessly or intentionally, key evidence necessary to the administration of justice and due process under the Ohio Constitution.

CONCLUSION

Whether this Court determines that the burden should shift to the State to prove the nature of the destroyed evidence or that the State destroyed the evidence in bad faith, the conclusion is the same: Mr. Lupardus’ due process rights were violated. This Court should reverse and remand for further proceedings.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



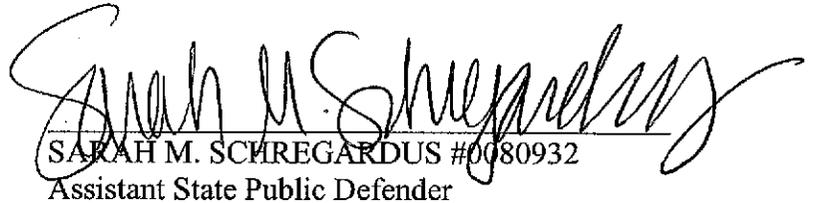
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing REPLY BRIEF OF APPELLANT MICHAEL LUPARDUS has been by regular U.S. mail to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750, and, Benjamin Mizer, Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 on this 25th day of August, 2009.


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LEXSTAT OHIO CRIM. R. 16

OHIO RULES OF COURT SERVICE

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*** RULES CURRENT THROUGH AUGUST 1, 2009 ***

*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 16 (2009) Review Court

Orders which may amend this Rule. **Rule 16. Discovery and Inspection**

(A) Demand for discovery.

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant.

Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or 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 prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record.

Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects.

Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or

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belong to the defendant.

(d) Reports of examination and tests.

Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant 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, available to or 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 prosecuting attorney.

(e) Witness names and addresses; record.

Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant.

Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence,

known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement.

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the

appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

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(3) Grand jury transcripts.

The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects.

If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or 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 on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney 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, available to or within the possession or control of the defendant, and 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 such results or reports relate to his testimony.

(c) Witness names and addresses.

If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement.

Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense

attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

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Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by

witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose.

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) 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 by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a 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) Time, place and manner of discovery and inspection.

An order of the court 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.

(3) Failure to comply.

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 with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions.

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.