Prosecutorial Misconduct: A National Survey

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Comments

PROSECUTORIAL MISCONDUCT: A NATIONAL SURVEY

INTRODUCTION

The determination and legal effect of prosecutorial misconduct in criminal cases is a problem which has plagued jurists for a number of years. In the thirty-five years since the United States Supreme Court decided *Mooney v. Holohan*,¹ where the prosecution's deliberate deception of the court and the jury through the knowing use of perjured testimony was held to be a denial of due process of law, a number of cases have appeared which attempted to further define and delimitate that decision. A progeny of the *Mooney* decision, is *Brady v. Maryland*,² which held suppression of evidence by the prosecution is a denial of due process of law, regardless of the negligence of the prosecution.

This comment attempts to catalogue the many cases involving prosecutorial misconduct as defined by *Mooney* and *Brady*. Six major problem areas have been selected, with attention given to both state and federal decisions of each federal appellate circuit and, where expressed, the opinions of the United States Supreme Court. Certain problems arose in the compilation of this survey, the major one being the proper placement and alignment of the various decisions. In many instances the nature of the particular case was such that it could have been properly placed in any one of several categories. Thus, although a case might be discussed under a particular topic, the reader should not feel precluded from using the case as the basis for the presentation of a different legal argument.

Another similar problem stemmed from the fact that the courts often failed to differentiate between substantive and procedural law. The cases, therefore, are necessarily a blend of the two, with no attempt made to differentiate between substantive and procedural aspects. A final problem is that cases from the first and sixth circuits are at a premium, with the result that, in some instances, opinions from those two circuits will not be presented. Where there are no decisions from a certain circuit covering one of the points, a notation will be made in the introduction to that topic.

¹. 294 U.S. 103 (1935).
². 373 U.S. 83 (1963).
The sections and the scope of the problems which will be covered within each, are as follows:

**Duties of the Prosecution.** A review of affirmative duties placed upon the prosecution and other representatives of the people. Are there any instances where these duties may be excused?

**The Need for a Defendant's Request.** A look at the courts' interpretation of the Brady decision placing the duty of a formal request for information upon the defense before a denial of due process of law may be claimed.

**What Must be Disclosed: Materiality and Discovery.** A discussion of the types of evidence which must be turned over to the defense, as well as what the defense is not entitled to receive. Furthermore, a survey of the various discovery rules throughout the several circuits.

**Where the Defendant Already Has Knowledge of the Facts.** A discussion of the legal implications where the defendant has actual knowledge of facts which he claims were suppressed. Also a look at the theory of implied knowledge attributed to the defense.

**Negligent Suppression by the Prosecution.** When the prosecution has been remise in its duties, what is the legal effect? Furthermore, what tests do the courts apply for a determination of prosecutorial negligence?

**Use of False Testimony or Evidence by the Prosecution.** Rather than a suppression of facts favorable to the defendant, what is the effect of the prosecution using false evidence to secure the conviction of the defendant? Are there any cases in which the prosecution may be excused from penalty for the use of the false evidence?

This work is not presented either as a defense or prosecution manual, but rather as a guide for the jurist whose interest is justice and to assist in further defining the relative rights and responsibilities of both the prosecution and the defense. It is for this purpose that this comment has been prepared.

**DUTIES OF THE PROSECUTION**

**INTRODUCTION**

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.iii

Ordinarily, when we speak of the duties of the prosecution, we tend to think of the public official whose sole task is to make certain that guilty parties pay their debts to society. However, as noted in the above quoted Canon, the duties of the prosecution are far more extensive than simply prosecuting the accused. As stated in the Canon, the primary duty of the prosecutor is to see that justice is done. But just how is the

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3. Canon Number 5, Canons of Professional Ethics of the American Bar Ass'n.
prosecutor to fulfill this duty? First, one must realize that the prosecution may not suppress evidence or intentionally deceive the court. But in reference to these duties, many new questions arise. For example, what percentage of its evidence must the prosecution put forth in the presentation of its case—all or just enough to convict? Is the prosecution under an affirmative duty to seek out evidence which might exculpate the defendant? To whom is the prosecutor accountable and may he ever be excused from his duty to present evidence favorable to the accused? Is technical compliance with court standards enough or must the prosecutor do more? These and similar questions will be examined in this section.4

UNITED STATES SUPREME COURT INTERPRETATIONS

In Brady v. United States,5 the defense requested the prosecution to produce an extrajudicial statement made by Brady’s accomplice in which the accomplice admitted performing the homicide of which Brady was convicted. As this statement might have had some effect on the jury that determined the penalty, the statement was quite important to the defense; however, the prosecutor, nevertheless, withheld the statement. The United States Supreme Court held this to be reversible error, stating:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process of law where the evidence is either material to guilt or punishment irrespective of the good faith or bad faith of the prosecution.6

Although Brady held that a suppression of evidence is a denial of due process, no criteria was set forth as to what actually must be turned over to the defense and at what time it was necessary to do so.7

An attempt to establish a specific requirement on the prosecution was made in Giles v. State of Maryland,8 where the state suppressed evidence pointing to the sexual proclivities of the prosecutrix in a rape prosecution. Although the Court refused to discuss the duty of the prosecution as to the disclosure of evidence, Mr. Justice Fortas in a concurring opinion, strongly related what he believed to be this duty:

A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellish-

4. First circuit cases have not been presented in this section.
5. Supra note 2.
6. Supra note 2, at 87.
7. In later chapters, the Brady holding shall be discussed almost phrase by phrase.
ing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State has caused to be given at the trial—the State is obliged to bring it to the attention of the court and the defense.9

INTERPRETATIONS WITHIN THE CIRCUITS

Second Circuit

In its decisions, the Court of Appeals for the Second Circuit has presented seemingly opposite views as to the duties of the prosecution. In United States ex rel. Meers v. Wilkins,10 it was alleged that the State suppressed the identity of two witnesses to the crime and in so doing denied Meers due process of law. The court cited Application of Kapatos,11 quoting Judge Palmieri's opinion as to the duties of the prosecution:

The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or the resources available to the state in its investigation of the crime. Nor does he have access to all of the evidence, much of which has usually been removed or obliterated by the time he learns that he is to be tried for the crime. In view of this disparity between the investigating powers of the state and the defendant, I do not think it imposes too onerous a burden on the state to require it to disclose the existence of a witness of the significance of Danise in the instant case. At the very least, the trial judge should have been made aware of this evidence, and a ruling should have been requested by the prosecutor with respect to his duty in the premises. . . .12

The court then proceeded to rule that the suppression of the names of the two witnesses by the prosecution amounted to a denial of due process of law.

Later, in a district court decision (affirmed by the Court of Appeals for the Second Circuit), United States ex rel. Fein v. Deegan,13 the court ruled that the prosecution did not deny the defendant due process by failing to disclose the name and address of a possible witness in a murder case. The district court first found that the defendant never really made a formal request for the information and further stated that the witness was unworthy of belief and could only have testified as to matters peripheral to the case. As to the prosecutorial duty, the court stated:

There is no requirement that the prosecutor be the guardian of every possible

9. Id. at 100.
10. 326 F.2d 135 (2d Cir. 1964).
12. Id. at 888. Also cited at 326 F.2d 139-40.
avenue of investigation available to the defense. Even assuming that a defense request is not always necessary, not every lead or story need be turned over. . . .

The court further pursued the matter of the prosecution's accountability to the defense, adding:

I find nothing improper in the prosecution's actions. Due process of law does not require the prosecutor to hold himself accountable to the defense on peripheral matters which he has good cause to believe are untrue, merely because they could conceivably be of some help to the defense. . . .

Third Circuit

Two cases in the third circuit considered the limitations on the prosecutor in withholding witnesses. In the first, United States ex rel. Brothers v. Rundle, the court found that the prosecution's failure to produce a possible witness for the defense did not constitute a denial of due process. The defendant was originally charged with sodomy and when the State failed to produce a second boy who escaped the defendant's attack, the defendant claimed a denial of due process. Finding that this boy's testimony would have been cumulative and of no use to the defense, the court, stated, in dicta, that Pennsylvania law "does not require the prosecution to produce all witnesses in a criminal case if the testimony is cumulative or relates to background information." The court went on to hold:

It is not a requirement of due process that the prosecution search out and produce every witness, and there is no violation if the prosecution 'merely fails to disclose the evidence of which he has no knowledge or fails simply to use or disclose evidence which is vague, inconclusive, and cumulative. . . .

In a second case, the Supreme Court of Pennsylvania required the prosecution to make available an F.B.I. agent who had performed certain tests upon the defendant which connected the defendant to a homicide. In ruling that the prosecution must produce the agent, the court in Lewis v. Court of Common Pleas of Lebanon County, stated:

A public prosecutor is entrusted with an awesome duty which requires him to serve the interests of justice in every case. For this reason, a witness who may have information which is favorable to the defense must be made available to the defense.

14. Id. at 363.
15. Id. at 383.
17. Id. at 403.
19. Id. at 189. Another third circuit case on point is State v. Taylor, 49 N.J. 440, 231 A.2d 212 (1967) (duty to disclose prosecution deal with witness when asked at trial.
Fourth Circuit

In the fourth circuit, a number of cases have considered the nature of the duties of the prosecution. The first of these, *Hamric v. Bailey*,\(^2\) discusses when material should be turned over to the defense. Here the prosecution withheld a favorable laboratory report from the defense until after the case had gone to the jury. The court ruled this conduct is prejudicial to the defense and a denial of due process of law. As to what point in time the prosecution must produce favorable materials for the defense, the court held:

> If it is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective, must be made at a time when the disclosure would be of value to the accused.\(^{21}\)

The court found that even if this case had been taken away from the jury for the presentation of the newly found evidence, the defendant would still have been prejudiced and would have been denied due process of law.

In another case, *United States v. Elmore*,\(^2\) the Fourth Circuit Court of Appeals excused the prosecution's failure to turn over certain information at the time of a defense demand for this information, concluding that there was a possibility that the witness in question might be intimidated if his identity was disclosed before he was called to testify and, therefore, the government's attempt to protect its witness was justified. The court did note, however, that the prosecution waited too long for a second request by the defense for the documents in question and stated:

> The government should have promptly disclosed the statements as soon as Brawly was called as a witness. At that point there was no further justification for withholding it, and we do not think that the government should be allowed to await a second request.\(^{23}\)

It should be noted that the court, nevertheless, failed to find prejudice in the nondisclosure and affirmed the conviction.

In *Regle v. State of Maryland*,\(^2\) the defense had requested the whereabouts of a police agent, which information the prosecutor stated he did not know, and further, that even if he did, he, nevertheless, was not required to furnish this information to the defense. The defense however, made attempts to find this agent, alleging that the agent was a material wit-

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20. 386 F.2d 390 (4th Cir. 1967).
21. *id.* at 393.
22. 423 F.2d 775 (4th Cir. 1970).
23. *id.* at 779-80.
ness in the case. Although the prosecutor was correct under Maryland law, the court questioned the prosecutor's conduct:

It may be that the State tried but was unable to locate Isele; if this were true, it may have been the wiser course had it so stated. On the other hand, the State is not affirmatively required to locate witnesses who may prove helpful to the accused. But where the State knows the whereabouts of such a witness, and intentionally, and without valid reason, fails to disclose it, it may quite unnecessarily be inviting the reversal of a conviction on constitutional grounds.25

Fifth Circuit

The courts throughout the fifth circuit have attempted to answer many of the questions posed by a consideration of the duties of the prosecution.26 Such a decision is Jackson v. Wainwright,27 in which a conviction for rape was reversed because the State suppressed a statement of a witness who was not called to testify. The State contended that because the defense knew of the existence of this witness there was no duty to disclose his earlier exculpatory statements. The court refuted this contention, stating: We hold that the prosecuting attorney was under a duty to disclose to the defense the exculpatory statements of Mrs. Elberty... The prosecution's partially truthful disclosure amounted to affirmative misrepresentation. A defense lawyer cannot be expected to assume that a witness subpoenaed by the State, even if not called to testify, has evidence favorable to the defense.28

A point which has been thoroughly discussed by the state courts within the fifth circuit is the duty of the prosecution to present all of his evidence at trial. In almost identical decision, the state courts have held that the prosecution has no such duty. A representative case is State of Louisiana v. Dickson29 where, although the defendant knew of the evidence in question and the prosecution did not produce this evidence, the defense still claimed a suppression of evidence by the prosecution. The court rejected this argument, stating:

the State could not be compelled to introduce that evidence to make out a case for the defendant. All the district attorney is required to do under the law is to introduce the evidence relied upon for conviction—he need not introduce evidence relied upon by the defendant for an acquittal.30

25. Id. at 359, 264 A.2d at 126. See also Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964) (duty to disclose is not excused when the prosecutor is the victim of police suppression).
27. 390 F.2d 288 (5th Cir. 1968).
28. Id. at 298.
29. 248 La. 500, 180 So. 2d 403 (1965).
30. Id. at 507, 180 So. 2d at 405. See also Eagen v. State, 451 S.W.2d 514
The courts have generally held that the prosecutor’s duties extend only to the actual time of trial. The Florida courts, however, have attempted to answer the question of whether this duty also arises to post-trial proceedings. In *Fast v. State of Florida,* the defense claimed that the prosecution’s refusal to investigate an allegedly exculpatory confession which was produced after the trial, resulted in a denial of due process of law. The court in ruling that the prosecution’s duty towards the defendant does not exist after the defendant’s conviction stated: “We find no authority to uphold appellant’s contention that the state has an affirmative duty to seek out evidence favorable to the defendant after his conviction.” Subsequently, this same defendant attempted to persuade the federal district court that the prosecutor had a duty to continue the investigation past the time of conviction and to bring all favorable attention to the court’s attention. This contention was similarly rejected in *Fast v. Wainwright,* in which the district court held:

No cases have been cited and research indicates no cases to support the contention that the prosecution’s burden to discover evidence favorable to the accused continues beyond the time of conviction and sentence. *Brady v. Maryland* . . . does not require this heavy burden. . . .

**Sixth Circuit**

Two state cases found within the sixth circuit conflict as to the prosecutor’s duty to call witnesses. In *City of Cincinnati v. Young,* the defendant pointed out that the arresting officer was not called to testify at the trial. To that point the court responded:

> It was within the discretion of the prosecution to call or not call any witness to testify. The fact that the prosecution did not call the arresting officer did not prevent the defendant from calling him as a witness for the defendant.

In a contrary case, *People v. Dickerson,* the court ruled that the prose-

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32. *Id.* at 204.
34. *Id.* at 406. See also Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968) (discussion of the effect of *Brady supra* note 3 on the duties of the prosecution); State v. Gillespie, 227 So. 2d 550 (Fla. App. 1969) (affirmative duty to disclose favorable evidence); and Newton v. State of Florida, 178 So. 2d 341 (Fla. App. 1965) (general discussion of the duties of the prosecution and the rights of the defense).
36. *Id.* at 94, 252 N.E.2d at 175.
cation did at times have an affirmative duty to call *res gestae* witnesses—the same class of witness as the police officer in the *Young* case. The court in the *Dickerson* case also implied that the prosecution should practice full disclosure, stating that "[t]he only legitimate object of the prosecution is to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence." 

**Seventh Circuit**

In the seventh circuit, all three state supreme courts contribute to the area of the duties of the prosecution. The Supreme Court of Illinois considered whether the prosecution has a duty to present all of its evidence in *People v. Nowak*. In this case, Nowak was found guilty of murder and claimed that because all the available eyewitnesses to the murder were not produced, he was denied due process of law. To this point the court answered:

The People are not required to call all of the witnesses to a crime in proving the State's case. Here . . . the witness in question was known and available to defendant and it was his privilege to call her either as his own or as a court's witness depending upon the circumstances. Having failed to call the witness himself, defendant is in no position to claim prejudice by the failure of the State to use her testimony. . . .

The Supreme Court of Indiana considered whether the prosecution has an obligation to present all physical evidence which it has in its possession. In *McDougall v. State of Indiana* the defendant appealed because the prosecution failed to introduce certain items into evidence in its prosecution for robbery. As to the duty of the prosecution to present all physical evidence, the court stated:

No authority is cited which holds the prosecution must introduce in evidence every physical item it possesses relating to the case. All that is required is that the State prove guilt beyond a reasonable doubt. The means used to satisfy this burden is for the prosecution to determine.

A third related question discussed by a state supreme court in the seventh circuit is: what kind of evidence must be disclosed—all evidence or

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38. *Supra* note 35.
40. *Supra* note 37, at 651, 141 N.W.2d at 362.
42. *Id.* at 168, 258 N.E.2d at 318. A similar holding is found in *People v. Jones*, 121 Ill. App. 2d 268, 257 N.E.2d 514 (1970); *People v. Jones*, 30 Ill. 2d 186, 195 N.E.2d 698 (1964).
44. *Id.* at —, 257 N.E.2d at 678.
merely exculpatory evidence? In Price v. State of Wisconsin, the prosecution introduced certain evidence which proved to be quite damaging to the defendant. The state, however, did not give the defendant notice that this evidence was in its possession or that it would be used. The defendant claimed that under the doctrines of Brady v. Maryland, and Giles v. Maryland, the failure to disclose resulted in a denial of due process of law. The court refuted the so-called duty of the prosecution to turn over exculpatory evidence to the defendant, stating that:

These, however, stand not for the proposition that appellant urges—that notice must be given of any inculpatory evidence—but rather that the government is obligated to reveal any evidence that tends to prove the innocence of the accused.

There is another Illinois case worth noting on the subject of the duties of the prosecution. In People v. Cagle, the Supreme Court of Illinois placed the duty not so much upon the prosecution as it did upon the trial court. The defendant had requested a particular police report which contradicted the testimony of the arresting police officers. The defense was given the report by the prosecution, but the trial judge refused to allow the defense to use the report at the trial as it was not mentioned during the direct examination. The trial court had ruled that the prosecution need only technically comply with the duty of disclosure. The Supreme Court of Illinois held this to be prejudicial error when it declared:

[T]he trial proceedings reveal technical compliance with the rule that defendant be furnished on request a copy of favorable evidence, including police reports; but they also show how effectively defense counsel was deprived of using the report for impeachment purposes. Merely giving defendant access to the report, while depriving him of the use of it, in no way constitutes compliance with the Illinois rule.

Eighth Circuit

The Supreme Court of Arkansas in Smith v. Urban set forth a criterion which allows the trial court to determine on a case-by-case basis, whether the prosecutor has failed in his duties to disclose information to the defense. The defendant, charged with being an accessory to murder, claimed that the suppression of a possible exculpatory confession was a denial of due process. The court, citing the federal district court case of

45. 37 Wis. 2d 117, 154 N.W.2d 222 (1967).
46. Supra note 2.
47. Supra note 8.
48. Supra note 45, at 133-34 n.3, 154 N.W.2d at 230 n.3.
49. 41 Ill. 2d 528, 244 N.E.2d 203 (1969).
50. Id. at 533, 244 N.E.2d at 203.
51. 245 Ark. 781, 434 S.W.2d 283 (1968).
Petition of Wright,52 held that, "[w]hether or not a prosecuting attorney in a criminal case must disclose evidence in his possession favorable to the accused depends on many factors and a case-by-case judgment must be made.53

Many times, defendants have contended that the State has an affirmative duty to seek out favorable evidence for his defense. In State of Missouri v. Reynolds,54 the appellant, earlier found guilty of murder, claimed exculpatory evidence was to be found in the files of the police department and not in the prosecutor's files. Although the court was reluctant to definitely state the duties of the prosecution, it did find an absence of such duty with respect to the facts in the instant case. The court concluded:

We deem it inadvisable to attempt in this opinion to state precisely the duties placed on the prosecution by reason of Brady v. Maryland, but we are of the opinion that it does not require the prosecution to comb through material not in its possession in an effort to locate something which, when and if followed up, might or might not prove to be helpful to the defense, and it does not require that the prosecuting attorney perform the investigation and preparation for trial which normally should be performed by defense counsel.55

The argument that the prosecution has a duty to present all physical evidence in its possession at trial has also been discussed and ruled upon within the eighth circuit. In Washington v. State of Arkansas,56 a defendant, convicted of unlawful sale of narcotic drugs, advanced such an argument in his appeal. He claimed that the trial court should have required the State to produce the physical evidence testified to by two of the State's witnesses. The court rejected this argument stating that, "[i]t is perfectly permissible, however, for a witness in a criminal case to testify about tangible objects involved in the crime without producing them."57

53. Supra note 55, at 785, 434 S.W.2d at 286.
54. 422 S.W.2d 278 (Mo. 1967).
55. Id. at 283.
57. Id. at 319, 451 S.W.2d at 450. Other seventh circuit cases worth noting include: People v. Richards, 120 Ill. App. 2d 313, 256 N.E.2d 475 (1970) (no requirement that the prosecution supply the defense with a list of witnesses which the State does not intend to call); Pierce v. State, 253 Ind. 550, 256 N.E.2d 557 (1970) (prosecution need not anticipate every theory that appellant might put forth); Britton v. State, 44 Wis. 2d 109, 170 N.W.2d 785 (1969) (State does not have a duty of full disclosure); Goetsch v. State, 45 Wis. 2d 285, 172 N.W.2d 688 (1969) (no duty to present unreported documents); and Gray v. State, 40 Wis. 2d 379, 161 N.W.2d 892 (1968) (no requirement for the State to do what State law prohibits the defendant from doing for himself).
Ninth Circuit

Are the prosecutor's duties any different when he is before the grand jury rather than before a trial jury? This question was considered by the Court of Appeals for the Ninth Circuit in Loraine v. United States. The defendant in this case moved for a dismissal on the grounds that the Government suppressed certain evidence in its presentation to the grand jury. Although the suppression of evidence is generally held to be a denial of due process of law, the Court ruled that the duty of the prosecutor is not extended to his presentation before the grand jury. The court held:

[T]he duty of the prosecuting authorities at the trial, and their duty when presenting a case before a grand jury, are not necessarily the same. Similarly, we hold that the trial court did not err in refusing to invalidate a federal indictment because the Government did not produce before the grand jury all evidence in its possession tending to undermine the credibility of the witnesses appearing before that body.

The court of appeals of California discussed the duties of the prosecution in presenting witnesses and pursuing every possible means of investigation in People v. Noisey. Here the defendant claimed a suppression of evidence primarily because an investigating officer failed to lift fingerprints at the scene of the crime. There were, however, two eye-witnesses to the crime. The court, citing People v. Tuthill, discussed the duty of the prosecution to call witnesses in the making of its investigation and concluded:

There is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial. The mere fact investigating officers do not pursue every possible means of investigation does not, standing alone, constitute a denial of due process or suppression of evidence. . . . the defendant must demonstrate that he has been prejudiced thereby.

In 1970, the Supreme Court of Washington ruled that the prosecution was under no duty to submit evidence to the defense prior to trial. In State of Washington v. Tyler, the defendant appealed, contending the trial court erred in refusing to direct the prosecution to furnish the defense with copies of earlier statements given by state witnesses to government authorities. The court ruled on the defense's point by stating:

58. 396 F.2d 335 (9th Cir. 1968).
59. Id. at 339.
61. 31 Cal. 2d 92, 187 P.2d 16 (1947).
62. Id. at 98, 187 P.2d at 19.
63. Supra note 60, at 550, 71 Cal. Rptr. at 344.
64. 77 Wash. 2d 726, 466 P.2d 120 (1970).
It is the general rule in this country, supported, we think, by the great weight of authority, that the prosecuting attorney is under no general obligation to submit any evidence in his possession to counsel for the defense. This rule applies to the written statements of witnesses as well as substantive evidence.\textsuperscript{65}

\textit{Tenth Circuit}

Within the state courts of the tenth circuit, two quite similar points were examined with substantially the same result. In \textit{Hampton v. People},\textsuperscript{66} the defendant, convicted of murder, appealed, claiming that the prosecution's failure to call two F.B.I. agents to testify in support of a written report was a denial of due process of law. The testimony would have favored the defense but the defense was allowed to read the report into the record before the jury. The court stated: "A prosecuting attorney is not obliged to call any particular witness, but may try his case in his own way and at his discretion call those witnesses he chooses."\textsuperscript{67} It should be further noted that in the instant case, the defense had compulsory process which could have been used if it had so chosen.

In a second case, \textit{Bearden v. State of Oklahoma},\textsuperscript{68} after a dispute with the trial court over the court's failure to grant any further continuances, both the defendant and his trial attorney stood mute throughout the entire proceeding. On appeal following his conviction, the defendant claimed that due process was violated in that all the evidence, was one-sided, having been presented only by the prosecution. The court rejected this argument and discussed the duties of the prosecution and the corresponding duties of the defense:

\begin{quote}
Any defense to be offered to prove an act of homicide to have been either excusable or justifiable \ldots is a matter for the defendant to present. It is not sufficient for defense counsel to 'lay behind a log' and do nothing, expecting the prosecution to explain the defendant's actions.\textsuperscript{69}
\end{quote}

\textit{District of Columbia}

From the court of appeals for the District of Columbia come two widely

\textsuperscript{65} Id. at 736, 466 P.2d at 126. Other eighth circuit cases and holdings include: Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968) (no duty to inform prior to trial the facts of a government witness’s criminal record), State of Missouri v. Davis, 450 S.W.2d 168 (Mo. 1970) (discussion of Missouri court rulings on prosecution duties at 172), and State v. Thompson, 396 S.W.2d 697 (Mo. 1965) (non-production and argument of the prosecutor amounted to a denial of due process of law).


\textsuperscript{67} Id. at 162, 465 P.2d at 399.


\textsuperscript{69} Id. at 925 n.6.
cited cases regarding the duties of the prosecution. In the first, *Griffin v. United States,*\(^7^0\) the question arose as to whether the prosecution should have informed the defense about a penknife found in the pocket of the deceased in a murder case. The defense had claimed self-defense and this knife would probably have been useful to the defense. The prosecution thought the penknife would have been inadmissible and withheld the knife. In reversing, the court of appeals cautioned the prosecution with respect to its duty to reveal material evidence by ruling:

[T]he case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. ...\(^7^1\)

The prosecution's duty to disclose and its possible ramifications were again examined in *Levin v. Katzenbach.*\(^7^2\) In this case the prosecution failed to reveal to the defendant the prior statement of one of its key witnesses. The court, in remanding the case for an evidentiary hearing, placed a duty of disclosure upon the prosecution. The court felt that:

Requiring government disclosure will not encourage defense counsel to be careless in trial preparation since there can be no assurance that the government, even with all its resources, will discover all significant evidence favorable to the defense. And we do not suggest that the government is required to search for evidence favorable to the accused, or to disclose all its evidence, however insignificant, to the defense.\(^7^3\)

**THE NEED FOR A DEFENDANT'S REQUEST**

**INTRODUCTION**

Are there any duties incumbent upon the defense before it may be claimed that the prosecution violated the defendant's right to due process of law? Returning to the holding of *Brady v. Maryland,*\(^7^4\) one should note that the Courts specifically mentioned the requirement of a request by the defendant:

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 or bad faith of the prosecution.\(^7^5\)

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\(^7^0\) 183 F.2d 990 (D.C. Cir. 1950).

\(^7^1\) Id. at 993.

\(^7^2\) 363 F.2d 287 (D.C. Cir. 1966).

\(^7^3\) Id. at 291. See also Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967), where after the district court held that the evidence suppressed was not material, the circuit court reversed and remanded for a new trial.

\(^7^4\) 373 U.S. 83 (1963).

\(^7^5\) Id. at 87.
Note the emphasized words "upon request." Are these words intended as a requirement for the defense in all cases or are they merely reflection of the fact situation of that particular case? From the discussion that follows, it will become apparent that the courts throughout the country are in complete disagreement as to the need for a defense request as a condition precedent to a claimed violation of due process.\textsuperscript{76}

UNITED STATES SUPREME COURT INTERPRETATIONS

Although the words "upon request" limit the Court's holding in \textit{Brady}, a later decision indicated that there was no need for such a request by the defense. In \textit{Giles v. State of Maryland},\textsuperscript{77} Mr. Justice Fortas, in a concurring opinion, referring to the \textit{Brady} decision, argued that there should be no need for such a request:

\begin{quote}
I see no reason to make the result turn on the adventitious circumstance of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event.\textsuperscript{78}
\end{quote}

Although Mr. Justice Fortas's opinion has been widely cited, thus far it has not been accepted by a majority of the Justices of the United States Supreme Court, and cannot be cited as prevailing authority.

INTERPRETATIONS WITHIN THE CIRCUITS

\textit{First Circuit}

To date, the only decision or point issued by the first circuit is \textit{State v. Anderson},\textsuperscript{79} in which the Supreme Court of New Hampshire apparently upheld the need for a defense request. Here the defendant, claiming that certain evidence was suppressed appealed his conviction for unlawful assembly. The court refused to accept his arguments and, in affirming the conviction, pointed out that there was no request by the defendant which would have called for the particular evidence at the trial.\textsuperscript{80} The court further noted that the evidence would have tended to be cumulative and refused to grant a new trial.

\textit{Second Circuit}

The Court of Appeals for the Second Circuit has given rather thorough

\begin{flushright}
\textsuperscript{76} There are no cases cited in this chapter from the fifth, sixth, or D.C. circuits.  

\textsuperscript{77} 386 U.S. 66 (1967).  

\textsuperscript{78} Supra note 77, at 102.  

\textsuperscript{79} 108 N.H. 9, 226 A.2d 790 (1967).  

\textsuperscript{80} Id. at 10, 226 A.2d at 791.  
\end{flushright}
consideration to the question of the need for a prior request; by the defense, however, the court's decisions have been quite inconsistent. In 1961, in United States v. Grabina, the defendant was convicted of possessing counterfeit Federal Reserve Bank notes and in his appeal alleged that certain statements of his co-conspirators were not made available to him by the prosecution, and this prosecutorial conduct amounted to reversible error. The court rejected his claim, curtly noting that no request was made for the statements:

The short answer to this is that no request was made for the statements nor any motion under 18 U.S.C. § 3500, and there is no reason to suppose that any such statements would have been withheld if requested. There is no reversible error here.82

Three years later, however, in United States ex rel Meers v. Wilkins, the court specifically held that no request was necessary. Meers alleged that the State withheld the names of two witnesses to the crime of which he was convicted. The district court granted habeas corpus, and the State appealed, claiming that there was no request for the allegedly suppressed information, and, hence, no denial of due process. The court, in contrasting this case to that of Brady v. Maryland, stated:

The case before us differs from Brady in that the defense counsel never requested the disclosure of evidence from the prosecution, but we think that such request is not a sine qua non to establish a duty on the prosecution's part.85

The court again reversed itself in United States v. Keogh, an appeal of a conviction for conspiracy to obstruct justice, wherein suppression of certain F.B.I. reports was claimed to be error. Noting that there had been no request for the reports, the court determined that this was not an obvious case of deliberate suppression of evidence:

We cannot agree with petitioner that where there has not been deliberate suppression in either of the senses we have outlined, the absence of a request is irrelevant. It serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files. . . .87

In another similar case the court determined that if a request is made, it must be directed to the proper party to be effective. In United States ex rel Fein v. Deegan, defendant, convicted of murder, claimed a suppres-

81. 295 F.2d 792 (2nd Cir. 1961).
82. Id. at 793.
83. 326 F.2d 135 (2d Cir. 1964).
84. Supra note 74.
85. Supra note 83, at 137.
86. 391 F.2d 138 (2nd Cir. 1968).
87. Id. at 147.
88. 410 F.2d 13 (2nd Cir. 1969).
sion by the prosecution of the name and address of a possible defense witness. An investigator working for the appellant had made the request for the information to a police detective who was working on the case. The detective refused to reveal the requested information, and the defense failed to follow up the request. The court refused to find error, because the request was made to an improper party:

[T]here was not only no request for Dagmar's full name, address, or telephone number but also no indication that the defense could not locate her. . . . But in our view, it would be unfair and inequitable to charge the prosecutor with the responsibility for any oral request which was made by an employee of the defendant, such as an investigator, to an employee of the prosecutor, such as a detective. . . .

Third Circuit

In the Court of Appeals for the Third Circuit, consideration was given to the degree of precision which was required on the part of the defense in requesting information from the prosecution in the case of United States ex rel. Felton v. Rundle. In the original trial for robbery, the defense counsel had made a request for certain police reports, but the trial court turned down the request, informing counsel that he may raise the request at a later time. The defense counsel failed to make that later request. Because of that failure, the majority of this court found that there was no suppression of evidence or denial of due process of law:

Moreover for the relator did not object to the ruling of the trial judge, and thereafter made no attempt to obtain the police report or even to discover if in fact it contained matter useful to the defense.

In a strongly worded dissent, Judge Biggs refused to believe that the defense was under a duty to make repeated requests for the information:

The majority seems to take the position that there must be more than one request for examination of a pertinent document; in fact, that the accused must go on knocking at the door until the trial judge sees fit in his own good time to open it. In my opinion one request is enough, for a constitutional right is neither aided nor injured by constant reassertion or reiteration. The majority seemingly asserts the position that an accused must find an exact combination of words and keep repeating them at artful times in order to maintain a constitutional right. I cannot agree with such a view. . . .

89. Id. at 19. Another case worth noting is United States v. Tellier, 255 F.2d 441 (2nd Cir. 1958), where the defense inquired as to whether a certain report was available but failed to request it and the court ruled there was no denial of due process of law.

90. 410 F.2d 1300 (3rd Cir. 1969).

91. Id. at 1304.

92. Id. at 1305.
In a Supreme Court of Pennsylvania decision, Commonwealth of Pennsylvania v. Osborne, the court stated in very simple terms how a defendant can avert a suppression of evidence by the prosecution. At the defendant's murder trial the prosecution failed to produce the bullets which caused the fatal wounds. Defendant contended that this was a suppression of evidence which amounted to a denial of due process. Because there was no request for the bullets, the court dismissed the allegation of suppression:

All that was required of him to obtain them was a formal call for the production of such bullet or bullets at trial. . . . [T]rial counsel knew of the existence of the bullets and knew what to ask for. Under these circumstances it cannot be said that the district attorney deliberately suppressed the bullets simply because he failed to introduce them.

Fourth Circuit

The prevailing law in the fourth circuit is that no request is necessary. In Barbee v. Warden, Maryland Penitentiary, the defendant claimed that the prosecution suppressed a report of ballistic and fingerprint tests made by the police department. The prosecution asserted that because no request was made no duty to produce the reports for the defense arose. The court refused to accept the prosecution contention:

It is no answer that Barbee's attorney failed to ask for the results of the tests. While a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial.

In Clements v. Coiner, a habeas corpus proceeding, the United States District Court for the Southern District of West Virginia took an historical approach in determining that a request was not necessary in the given fact situation. First noting the number of decisions which held that a request was unnecessary, the court pointed out that defendant was convicted before the Brady decision. Furthermore, even with a request, the report in question would probably not have been turned over to the defense. Thus, a request on the part of the defense would have been a futile gesture and as such should not have been required.

94. Id. at 300, 249 A.2d at 332.
95. 331 F.2d 842 (4th Cir. 1964).
96. Id. at 845.
98. Supra note 74.
99. Supra note 97, at 758.
Seventh Circuit

The Supreme Court of Illinois reflected the split in opinion over the need for a request in the case of People v. Moore. After being convicted of murder, the defendant appealed, alleging a suppression of evidence by the prosecution denied him due process of law. The prosecution answered, arguing that no request was ever made for the information allegedly suppressed and, thus, no duty arose to produce it. The majority of the court, affirming the conviction, enunciated the rationale underlying the requirement of a request by defendant:

[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material. ... To sustain defendant's contention would be to require the prosecution to fully report every detail of lengthy police investigations including the following up of useless leads and discussions with immaterial witnesses.

However, Mr. Justice Schaefer, dissenting, stated his belief that there was no necessity for a defense request:

I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite to disclosure by the prosecution. ... I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to Brady by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information.

The Supreme Court of Wisconsin has concurred in the Moore decision in Goetsch v. State of Wisconsin, where it stated, “The Constitution imposes no duty upon the state to produce unrequested documents.”

However, the Court of Appeals for the Seventh Circuit excused the lack of a proper defense request in United States v. Poole. In this case the victim of the alleged kidnapping stated incorrectly that she had gone to a certain “Dr. Green” for examination following the kidnapping. When the defense counsel was unable to find this doctor, he did not attempt to gather any further information on the matter or attempt to see if there was a mistake as to the doctor’s identity. The defense then claimed a suppression of favorable evidence by the prosecution, but the prosecution argued, “no request-no duty.” The court excused the defense counsel's lack of diligence due to the prosecutorial misconduct of failing to correct the statement at the time of the preliminary hearing:

100. 42 Ill. 2d 73, 246 N.E.2d 299 (1969).
101. Id. at 80-81, 246 N.E.2d at 304.
102. Id. at 89-90, 246 N.E.2d at 308-09.
103. 45 Wis. 2d 285, 172 N.W.2d 688 (1969).
104. Id. at 292, 172 N.W.2d at 691.
105. 379 F.2d 645 (7th Cir. 1967).
It it true, as the government argues, that defense counsel was not diligent in following up the information obtained at the preliminary hearing, despite its inaccuracy. The government failed to correct the misinformation, however, and we think under these circumstances Poole should not suffer for the mistake of his counsel.\textsuperscript{106}

\textbf{Eighth Circuit}

The Supreme Court of Arkansas has ruled in alternate decisions that a defense request both is and is not required. In \textit{Smith v. Urban},\textsuperscript{107} the court, citing \textit{United States ex rel. Meers v. Wilkens},\textsuperscript{108} determined that a request by the defense is not essential, and reversed defendant's conviction. In \textit{Washington v. State of Arkansas},\textsuperscript{109} however, the court affirmed an earlier conviction because "there was no request in the court below that the capsules be produced. Consequently there was no adverse ruling by the trial court upon which a claim of error can now be based."\textsuperscript{110}

In \textit{State of Minnesota v. Hanson},\textsuperscript{111} the Supreme Court of Minnesota found that the defendant failed to state specifically what was suppressed, and, therefore, affirmed his conviction. The court, in examining the obligations of the prosecution in this case, said:

It is clear to us that if the state had such evidence in its possession at time of trial, it was obligated to produce it, \textit{particularly where, as in this case, a demand was made by defendant's counsel that such evidence—specifically, copies of any writings attributed to defendant—be produced}...\textsuperscript{112}

\textbf{Ninth Circuit}

The Court of Appeals for the Ninth Circuit considered the need for a defense request in \textit{Peoples v. Hocker}.\textsuperscript{113} Peoples was convicted guilty of murder in Nevada and, on appeal, claimed a suppression of the autopsy report. The record did not show a request for the production of the report but merely a notation that a report be sent to the district attorney or the trial court. The court of appeals ruled directly upon the point of the lack of request:

\begin{quote}
During trial, Peoples never asked that a copy of the autopsy report be produced.
\end{quote}

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 649. \textit{See also} \textit{Fair v. State}, 252 Ind. 494, 250 N.E.2d 744 (1969) (no attempt to gain the information from the prosecution, hence no prejudice to the defense).
\item \textsuperscript{107} 245 Ark. 781, 434 S.W.2d 283 (1968).
\item \textsuperscript{108} 326 F.2d 135 (2d Cir. 1964).
\item \textsuperscript{109} 248 Ark. 318, 451 S.W.2d 449 (1970).
\item \textsuperscript{110} \textit{Id.} at 319, 451 S.W.2d at 450.
\item \textsuperscript{111} 286 Minn. 317, 176 N.W.2d 607 (1970).
\item \textsuperscript{112} \textit{Id.} at 334, 176 N.W.2d at 618.
\item \textsuperscript{113} 423 F.2d 960 (9th Cir. 1970).
\end{itemize}
In fact when Dr. Joy testified at the trial, Peoples made no mention of the autopsy report, although it had been discussed on direct examination. Under these circumstances there was no unconstitutional suppression of evidence on the part of the district attorney. We have no reason to doubt that if the report had been asked for at the trial, it would have been produced.\textsuperscript{114}

\textit{Tenth Circuit}

In \textit{Lewis v. State of Oklahoma},\textsuperscript{115} the defendant was convicted of murder and appealed. After relief was denied by the state courts, he brought a habeas corpus action in the district court, claiming a suppression of evidence by the prosecution. The court noted that there was no request for the evidence made at trial, and then compared the holdings of \textit{Brady v. Maryland},\textsuperscript{116} and \textit{Giles v. State of Maryland}.\textsuperscript{117} After reviewing the criteria for setting forth a case under \textit{Brady}, especially the requirement that "[t]he evidence was suppressed and not made available to the Petitioner upon his request therefor,"\textsuperscript{118} the court held:

Had the Supreme Court desired to turn the \textit{Giles} case on a rule of compulsory disclosure without request, it could have done so. Therefore, this Court takes the request requirement of the \textit{Brady} case as the Supreme Court's definitive expression on the matter.\textsuperscript{119}

Similarly, the Supreme Court of New Mexico in \textit{State v. Vigil},\textsuperscript{120} held that such a request on the defendant's part is necessary. The defendant, convicted of unlawful possession and sale of narcotic drugs, claimed a suppression of certain viles of seized drugs and a resulting denial of due process under \textit{Brady} and other authorities. The court refused to sustain the defendant's assertions, stating:

Each of these cases treats the suppression by the prosecution of material evidence favorable to and \textit{requested} by the accused as a denial of due process of law. It cannot be reasonably be said, in our opinion, that evidence of this character involved here is suppressed or withheld by the prosecution, if the defendant knowing it to have been in possession of the prosecution fails to demand its production.\textsuperscript{121}

\textsuperscript{114} \textit{Id.} at 963.  
\textsuperscript{116} \textit{Supra} note 74.  
\textsuperscript{117} \textit{Supra} note 77.  
\textsuperscript{118} \textit{Supra} note 115, at 120.  
\textsuperscript{119} \textit{Supra} note 115, at 120-21. See also Tilford v. Page, 307 F. Supp. 781 (W.D. Okla. 1969), the companion to the \textit{Lewis} case which reached the same results for the same reasons.  
\textsuperscript{120} 79 N.M. 80, 439 P.2d 729 (1968).  
\textsuperscript{121} \textit{Id.} at 81-82, 439 P.2d at 730-31. See also De Baca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967) (no defense request, hence no suppression).
WHAT MUST BE DISCLOSED: MATERIALITY AND DISCOVERY

INTRODUCTION

In considering what the prosecution must disclose, one again must refer to *Brady v. Maryland*, where the criteria for disclosure is framed in these terms: "... where the evidence is material either as to guilt or to punishment, ..." Therefore, exactly what type of evidence is material must first be determined. Once the question of whether evidence is material or not has been examined, it becomes necessary to discuss the proper means of obtaining this evidence for the defense. The *Jencks Act*, has set forth procedures for discovery in federal cases; the corresponding state procedures will also be analyzed. Other areas to be considered under this topic include the discretionary powers of the court regarding the admissability of *in camera* inspections and whether the defendant should be permitted to go on so-called "fishing expeditions."

UNITED STATES SUPREME COURT INTERPRETATIONS

The United States Supreme Court has dealt quite extensively with the problems of disclosure. One of the most important of these cases is *Jencks v. United States*, wherein the defendant was violating the National Labor Relations Act. At his trial, he introduced a motion for the production of certain reports made by two F.B.I. agents who had testified against him, but the motion was denied by the trial court, on the ground that Jencks had failed to lay a proper foundation of inconsistency in the agents' testimony. The Court first ruled that this foundation was unnecessary because "a sufficient foundation was established by the testimony of Matysow and Ford that their reports were of the events and activities related in their testimony." The Court then reaffirmed the principles already established by *Gordon v. United States*, which held in part: "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule. ..." In many cases after a defense request for evidence, courts have inspected the requested evidence *in camera* to determine whether the defense may use it, but in *Jencks* the use of this procedure was disapproved:

123. *Id.* at 87.
126. *Id.* at 666.
127. 344 U.S. 414 (1953).
We hold, further, that petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved.\(^{120}\)

Following this decision, Congress passed the Jencks Act, which established rules of discovery in federal criminal cases, a codification of the *Jencks* decision.\(^{180}\)

In *Giles v. State of Maryland,*\(^{131}\) the United States Supreme Court declined to accept the Maryland court's interpretations as to what type of evidence must be disclosed to the defense. As noted earlier, the State in the *Giles* case had suppressed reports tending to show the sexual proclivities of the prosecutrix. When the Supreme Court of Maryland reversed, it delineated what type of nondisclosure would amount to a denial of due process of law:

\[\text{[I]}\text{t must be such as is material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense.}\] \(^{132}\)

The United States Supreme Court in declining to accept the Maryland interpretation stated:

Thus the case presents the broad question whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense and the degree of prejudice which must be shown to make necessary a new trial. We find, however, that it is unnecessary and therefore inappropriate to examine these questions.\(^{133}\)

The case was nevertheless reversed for the purpose of holding an evidentiary hearing.

**INTERPRETATIONS WITHIN THE CIRCUITS**

**First Circuit**

Two state supreme court rulings within the First Circuit consider the duties of the defense and the discretion of the trial court in allowing pre-
trial discovery. In *Commonwealth of Massachusetts v. French*, 134 seven defendants were found guilty of conspiracy and six of them of murder. In a discussion of the less significant issues raised in the case, the court spoke of the need for specificity by the defense in moving for pre-trial inspection:

> The trial judge was not required to grant motions for inspection of exculpatory evidence, or of the results of scientific and other examinations made in connection with the case, in the absence of greater specification of the areas of desired inquiry.135

In the second case, *State of New Hampshire v. Superior Court*, 136 the Supreme Court of New Hampshire affirmed a court order which granted inspections and examinations of various items under a defense motion for discovery. The court ruled that the trial court had the power to grant the motion. After quoting from *Regan v. Superior Court*, 137 the court held: "We reaffirm the inherent power of our trial court to permit such inspections and examinations if it finds that justice so requires. . . ."138

The court further held that all the items requested by the defense except the "work-product" of the prosecution were susceptible of inspection:

> We hold that notes personally compiled by law enforcement authorities in the course of their investigation, even if they include notes of conversations with the accused, constitute the work product of the State and are privileged from pretrial discovery.139

**Second Circuit**

The Court of Appeals for the Second Circuit has resisted granting broad discovery powers to the defense. The defendants in *United States v. Jordan*, 140 appealed a conviction of bank robbery, contending that the trial judge's refusal of a defense request for a complete search of the government's files amounted to a denial of due process, and that *Brady v. Maryland*, 141 authorized such a search. The court held, however, that the *Brady* decision did not require the government to disclose "the myriad immaterial statements and names and addresses which any extended investigation is bound to produce."142 The court further stated that ma-

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135. *Id.* at —, 259 N.E.2d at 227.
138. *Supra* note 136, at 230, 208 A.2d at 833-34.
139. *Supra* note 136, at 230, 208 A.2d at 834.
140. 399 F.2d 610 (2nd Cir. 1968).
141. *Supra* note 122.
142. *Supra* note 140, at 615.
Materiality is not for the defense to decide but rather for the trial court, subject to appellate review.143

The second circuit court of appeals established further criteria in United States v. Evanchick,144 affirming a conviction for transporting stolen goods in interstate commerce. Upon defendants’ request for discovery, the trial court instructed the defendants to narrow their request for information. Further requests by the defendants also proved too broad and failed to state how the information would be useful. The court of appeals, in upholding the trial court’s ruling, stated: “The Court’s denial of the motion for inspection was proper. Neither Brady v. Maryland . . . , nor any other case requires the government to afford a criminal defendant a general right of discovery. . . .”145

Third Circuit

The Court of Appeals for the Third Circuit has considered in two early cases, United States ex rel. Almeida v. Baldi,146 and United States ex rel. Thompson v. Dye,147 what need and need not be disclosed. In Almeida,148 the court considered the duty to turn over physical evidence to the defense. In Almeida, a murder trial, the prosecution had suppressed a spent bullet which would have shown that Almeida did not commit the murder, although he had taken part in the crime. This information would have had no effect as to the murder charge but might have influenced the jury’s decision as to the sentence. The court, therefore, found:

We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process. . . .149

In Thompson, a prisoner under sentence of death for first-degree murder appealed the denial of a writ of habeas corpus on the ground that the suppression of vital evidence, material to issues of guilt and penalty, denied him due process of law. The alleged suppressed evidence consisted of pre-trial statements made by the arresting officer and others to the prosecutor that, at the time of the arrest, Thompson was intoxicated and showed signs of having been in a fight. The question was whether these

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143. Supra note 140, at 615.
144. 413 F.2d 950 (2d Cir. 1969).
145. Id. at 953.
146. 195 F.2d 815 (3rd Cir. 1952).
147. 221 F.2d 763 (3rd Cir. 1955).
148. Supra note 152.
149. Supra note 152, at 820.
observations were vital to Thompson's case. The court, in finding that they were of importance to Thompson's case and should have been turned over to the defense, held:

Nor can it be held as a matter of law to be unimportant to the defense here. It was substantial evidence which should have been but never was submitted to the jury . . . in connection with what the court did charge as to the effect of the drunkenness of Thompson or that he was under the influence of marijuana or a drug at the time of the killing. . . .

Although the Third Circuit has held that both physical and observational evidence must be disclosed to the defense, the court has not held that all material should be given over to the defense. In United States v. Fioravanti,151 the defendant requested anything that could be useful to his defense, including information concerning how the government intended to prove its case. The court found that federal procedural rules did not require the prosecution to "disclose all the minutia of its evidence, to reveal its trial strategy, and to deliniate with total specificity the case it intends to present."152 The court further distinguished this case from Brady v. Maryland,153 in that the prosecution possessed only incriminating statements as opposed to the exculpatory statements suppressed in Brady.154

The Supreme Court of New Jersey has ruled that evidence pointing to the credibility of witnesses is material and must be disclosed to the defense. In State of New Jersey v. Vigliano,155 the defendant appealed a conviction of murder, claiming a suppression of material evidence by the prosecution. The prosecution's key witness, the defendant's father, had been found mentally ill and two physicians recommended that he be committed to a mental institution. When the defense attempted to question this witness as to his earlier psychiatric study, the prosecution, which knew of the psychiatrists' findings, objected to the question and was sustained by the trial court. The trial court held that this was not prejudicial error as the father's value as a witness had been destroyed both through cross-examination and by police officers' testimony that the father seemed to be intoxicated on the night of the murder. The Supreme Court of New Jersey disagreed with the trial court and ruled that the information in ques-

150. Supra note 147, at 767.
151. 412 F.2d 407 (3rd Cir. 1969).
152. Id. at 411.
153. Supra note 122.
154. See also Lewis v. Court of Common Pleas of Lebanon County, 426 Pa. 296, 300, 260 A.2d 184, 187 (1969): "[I]n the absence of exceptional circumstances and compelling reasons an accused has no right to the inspection or disclosure before trial of evidence in possession of the prosecution."
tion should have been disclosed: "[T]he grave delinquency of the State cannot be overlooked. ... Even where the evidence concerns only the credibility of a State's witness against defendant, it denies him a fair trial and violates due process. ..."156

*Fourth Circuit*

There are times when evidence does not become material until something occurs to make it so. For example in *Barbee v. Warden, Maryland Penitentiary*,157 the appellant claimed a denial of due process by the prosecution's failure to produce potentially exculpatory evidence, namely a report on ballistic and fingerprint tests made by the police, which would have been favorable to Barbee's case. The revolver used in the crime was presented by the prosecution for identification and not as evidence. Although the State claimed that the report had no probative value, the court ruled that this report should have been turned over to the defense. It was noted that the report became relevant as soon as the revolver was produced by the prosecution, albeit only for identification purposes: "[T]he evidence tending to exculpate the petitioner became highly relevant the instant his revolver was produced in open court, formally marked for identification, and witnesses interrogated about it."158 The court further stated that in cases of doubt the prosecution should turn the evidence over to the court. The court cited *Griffin v. United States*,159 which held in part that "[w]hen there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful."160

The Court of Appeals for the Fourth Circuit has considered who is best able to decide what evidence is favorable to the defense in *United States v. Mitchell*.161 Prior to the defendant's trial for bank robbery, the defense counsel moved for disclosure of the entire government file. The trial judge made an *in camera* inspection of the file and turned some material over to the defense. The defense contended that only the defense could make a proper determination of what information was favorable to him. It appears the trial judge's refusal was based, at least in part, upon an attempt to insure the safety of certain government witnesses. In affirming, the court stated:

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156. *Id.* at 60, 232 A.2d at 133-34.
157. 331 F.2d 842 (4th Cir. 1964).
158. *Id.* at 845.
159. 183 F.2d 287 (D.C. Cir. 1966).
161. 408 F.2d 996 (4th Cir. 1969).
We think that the District Judge properly exercised his discretion. Witnesses for the prosecution can be endangered when their identities are prematurely disclosed to persons accused of violent crimes. The trial judge was correct in weighing the safety of potential witnesses in deciding whether to disclose the entire file.  

The problem of whether to allow the defendant to go “rummaging” or on a “fishing expedition” through the prosecution files was discussed in *United States v. Frazier*. The appeal in this conviction for bank robbery was based upon the trial court's refusal to grant an *in camera* inspection of the Government's files to determine the presence of exculpatory information. The appellants cited both the *Brady* and *Barbee* decisions as their authority for such a request. The court first pointed out that the defendants had no knowledge of exculpatory evidence, had never alleged that such information existed and had not claimed that anything was hidden from the defense. The court then went on to hold that the obligation upon the Government not to suppress favorable evidence [*Brady*], and affirmatively to disclose [*Barbee*], does not make it incumbent upon the trial judge to rummage through the file on behalf of the defendant.  

The Maryland Court of Appeals considered whether to allow the defendant to become privy to the case which the State expected to present against him in *Presley v. State of Maryland*. Here the appeal, following a conviction for rape, was based upon the trial court's refusal to furnish, prior to trial, the substance of testimony which the prosecution hoped to elicit from its witnesses. The State turned over a list of its witnesses but not the requested information. The court of appeals rejected the defense contention and in affirming the conviction stated: “We are not aware of any constitutional or statutory requirement which compels the State to furnish the appellant with the substance of the testimony to be given by its witnesses.”  

**Fifth Circuit**  

Within the Fifth Circuit, a number of points dealing with disclosure have been considered, the first of which concerns the use of the *in camera* in-

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162. *Id.* at 998.
163. 394 F.2d 258 (4th Cir. 1968).
164. *Supra* note 122.
166. *Supra* note 163, at 262.
168. *Id.* at 430, 251 A.2d at 628. *See also* United States v. Harris, 409 F.2d 77 (4th Cir., 1969), where it was recited in dicta that *Brady* does not require the trial court to grant *in camera* inspections; and Ward v. State of Maryland, 2 Md. App. 687, 236 A.2d 740 (1968), where the court refused to allow the defense to
spection procedure. In *Williams v. Dutton*,169 the court discussed the use of the *in camera* procedure and its rationale for authorizing that procedure:

In the circumstances of this case, we think the question should be determined *in camera* by the state courts. If, after examination of the demanded evidence, the state court determines that favorable evidence "material either to guilt or to punishment" has been suppressed, then Williams must be granted a new trial. . . . The right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor. Likewise we reject appellant Williams' contention that the prosecution's files should have been open to him. . . . We think that unlimited discovery of the state's files would unduly impair effective prosecution of criminal cases. On the other hand, since the investigative resources of the state are generally far superior to those of the defendant, a total exclusion of the accused from the evidence gathered by the prosecution also seems unwarranted. We therefore think that the procedure which we adopt in this case is a necessary compromise of the conflicting interests of state and accused.170

The use of the *in camera* inspection was also authorized in Florida in *State of Florida v. Gillespie*,171 and *State of Florida v. Drayton*.172

The state courts within the Fifth Circuit are nearly unanimous in refusing to allow a defendant to go rummaging through the prosecution's files. In *Sanders v. State of Alabama*,173 the defendant, who was convicted of first degree murder, appealed, claiming as error the trial court's refusal to allow inspection of certain documents. The defendant cited *Brady v. Maryland*,174 as authority, but the court refused to accept *Brady* as a permit for a "fishing expedition." The court stated in part:

We can see no violation of the rule of the Brady case, supra, in the action of the trial court in refusing to require the State to produce all that was requested by Sanders in his motion to produce. He was not entitled to a mere fishing expedition. . . .175

In *Bell v. State of Texas*,176 the Texas court affirmed a murder conviction after the appellant claimed that the overruling of a motion for discovery by the trial court was error. The court noted that the motion failed to state the nature of the items sought, that they were material either to her

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169. 400 F.2d 797 (5th Cir. 1968).
170. *Id.* at 800-01.
171. 227 So. 2d 548 (Fla. 1969).
172. *Infra* note 179.
173. 278 Ala. 453, 179 So. 2d 35 (1965).
175. *Supra* note 173 at 457, 179 So. 2d at 39.
defense or to the issue of punishment, or for that matter, that the State was in possession of these items. The court, referring to *Brady v. Maryland*,\(^{177}\) and similar cases, held that these decisions

\[ \ldots \text{do not stand for the proposition advanced by appellant here—that she should have been granted carte blanche in rummaging through the state's files in the hope of uncovering some shred of evidence which might be of assistance to her either on the issue of guilt or punishment.}^{178} \]

When evidence should be turned over to the defense by the prosecution arose in *State of Florida v. Drayton*.\(^{179}\) Here, the State appealed a court order for an *in camera* inspection of the grand jury testimony of the prosecutrix in a rape case. In ruling upon that appeal, the court discussed the timing of disclosure with its constitutional implications:

> After careful examination, we are of the opinion that the accused in a criminal trial has the right, *protected by the Constitution*, to have the prosecution disclose to him favorable evidence material either to guilt or punishment with adequate time allowed to utilize it fully. However, he has no *constitutionally protected right* to examine such evidence *prior* to trial.\(^{180}\)

The Georgia courts have been consistent in holding that there is no constitutional requirement for pre-trial discovery. This holding was stated in *Bryan v. State of Georgia*,\(^{181}\) an appeal following a conviction for murder. The appeal was based on a refusal to allow pre-trial inspection of certain photographs and other items in the possession of the prosecution. The court, in affirming, cited *Blevins v. State of Georgia*,\(^{182}\) which held:

> There is no statute or rule of procedure of force in this State which requires a solicitor general or other prosecuting officer to make his evidence, documentary or otherwise, available to the accused or his counsel before trial.\(^{183}\)

In *Ashley v. State of Texas*,\(^{184}\) the appellant, who was convicted of murder, claimed a suppression of a psychiatric report stating that he was not competent either at the time of the crime or at the time of the trial. The state claimed that this was only an opinion, and as such was not required to be disclosed to the defense. The court refused to accept this contention and compared this case to *United States ex rel. Thompson v. Dye*:\(^{185}\)

\[ \text{177. Supra note 174.} \]
\[ \text{179. 226 So. 2d 469 (Fla. 1969).} \]
\[ \text{180. Id. at 471.} \]
\[ \text{181. 224 Ga. 389, 162 S.E.2d 349 (1968).} \]
\[ \text{182. 220 Ga. 720, 141 S.E.2d 426 (1965).} \]
\[ \text{183. Id. at 723, 141 S.E.2d at 429, cited also supra note 181, at 391, 162 S.E.2d at 350. This same view was upheld in Daniel v. State of Georgia, 118 Ga. App. 370, 163 S.E.2d 863 (1968).} \]
\[ \text{184. 319 F.2d 80 (5th Cir. 1963).} \]
\[ \text{185. Supra note 147.} \]
The vice of this argument is that it is not the nature or the weight to be accorded to an opinion, but the fact that such an opinion had been formed by such an obviously objective witness as one engaged by the prosecution to make the examination. In this respect it falls very much within the concept of the Bye case, where it was a police officer whose testimony, if elicited, would have been helpful to the defendant.186

In 1968, the Supreme Court of Mississippi gave the defendant the right to inspect both favorable and non-favorable evidence in certain cases. In Armstrong v. State of Mississippi,187 the appellant was found guilty of manslaughter and partially based his appeal on a denial of a discovery motion by the trial court. This court, after citing Brady v. Maryland,188 considered the discovery rights of a defendant, and concluded:

Although the trial judge has discretionary power in determining whether or not tangible evidence in the possession or under the control of the prosecuting attorney should be given to the defendant for his inspection, nevertheless, the defendant should be permitted to inspect tangible evidence which may be used against him or which may be useful in his defense. This does not mean that a defendant may peruse the private files of a prosecuting attorney or examine his private notes. It does mean, however, that the concept of "due process" and "fair trial" requires that material, tangible evidence must not be concealed from the defendant who is accused of crime.189

Sixth Circuit

The discovery procedures for the State of Ohio were discussed in two cases, State of Ohio v. White,190 and State of Ohio v. Laskey.191 In White, the defendant, convicted of murder, appealed because the trial court's denied a defense motion to inspect the prior statements of a witness for the prosecution. The court, in discussing the law of discovery, pointed out that the "Jencks rule"192 was not yet binding upon the states. Furthermore, most jurisdictions are divided on the point of inspection of prior statements of prosecution witnesses for the purpose of cross exami-

186. Supra note 184, at 85.
187. 214 So. 2d 589 (Miss. 1968).
188. Supra note 174.
189. Supra note 187, at 596. Other fifth circuit cases worth noting include: Warren v. Davis, 412 F.2d 746 (5th Cir. 1969) (evidence allegedly suppressed was not material to the case); Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968) (refusal of broad motion for discovery was affirmed); and Means v. State, 429 S.W.2d 490 (Tex. Crim. App. 1968) (all possible evidence should be turned over to the trial court for a decision as to whether it should be turned over to the defense).
190. 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968).
192. See discussion accompanying supra note 125.
nation or impeachment. The court, therefore, proposed an alternative—the in camera inspection—by the trial court, to determine whether or not any inconsistencies existed, and described the procedure thusly:

A review by the court at which counsel for the state and counsel for the defense are present and participating. If the judge determines that inconsistencies exist between the testimony of the witnesses and his prior statements, and such inconsistencies are of so substantial a nature that the demands of a fair trial and due process require that the defense be permitted to cross examine the witness as to such inconsistency, the statement should be released to defense counsel. Otherwise, defense counsel is bound under obligation of his oath of office as an attorney to erase from his mind, and never to use, any information received from the in camera inspection.

The court then held that this procedure should have been used by the trial court and reversed the earlier decision.

In the Laskey case, the defendant claimed that the denial by the trial court of his motion to examine the grand jury minutes before trial constituted error. Note that this case is distinguishable from White in that White's demand was at trial whereas the instant case involves a pre-trial demand. The court, in deciding this case, set forth the criteria for the production of grand jury minutes prior to trial when it stated:

Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general. This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy.

The court further examined its ruling in the White case and discussed its impact on a defense request for discovery prior to trial:

The White rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, can not be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination.

In Elliot v. State of Tennessee, the defendant, charged with armed robbery, requested access to any information which the State might have affecting the credibility, character, conflicting statements or motives of the State's witnesses. This motion was denied and the defendant ap-

193. Supra note 130, at 157-58, 239 N.E.2d at 73.
194. Supra note 191.
195. Supra note 190.
196. Supra note 191, at 191, 257 N.E.2d at 68.
197. Supra note 191, at 191, 157 N.E.2d at 68.
pealed claiming this denial as prejudicial error. The court held it not mandatory that evidence of this type be turned over to the defense, nor must "work product" or oral or written statements be disclosed prior to trial. In ruling on the specific motion of this case, the court held:

The motives, attitudes . . . are matters that must be determined by such investigation as the party seeking the information deems sufficient and in the absence of a designation of tangible objects that might tend to shed some light on the area of investigation the court should not permit a blanket inspection of the files of the State on the off-chance something "might" be found that "might" help the defendant. Such "fishing expeditions" have not as yet been authorized in Tennessee.199

**Seventh Circuit**

The problems of discovery and disclosure have arisen in the three state supreme court decisions within the seventh circuit. In *People v. Cole*,200 the defendant, convicted of rape and robbery, was denied access by the trial court to certain police reports which contained conflicting statements made by the prosecutrix and he appealed that denial. Noting that the officers who wrote the report were not called as prosecution witnesses, the court cited *People v. Moses*,201 which stated:

Where it appears that there is evidence in the possession and control of the prosecution favorable to the defendant, a right sense of justice demands that it should be available, unless there are strong reasons otherwise.202

The court then ruled upon the merits of this case and upon the fact that the reporting police officers were not called as witnesses for the prosecution:

The failure of the State to call the two officers to testify concerning the oral statement of Birdia Jordan cannot be relied upon by the prosecution to evade this rule. If contradictory statements were made by the prosecuting witness to these two missing officers then the defendant by all means should have the benefit for impeachment purposes. *Justice requires a full and fair disclosure*.203

A thorough discussion of discovery and disclosure was presented by the Supreme Court of Indiana in *Antrobus v. State of Indiana*,204 an appeal following a conviction for burglary. One issue on appeal was the trial court's denial of certain motions for discovery. The court held that the State was required to present a list of witnesses to the defense upon re-

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199. *Id.* at —, 454 S.W.2d at 189.
201. 11 Ill. 2d 84, 142 N.E.2d 1 (1957).
203. *Supra* note 200, at 381, 196 N.E.2d at 694-95.
quest, citing Bernard v. State of Indiana, which set forth the criteria and justification for the production of such a list:

It is self-evident that a list of witnesses would have been beneficial in the preparation of appellant's case. We do not require that the State lay bare its case in advance of trial nor that the criminal defendant be allowed a fishing expedition, however these objections do not arise when a list of witnesses is requested and the State fails to show a paramount interest in nondisclosure.

Presenting a detailed analysis of the criteria for obtaining production of a witness's pre-trial statements, the court stated:

First, the defendant must lay the proper foundation for his motion or the trial court may properly deny it. An adequate foundation is laid when: (1) The witness whose statement is sought has testified on direct examination; (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) The statements relate to matters covered in the witness' testimony in the present case. If the foundation is proper the trial court must grant the motion (for production) and order the statements turned directly over to the defendant unless the State alleges: (a) There are no such statements within the control of the State. The trial court must conduct a hearing on the conflicting claims of the parties to resolve this issue. (b) There is a necessity for keeping the contents of the statement confidential. (c) The statement also contains matter not related to the matters covered in witness' testimony and the State does not wish to reveal that portion. In the latter two cases the statements need not be given directly to the defendant but should be given to the trial court for his decision concerning the State's claim.

The court then went on to apply its rule to the disclosure of grand jury statements: "We believe that the above rule applies to statements made by the witness to the grand jury as well as statements made to law enforcement agents of the State. . . ."

In the Wisconsin case of State of Wisconsin v. Miller, the defendant had been convicted of sexual intercourse with a child and appealed. At the close of the child's testimony, the defense requested and the court denied, the production of whatever records the State might have concerning the child's mental condition. This court, noting that there was no Wisconsin pre-trial discovery statute, affirmed the conviction:

Further, Wisconsin does not recognize a right in defendant to pretrial discovery of the prosecution's evidence. If we are to adopt a pretrial discovery procedure in criminal cases in this state we deem it would be best done by a rule of court or by legislative action rather than on a case to case basis by the court.

205. 248 Ind. 688, 230 N.E.2d 536 (1967).
206. Id. at 692-93, 230 N.E.2d at 540, cited at 254 N.E.2d at 874-75.
207. Supra note 204, at 170, 254 N.E.2d at 876-77.
208. Supra note 204, at 173, 254 N.E.2d at 878.
209. 35 Wis. 2d 454, 151 N.W.2d 157 (1967).
210. Id. at 458, 151 N.W.2d at 169. See People v. Rose, 43 Ill. 2d 273, 253 N.E.2d 456 (1969) (certain blood tests were held not material to the case).
The Supreme Court of Iowa reviewed that state’s law of pretrial discovery in *State of Iowa v. Eads*, a certiorari proceeding to review the trial court’s order directing the State to produce certain statements, reports, photographs and physical evidence for the defendant’s inspection prior to his murder trial. In its decision, the court first spoke of the defendant’s right to inspect evidentiary information:

It is true that we have held discovery is not available to one charged with a crime (citation omitted) . . . However, that does not deny a defendant access to all evidentiary information which is in possession of the State and which is necessary to assure him a fair trial.

The court, in distinguishing documentary evidence from physical evidence, further stated:

In *State v. White*, we said a defendant is entitled to know the contents of a document the State intends to use against him. We believe this applies with equal force to his right to know the physical characteristics of real evidence the State expects to use against him.

As to the instant case, the court held:

1) . . . defendant was entitled to a copy of the autopsy report. . . . 2) The defendant was entitled to an F.B.I. report of its analysis of items of physical evidence. . . . 3) The trial court abused its discretion in ordering the State to deliver copies of the statements of all witnesses expected to testify at defendant’s trial.

In a separate opinion, Justice Becker stated that the statements of “witnesses who the State indicated would not be used at trial, should be turned over to the defense.”

The Supreme Court of Missouri has dealt extensively with the question of pre-trial discovery and disclosure. In *State of Missouri v. Aubuchon*, an appeal following a conviction for first degree robbery, the court considered instances where discovery would be allowed. Having first stated the Missouri general rule on discovery, the court pointed out that there was no general right presented its reasons for that belief:

There is no general right of discovery by statute or rule in Missouri in criminal cases. . . . The State is not permitted in any possible way to discover facts from a defendant; we are unwilling to open up, carte blanche, the files of the State to the defendant. We have reached the point in our criminal jurisprudence where we should

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211. 166 N.W.2d 766 (Iowa 1969).
212. *Id.* at 768.
213. *Id.* at 772.
214. *Id.* at 772-74.
215. *Id.* at 775.
216. 381 S.W.2d 807 (Mo. 1964).
consider, and balance, the rights of the public against some of the recently pressed rights of the defendant.\textsuperscript{217}

However, the court then tempered this statement when it further held: We hold now that, if there is a satisfactory showing that a report or statement of a witness in the hands of the State is of such a nature that without it, the defendant's trial would be fundamentally unfair, then it should be produced; otherwise not. . . .\textsuperscript{218}

In \textit{State of Missouri v. Blevins},\textsuperscript{219} the defendant appealed following his conviction for first degree robbery. He claimed error in the trial court's denial of his request for a subpoena duces tecum for a certain police report. Defense counsel argued that the request was based upon a "feeling" that there would be conflicting statements about the identity of the defendant and wished the report for impeachment purposes. This court upheld the trial court when it found:

The record does not demonstrate any sufficient reason for the production of the report; the motion was one in the nature of a "fishing expedition." . . . The police report was not used in any way at the trial by any witness. Under these circumstances, there was certainly no "plain error" in the denial of the motion. The point is without merit.\textsuperscript{220}

An example of what must be shown to obtain discovery and a discussion of "fishing expeditions" is to be found in \textit{State of Missouri v. Yates},\textsuperscript{221} where, following a conviction for illegal sale of a stimulant drug, the defendant appealed. He argued that the destruction of certain film showing his arrest and the denial of an all-encompassing discovery motion amounted to prejudicial error. The court first ruled that there was no showing that the film "... would have demonstrated his innocence, depicted any fact favorable to his defense, impeached any state witness on any material fact, or reveal(ed) any fact not testified to orally."\textsuperscript{222} The court then referred to \textit{State of Missouri v. Aubuchon},\textsuperscript{223} and ruled that the discovery motion was in the nature of a fishing expedition and as such, there was no abuse of discretion by the trial court in denying such a motion. Concurring in result only, Judge Seiler attacked the majority for denying the defendant's right to go on a fishing expedition:

The first essential of the rule is the existence of favorable evidence in the hands of the prosecution. If the evidence exists it does so regardless of whether the defendant knows of it. . . . Whether he is attempting a "fishing expedition" or knows exactly

\begin{footnotes}
\item[217.] \textit{Id.} at 813-14.
\item[218.] \textit{Id.} at 814.
\item[219.] 421 S.W.2d 263 (Mo. 1967).
\item[220.] \textit{Id.} at 268.
\item[221.] 442 S.W.2d 21 (Mo. 1969).
\item[222.] \textit{Id.} at 23.
\item[223.] Supra note 216.
\end{footnotes}
what the police have does not change the basic constitutional principle that the prosecution cannot fail to disclose favorable information and that if it does, the failure will invalidate the conviction.\(^\text{224}\)

In *State of Nebraska v. Davis*,\(^\text{225}\) the defendant was convicted of first degree murder and appealed. At the trial the defendant was denied discovery of reports of examinations and scientific tests relating to blood and hair found at the scene of the crime. There were no witnesses and the conviction was based on physical and circumstantial evidence. The court restated the Nebraska law of discovery:

[\text{T]}he trial court has a broad discretion in ruling upon a discovery motion, but that such a motion should be granted where required by the interests of justice.\(^\text{226}\)

The scientific evidence in this case was of particular importance because it tended to disprove any theory of accidental death.\(^\text{227}\)

The court ruled that the denial of the discovery motion as well as other acts were prejudicial error and reversed the conviction.\(^\text{228}\)

**Ninth Circuit**

The defendant in *State of Arizona v. Fowler*,\(^\text{229}\) appealed a conviction of first degree murder. At the trial he asserted self defense, claiming the decedent was the aggressor and had a knife. A knife was found a short time later near the scene of the crime but its existence was concealed from the defense by the prosecution. The State contended there was insufficient foundation to make the knife admissible as evidence. The Supreme Court of Arizona pointed out that the sufficiency of the foundation was not a matter for the prosecution's unilateral determination, citing *United States v. Griffin*,\(^\text{230}\) and reversed the earlier decision in determining that the knife which was suppressed was both material and relevant to the defendant's plea of self defense.\(^\text{231}\)

In *People v. Dickerson*,\(^\text{232}\) the appellant appealed from a conviction of

\(^{224}\) *Supra* note 221, at 29.


\(^{227}\) *Supra* note 225, at 443, 176 N.W.2d at 663.

\(^{228}\) See State v. Berry, 451 S.W.2d 144 (Mo. 1970) (Sup. Ct. Rule 25 does not authorize blanket request for all material in the possession of the prosecution); State v. Davis, *supra* note 225 (requiring police officers to disclose the name of an informant in a matter resting within the discretion of the trial court); and State v. Reichel, *supra* note 226 (trial court has broad discretion in ruling upon a discovery motion and that motion should be granted when required by the interest of justice).

\(^{229}\) 101 Ariz. 561, 422 P.2d 125 (1967).

\(^{230}\) 183 F.2d 990 (D.C. Cir. 1950).

\(^{231}\) *Supra* note 229, at 564, 422 P.2d at 128.

illegal sale of marijuana, claiming an illegal suppression of evidence in that he did not receive all the police reports held in the prosecution's files. In affirming the conviction, the court reviewed pre-trial discovery procedures and ruled that the appellant had failed to be specific enough in his request:

There is no question but that under modern procedure a defendant is entitled, after proper application, to secure information in the hands of the prosecuting officials in order to prepare for trial; however, this does not mean that the defense is released from the necessity of a specification of what it wants. If the defense states only in general terms that it wants to see everything in the hands of the district attorney or the police that bears on the case, this all-purpose demand need not be granted. There must be at least a reasonable specificity as to what is required and a plausible justification for the production of relevant writings.\textsuperscript{233}

In State v. Tyler,\textsuperscript{234} the Supreme Court of Washington gave the trial courts great latitude in deciding whether or not to grant the pre-trial production of written statements of witnesses:

Whether the court will direct the production of written statements of witnesses in advance of trial, or at all, is a matter peculiarly within the trial court's discretion, and its ruling on that point will be disturbed only when there has been a manifest abuse of that discretion.\textsuperscript{235}

The Montana Code of Criminal Procedure,\textsuperscript{236} requires that a defendant who intends to rely upon self-defense, insanity, or alibi to give the prosecution notice of the defense and defense witnesses. This statute was challenged in State of Montana ex rel. Sikora v. District Court of 13th Judicial District,\textsuperscript{237} where the court upheld the statute while avoiding a direct consideration of the problem of pre-trial discovery. In so avoiding that issue, the court stated that "[s]uch pretrial discovery in criminal cases is now in the evolutionary stage and each case must of necessity face the constitutional questions that arise, when and if they are raised during trial."\textsuperscript{238}

\textit{Tenth Circuit}

The court of appeals for the tenth circuit, discussed the constitutional

\textsuperscript{233} Id. at 359, 75 Cal. Rptr. at 832.
\textsuperscript{234} 77 Wash. 2d 726, 466 P.2d 120 (1970).
\textsuperscript{235} Id. at 736, 466 P.2d at 126.
\textsuperscript{236} MONT. REV. CODES ANN. § 95-1803(D) (1947).
\textsuperscript{238} Id. at 246, 462 P.2d at 900. For other ninth circuit cases see, People v. Chapman, 52 Cal. 2d 95, 338 P.2d 428 (1959) (to obtain written statement of witness, no need to show any prior inconsistencies), and People v. Brawley, 82 Cal. Rptr., 161, 461 P.2d 361 (1969) (evidence not material to guilt due to California conspiracy laws but was material as to punishment).
impact of *Jencks v. United States*,239 in *Hill v. Crouse*,240 where the petitioner had appealed following a district court's denial of a petition for a writ of habeas corpus. The appellant contended that the *Jencks* decision was applicable to the states, but the court ruled that the *Jencks* decision was not based upon constitutional rights: "[w]e must conclude that the trial court correctly held that the petition did not raise any federal Constitutional question and that the order of dismissal was proper."241

In *Rapue v. People*,242 the defendant, who was convicted of taking indecent liberties with a fifteen year old boy, claimed the trial court erred in refusing a defense request to compel the district attorney to produce for inspection the notes which the district attorney had made in an interview with the young boy. In affirming the lower court decision, the court ruled that: "Colo. R. Crim. P. 16 does not cover or include the "work sheets" of a district attorney made by him in preparation for trial."243

The question of the prosecution's "work product" was also considered in *State of Kansas v. Lemon*,244 where the defendant appealed from a conviction of receiving stolen goods. One point of appeal was the State's failure to supply the appellant with copies of the witnesses' pretrial statements contained within certain reports held by the State. The court discussed the disclosure of investigative reports:

This court has heretofore held that a report compiled by a law enforcement agency in the course of its investigation into a criminal offense is quasi-private in character, and it was not error for the trial court to refuse a defendant's motion to require the state to produce such a report in court for the defendant's inspection and use in cross-examination of a witness whose statement was contained therein.245

In *State of New Mexico v. Turner*,246 the defendant, convicted of aggravated burglary and rape, appealed the denial of a motion for the trial court to inspect the State's files for any exculpatory evidence not made available to the defense. The defendant contended that he had no way of knowing if any evidence had been suppressed. The Court viewed the defendant's request as "fishing expedition," and in affirming the conviction held:

Defendant's claim simply is that he doesn't know whether the State has complied with his demand for exculpatory material; that because he doesn't know, the trial

240. 360 F.2d 603 (10th Cir. 1966).
241. Id. at 604.
243. Id. at 328, 466 P.2d at 927.
245. Id. at 470, 454 P.2d at 723.
court should check on the truth of the State's response. In essence, defendant wants the court to go on a "fishing expedition." (citation omitted.) Since defendant is not entitled to such an expedition himself, the trial court did not err in refusing to undertake such an expedition. On defendant's behalf, absent some showing, or indication, that a right of defendant has been or would be violated. . . . There being no such showing or indication, the point is without merit.247

District of Columbia

In Levin v. Katzenbach,248 the appellate court for the District of Columbia specified what evidence must be disclosed to the defendant in stating: "Thus appellant would be entitled to relief in the present case if the government failed to disclose evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt."249

WHERE THE DEFENDANT ALREADY HAS KNOWLEDGE OF THE FACTS

INTRODUCTION

Is it possible for evidence to be suppressed when the defendant has prior knowledge of the facts or items allegedly suppressed? Generally, the courts have held that there can be no suppression when the defendant has prior knowledge. However, several questions arise when one attempts to apply this rule of law to a given set of facts. For example, what is the legal effect of the defendant not communicating his knowledge of material facts to his attorney, thus rendering this information useless to his defense? Is it possible that knowledge may be imputed from the defendant to his attorney? May knowledge be inferred from the words, actions, or deeds of the defendant or his attorney? These questions shall be considered in this section as well as a review of the doctrine of defense knowledge as applied throughout the various circuits.250

UNITED STATES SUPREME COURT INTERPRETATIONS

The United States Supreme Court has not yet commented on the question of the defendant's prior knowledge in relation to a suppression of evidence case.

247. Id. at 573, 469 P.2d at 722. See also State v. Tackett, 78 N.M. 450, 432 P.2d 415 (1967) (discussion and rationale against defense "fishing expeditions").
249. Id. at 291. See also Levin v. Clark, 408 F.2d at 1212, for a reiteration of this holding.
250. Cases from the 6th and D.C. circuits have not been cited within this section.
First Circuit

The court of appeals for the first circuit considered the problem of prior knowledge in *United States v. DeLeo*, where the defendant appealed a conviction for federal bank robbery. One issue raised on appeal was an inconsistency in a bank teller's description of the robber and his gun to the local police and the F.B.I. It was shown that the appellant knew of the inconsistencies as to the color of the gun, prior to trial, and, therefore, the court held:

[W]e cannot say that the prosecutor's failure to disclose them amounts to reversible error. Defense counsel learned of the inconsistency concerning the color of the gun prior to trial and introduced testimony at trial concerning the inconsistency. Thus, even assuming it was material—which we doubt—there is no possible prejudice to appellant arising from the nondisclosure.

Second Circuit

In *United States v. Roberts*, the defendant, convicted of unlawful sale of heroin, objected to the denial of his motion for a new trial. He alleged in his appeal that the Government suppressed certain favorable evidence, namely the location of a certain witness, who had given two statements to Government agents investigating the case. The court found prior knowledge on defendant Robert's part and affirmed, stating that "Roberts knew Robinson's identity and his potential importance as a witness; moreover, Roberts himself alleged that before trial 'a friend' told him that Robinson was in a city jail. . . ." The court further ruled that Robinson's information was harmful and not helpful to the defense, thus further emphasizing the lack of prejudice to the appellant.

In *People v. Rosenberg*, the defendant, tried and convicted of murder, had knowledge of the results of certain tests, but he failed to communicate those results to his attorney. On appeal, the defendant's attorney claimed a suppression of evidence in that the State did not apprise him of the results of the tests. Responding to this allegation, the Court stated: If the defendant did not inform his attorneys, then it is his responsibility and he must bear the legal consequences. He may not now complain about the suppression

251. 422 F.2d 487 (1st Cir. 1970).
252. Id. at 498-99.
253. 388 F.2d 646 (2nd Cir. 1968).
254. Id. at 648.
of evidence of which he had knowledge but which he did not communicate to counsel.256

Third Circuit

The third circuit considered defendant's prior knowledge in United States ex rel. Thompson v. Dye,257 where it ruled that "Evidence is not suppressed or withheld if the accused has knowledge of the facts or circumstances or if they otherwise become available to him during the trial."258

In Commonwealth of Pennsylvania v. Osborne,262 the defendant was convicted of murder, appealed alleging a suppression of evidence by the prosecution. He complained that he was not allowed to inspect certain investigative reports which showed inconsistencies in a witness's statements. The facts showed that at the preliminary hearing the witness had stated that the defendant had left his house on the day in question, whereas the witness had given the defense a written statement that the defendant had stayed home on that day. The defense counsel read both the testimony at the hearing and the written statement into the record and both were used at trial. The court, citing Rosenberg v. United States,260 to show a lack of prejudice against the defendant, ruled:

In view of the fact that the same inconsistencies revealed in Skeete's interviews with the police was already known to defendant's counsel by virtue of Skeete's testimony at the preliminary hearing and of his signed statement given to such counsel's own law clerk, we are unable to say that the failure of the Government to make available to defendant or his counsel the reports in the possession of the police violated due process. . . .261

In Commonwealth of Pennsylvania v. Osborne,262 the defendant was convicted of second-degree murder and appealed. The failure of the Commonwealth to produce, at trial, the bullets which inflicted the fatal wounds was raised on appeal. The defendant contended this was an act of suppression and a denial of due process of law; however, the court, noting that the defense counsel had known of the presence of the bullets but failed to call for their production at the trial, held:

Unlike the trial counsel in Almeida, appellant's trial counsel knew of the existence of the bullets and knew what to ask for. Under these circumstances it cannot be said

256.  Id. at 3, 297 N.Y.S.2d at 863.
257.  221 F.2d 763 (3rd Cir. 1955).
258.  Id. at 767.
259.  410 F.2d 307 (3rd Cir. 1969).
261.  Supra note 259, at 311.
that the district attorney deliberately suppressed the bullets simply because he failed to introduce them.268

Fourth Circuit

Two Maryland state cases illustrate the problem of a defense allegation of suppression when it can be shown that the defense had knowledge of the allegedly suppressed items. In *Hyde v. Warden of Maryland Penitentiary*,264 defendant had been convicted of murder and appealed, alleging an illegal suppression of certain physical evidence. In motion at the trial, the appellant had moved for a suppression of the evidence, claiming that it was illegally seized. The court took note of that motion and then ruled "... in view of Hyde's knowledge of these articles, this contention was not supportable."265

In *Duffin v. Warden of Maryland Penitentiary*,266 the defendant had been found guilty of assault with intent to murder and assault and battery. He alleged in his appeal that there was a suppression of evidence, specifically, a knife taken from the prosecuting witness which had not been placed in evidence by the prosecution. The facts showed that the defendant knew of the knife and also knew that it was in the possession of the police. In affirming the decision, the court declared:

Duffin had full knowledge with regard to the knife and its custody long before his trial. ... It would seem clear that the defendant had ample opportunity, had he so desired, to have put the knife in evidence on cross-examination or otherwise, through either Loretta J. Mahoney or the police officer. In view of the above statement by Duffin and in view of the other facts just stated, we see no foundation for a claim of suppression or concealment of evidence by the State.267

Fifth Circuit

In *Conyers v. Wainwright*,268 a proceeding on a petition for a writ of habeas corpus, the petitioner claimed a suppression of evidence by the prosecution. The evidence allegedly suppressed were certain hospital records showing the treatment of the petitioner after his arrest. The court considered the merits of the case and then stated its rule concerning suppression where there is knowledge on the part of the defendant:

The record shows that both the petitioner and his trial counsel knew of the existence

263. Id. at 300, 249 A.2d at 332.
265. Id. at 645, 202 A.2d at 384.
267. Id. at 647, 167 A.2d at 602.
of the records. It cannot be said that the records were suppressed. . . . Once the evidence is made known to defense counsel the prosecutor's burden is eliminated.269

In *Harris v. State of Texas*,270 the defendant was convicted of robbery and appealed, alleging suppression of reports made by the police officers who investigated the offense. The officers were not called as witnesses at the trial. The court found nothing in the record to show that the defendant or his counsel did not know of the reports or that they were not allowed to inspect the reports, and, therefore, ruled that "[i]f such facts were known to appellant or his trial counsel, he cannot now seek relief on the basis of the State's failure to disclose the same facts."271

In *Means v. State of Texas*,272 the Texas Court of Criminal Appeals emphasized the possibility of indirect knowledge resulting in the denial of relief for an alleged suppression of evidence by the prosecution. In that trial for murder with malice, the prosecutor informed a newspaperman about the results of certain tests which were possibly exculpatory to the defendant. The defense counsel learned of these results, not from the prosecution, but by reading of them in a newspaper while the jury was engaged in deliberation. The court, in affirming, stated:

We cannot conclude that appellant has shown he did not know the results of this test prior to the receipt of the jury verdict. It appears that prior to the receipt of the jury's verdict that the results of the tests by virtue of newspaper coverage was a matter of some public knowledge in Harris County and if having learned of such test the appellant could have moved the court to allow him to reopen in order to introduce such evidence. . . . We find no evidence in the record that appellant ever made such request . . . reversible error is not shown in view of the fact that appellant has failed to show that he did not know the results of the test involved before the receipt of the jury verdict at this one stage trial.273

**Seventh Circuit**

In *People v. Raymond*,274 the defendant had been found guilty of rape and robbery. Tests were made of his clothing which proved negative as to the presence of spermatozoa or other extracts. Although the defendant was aware of the results of the tests, he failed to inform his attorney. In affirming, the court held:

269. *Id.* at 1105.
271. *Id.* at 839.
273. *Id.* at 495-96. Another 5th circuit case on point is *Diamond v. State*, 233 So. 2d 418 (Fla. 1970) (existence of alleged accomplice should have been known by defendant arrested at the same time).
Where a defendant is fully informed as to matter possessed by the State which would not necessarily be exculpatory, and does not exhibit any interest in its procurement until after he has been found guilty, no deprivation of due process has been shown.\textsuperscript{275}

\textit{Eighth Circuit}

The Supreme Court of Nebraska has ruled that a defendant may preclude his subsequent claim of a suppression of evidence by objecting to the introduction of certain items. In \textit{State of Nebraska v. Reichel},\textsuperscript{276} the defendant objected to the State's attempted use of a report comparing dirt samples taken from the defendant's clothes and dirt collected at the scene of the crime. The court ruled there was no suppression of evidence, stating: "[I]t cannot be said that the State suppressed the report in view of the attempt of the State to show the results of the tests and what the report stated during the cross-examination of the deputy county attorney."\textsuperscript{277}

\textit{Ninth Circuit}

The petitioner in \textit{Thomas v. United States},\textsuperscript{278} was convicted of interstate transportation of forged securities and appealed, asserting that the prosecution had suppressed the testimony of another who had admitted that he had taken two guns from the car in which appellant was alleged to have stolen the securities. It was pointed out that Thomas' attorney knew of this witness before the trial and demonstrated this knowledge at the trial. The court, therefore, found that no suppression existed, stating: "Thus there was no concealment or suppression of evidence, willful or otherwise. Counsel for Thomas had the information from the Government in time to call Liday as a witness or at least arrange for his deposition."\textsuperscript{279}

\textit{Tenth Circuit}

In \textit{Butt v. Graham},\textsuperscript{280} defendant was convicted of carnal knowledge and appealed, alleging suppression of the results of an examination of the prosecutrix taken by a private physician. The report tended to be favorable to the appellant, although it was not conclusive. While the defend-

\begin{itemize}
\item \textsuperscript{275} Id. at 568, 248 N.E.2d at 665.
\item \textsuperscript{276} Supra note 226.
\item \textsuperscript{277} Supra note 226, at 196, 165 N.W.2d at 744.
\item \textsuperscript{278} 343 F.2d 49 (9th Cir. 1963).
\item \textsuperscript{279} Id. at 54-55.
\item \textsuperscript{280} 6 Utah 2d 133, 307 P.2d 892 (1957).
\end{itemize}
ant claimed that he knew nothing of this report, it was subsequently shown that his trial attorney was aware of the report and furthermore, the trial attorney testified that he had discussed the matter with the defendant. The court found:

In view of all the evidence on this point, the court was justified in finding that appellant had knowledge of this examination before his trial. This evidence was as available to him as it was to the prosecuting attorney, and, therefore, the court did not err in finding there was no suppression of material evidence by the prosecuting attorney amounting to a denial of due process.281

The Court of Appeals for the Tenth Circuit ruled in Brown v. Crouse,282 that where there is knowledge on the part of the defense there can be no suppression. Appealing the denial of a motion for a writ of habeas corpus, defendant urged as error an alleged suppression of a doctor’s report following the doctor’s examination of a rape victim. The court upheld the district court’s finding of no suppression because there was evidence that the existence of the reports had been known by the defense counsel, had been made available to the defense, and had been mentioned by the defense at the trial but had not been produced.283

NEGLIGENT SUPPRESSION BY THE PROSECUTION

INTRODUCTION

In previous sections, attention has been directed to an intentional act of misconduct by the prosecution. It was usually alleged that the prosecution intentionally suppressed the evidence or failed to fully disclose the exculpatory evidence sought, but not received, by the defense. This section considers the determination and effect of negligent suppression. For example, what is the legal effect of negligent suppression by the prosecution? What tests are used to determine if the suppression is intentional, negligent, or excusable? Is a “reasonable man” test applicable or should the court apply a different criterion? Whose responsibility is it to remain free from negligence—the prosecution, the police, or both? In the few recorded cases on point cited in this chapter, these questions shall be explored and discussed.284

UNITED STATES SUPREME COURT INTERPRETATIONS

As in previous areas of prosecutorial misconduct, reference must again

281. Id. at 135, 307 P.2d at 893.
282. 425 F.2d 305 (10th Cir. 1970).
283. Id. at 309.
284. Cases from the 1st, 3rd, and 6th circuits have not been cited in this section.
be made to Brady v. Maryland.285 In Brady, the Court found a denial of due process when there was suppression of evidence "irrespective of the good or bad faith of the prosecution."286 The Court went further in considering the role of the prosecutor in terms of negligence when it stated:

A prosecution that 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. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not "the result of guile". . . .287

The United States Supreme Court in United States v. Augenblick,288 excused the loss of certain tape recordings by the Government. Although most courts hold that the loss of material evidence is tantamount to a negligent suppression of evidence, the Court here ruled:

There is no doubt but that the tapes were covered by the Jencks Act; and an earnest effort was made to locate them. Their nature and existence were the subject of detailed interrogation at the pretrial hearing convened at the request of the defense. Four government agents testified concerning the interrogation of Hodges, the recording facilities used, the Navy's routine in handling and using such recordings, and the fate of the tape containing Hodge's testimony. The ground was covered once again at the court martial. The tapes were not produced; the record indeed shows that they were not found; and their ultimate fate remains a mystery. The law officer properly ruled that the Government bore the burden of producing them or explaining why it could not do so. The record is devoid of credible evidence that they were suppressed.289

INTERPRETATIONS WITHIN THE CIRCUITS

Second Circuit

The Court of Appeals for the Second Circuit spoke of negligent suppression and its implications in United States v. Keogh:290

There remains a third category of cases—where the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use. While we do not dispute that relief may sometimes be granted even in such cases, the standard of materiality must be considerably higher.291

286. Id. at 87.
287. Id. at 87-88.
289. Id. at 355-56.
290. 391 F.2d 138 (2nd Cir. 1968).
291. Id. at 147.
The court then differentiated between misjudgment and prosecutorial misconduct as it further stated:

Failure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it a new importance, are quite different. . . . To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties.292

Fourth Circuit

In Barbee v. Warden, Maryland Penitentiary,293 the prosecution claimed that there could be no suppression since there was no showing that the prosecuting attorney had any knowledge of the existence of the allegedly suppressed report. The court referred to this point and to negligence of public officials other than those engaged in the actual prosecution when it declared:

Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. . . . If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.294

Fifth Circuit

In Conyers v. Wainwright,295 the United States District Court for the Southern District of Florida, Miami Division, held that knowledge of evidence in the hands of certain public officials could not be imputed to the prosecution. Here, the prosecution had no actual knowledge of certain suppressed medical records, and the only persons with knowledge of these records were members of the Sheriff's department. The court considering the relationship between the sheriff and the prosecution, ruled that, "[w]hile still a branch of the state, the Sheriff here was merely the jailkeeper and had nothing to do with the prosecution of the case."296 However, a direct confrontation with the issue of negligence was avoided when it further stated: "It is not necessary to decide whether the prosecutors

292. Id. at 148.
293. 331 F.2d 842 (4th Cir. 1964).
294. Id. at 846.
295. Supra note 268.
296. Supra note 268, at 1104.
should have known of the records because the facts of this case do not establish any suppression."... 297

Seventh Circuit

In United States v. Poole,298 the Court of Appeals for the Seventh Circuit determined that when the prosecution failed to correct the testimony of the prosecutrix and to assist the defense in locating the doctor who had examined the prosecutrix, the defense's case was prejudiced to the extent that a new trial was necessary. The court first found that the suppression was not intentional and then outlined the criteria for awarding a reversal in cases of negligent suppression:

There can be no claim on this record that the government counsel's conduct was in bad faith... In the absence of such conduct, a showing of prejudice has generally been a prerequisite for relief in collateral proceedings on a claim of failure to disclose unrequested exculpatory information... We think Poole's burden of showing prejudice on appeal, as distinguished from the burden in collateral proceedings, is satisfied by the serious doubt we have that he received a fundamentally fair trial, free from prejudice.299

In Hale v. State of Indiana,300 the defendant was convicted of assault and battery with intent to gratify sexual desires on a twelve-year-old girl, and appealed. He claimed a suppression of evidence by the police who threw away a pair of panties found in the back of the defendant's truck, where the alleged incident took place. The defendant claimed that the panties belonged to another person and the prosecution contended that they belonged to the assaulted young girl. The defendant further contended that the panties would not have fit the young girl, but, because the police threw the panties away, it was impossible to prove that contention. Although the court affirmed because of the defendant's failure to demonstrate the materiality of the destroyed evidence, it nonetheless still agreed that negligent suppression is grounds for reversal and further enunciated its beliefs on the subject:

We agree that the negligent destruction or withholding of material evidence by the police or the prosecution presents grounds for reversal.301 We fail to see any valid basis for distinction between negligent failure to disclose or negligent destruction from intentional destruction or intentional non-disclosure as long as the interest to be protected is that of the defendant's right to a fair trial and due process.302

297. Supra note 268, at 1104-05.
298. 379 F.2d 645 (7th Cir. 1967).
299. Id. at 648.
300. 248 Ind. 630, 230 N.E.2d 432 (1967).
301. Id. at 634, 230 N.E.2d at 435.
302. Id. at 634-35, 230 N.E.2d at 435 n.1.
Eighth Circuit

The Supreme Court of Iowa has yet to equate negligent nondisclosure with a denial of due process of law. In State of Iowa v. Thomas,\textsuperscript{303} the defendant was found guilty of manslaughter. On appeal, the defendant asserted two grounds for reversal: (1) that the State withheld unfavorable testimony by its failure to call a doctor who had prepared a case history of the decedent, and (2) that the State suppressed evidence in its failure to fully investigate a possible lead given it by the defense counsel. The court analogized this situation to Levin v. Katzenbach,\textsuperscript{304} where negligent nondisclosure was held to be a denial of due process of law and went on to state:

We recognize there may be instances in which a defendant's right to due process of law may be violated by concealment of material evidence, but this is certainly not one of them. The fact that we quote from Levine v. Katzenbach, supra, should not be interpreted as approving the theory of negligent nondisclosure. We need not pass upon that question here. . . .\textsuperscript{305}

Ninth Circuit

In Lessard v. Dickson,\textsuperscript{306} the court of appeals for the ninth circuit considered the problems raised by the nondisclosure of fact which occurred two years prior to arrest. After conviction for first-degree murder and a denial of habeas corpus by the district court, the defendant appealed, claiming that the prosecution suppressed the statement of a telephone operator at the motel of the deceased, who stated that she saw a different man visit the deceased earlier in the evening in question. Two years passed between the time of the death and the petitioner's arrest. The defense did not learn of this statement until the trial ended, at which time the prosecuting attorney reviewed his file with the defendant's new attorney. The court cited the Supreme Court of California's earlier opinion and concluded that it was correct in distinguishing the responsibilities of the prosecution with respect to a deliberate versus negligent suppression:

Due process does not require that officers, two years after the discovery of the information, must remember facts that have become stale with time and that they must sua sponte disclose them to the petitioner or his attorneys. We cannot find that the prosecution 'deliberately suppressed' evidence which long before they had considered to be unreliable or that failure to resuscitate such forgotten statements 'was a material deception' and that there was knowledge thereof on the part of the prosecuting officer. . . .\textsuperscript{307}

\textsuperscript{303} 162 N.W.2d 724 (Iowa 1968).
\textsuperscript{304} 363 F.2d 287 (D.C. Cir. 1966).
\textsuperscript{305} Supra note 303, at 729.
\textsuperscript{306} 394 F.2d 88 (9th Cir. 1968).
\textsuperscript{307} Id. at 91.
Note that there was a strong dissent entered by Judge Ely. 308

In *Peoples v. Hocker*, 309 the defense contended that inadequate police procedures amounted to a denial of due process of law. Here, it was claimed that the police should have taken tests that would have determined whether the deceased was shot by defendant or by herself. The court first stated that "[i]t would be an exceedingly delicate task to endeavor to establish a criteria to tell when a certain quantum of police investigation constitutes due process and when it does not." 310 The court then ruled that while a better investigation would have been more helpful to the jury, the investigation actually made was not so poor as to deny the defendant due process or amount to a suppression of evidence as found in *Brady v. Maryland*. 311

In *State of Arizona v. Maloney*, 312 the defendant was convicted of two counts of murder and appealed. He asserted that he has having sexual intercourse with his mother when his step-father came into the room and in a struggle both his mother and step-father were killed. He claimed that his step-father killed his mother and that he killed his step-father in self-defense. One point of the appeal alleged was a negligent suppression of evidence by the police who found a used condom and condom box in the bedroom but discarded both. In answering, the court applied a "reasonable man" test to the actions of the police:

They could not then have known that defendant was to later claim that his step-father had discovered him and his mother in an act of sexual intercourse. Nor could they have known, and there was nothing to put them on notice at the time, that such evidence might tend to exonerate the accused. Certainly the destruction thereof was not the result of guile. 313

The court then considered possible ramifications of following the defendant's contentions as to the "negligent" actions of the police:

If the argument here advanced by the defendant were to prove successful, would we not hereafter be requiring all investigating officers, at their peril, to bring the entire crime scene, "lock, stock, and barrel," including the ceiling, floor, and walls, into court? . . . The principle urged could well lead to deliberate fabrication on the part of an accused after learning what items officers had discarded or failed to preserve. 314

308. *Id.* at 93.
309. 423 F.2d 960 (9th Cir. 1970).
310. *Id.* at 964.
311. *Id.* at 964.
313. *Id.* at 351, 464 P.2d at 796.
314. *Id.* at 352, 464 P.2d at 797. Other 9th circuit cases on negligent suppression include *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969) (a conviction cannot stand where the prosecution has, either willfully or negligently,
Tenth Circuit

The Supreme Court of New Mexico has considered assertions charging both negligent suppression, stemming from the loss of evidence by the prosecution, and faulty investigation by the investigating officers. In Trimble v. State of New Mexico, the defendant was convicted of first degree murder. Although fourteen separate points were cited by the defendant for reversal, the court dealt only with the first—the handling of certain evidence by the prosecutor's office and the police department. The evidence in question consisted of a letter and some twenty rolls of magnetic tape which supported the defendant's self-defense story. However, the letter and all four copies of it were lost, and some of the tapes were missing for a time but were later returned. The court ruled that this mishandling of the evidence was tantamount to an illegal suppression of evidence, basing its ruling on the conclusion that "... unquestionably the effect of the officers' actions was just as damaging as if the evidence had been known to the police or district attorney and not to the defendant..." In the opinion of the court, negligent suppression is to be viewed as equivalent to unlawful suppression.

The defendant in State of New Mexico v. Rose, was convicted of voluntary manslaughter and appealed. He urged that a suppression of evidence had occurred because the sheriff and other investigating officers negligently failed to properly investigate and preserve evidence at the scene of the crime or to make certain tests or measurements. Specifically, the appellant cited a failure to lift fingerprints from a .22 automatic belonging to the deceased or to conduct experiments relating to the trajectory of the fatal bullet. The court ruled that this was not the normal suppression of evidence case in stating that, "[i]n this case it is the manner of investigation which is being challenged—not the seizing and subsequent negligent loss or destruction of exculpatory evidence." However, the court went on to excuse the procedures used by the investigators in this case, having found no evidence of prejudice:

No doubt in this, as in many other investigations, officers later wish they made a

315. 75 N.M. 183, 402 P.2d 162 (1965).
316. Id. at 186, 402 P.2d at 165.
317. Id. at 187, 402 P.2d at 166.
318. 79 N.M. 277, 442 P.2d 589 (1968).
319. Id. at 278, 442 P.2d at 590.
more complete, detailed investigation. In this instance, the offense having occurred some forty miles out in the country, the investigation may have fallen short of "textbook" procedures, but we are not prepared to say on the facts of this case that the investigation requires a reversal.\cite{320}

**District of Columbia**

In 1966, the circuit court of appeals for the District of Columbia, in *Levin v. Katzenbach*,\cite{321} held that negligent suppression is equivalent to intentional suppression, stating:

A number of circuits have recently held that the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief. We find the reasoning of such cases persuasive and essential to the fair administration of criminal justice especially in view of the disadvantages facing the accused in the trial process.\cite{322}

However, in *United States v. McCord*,\cite{323} the court refused to reverse convictions for assault with a deadly weapon and carrying a dangerous weapon in an appeal which asserted a suppression of evidence due to the failure of the police to conduct a fingerprint analysis of the gun in question. The court found:

We need not reach appellant's contention that this doctrine was violated here by the failure of the police to conduct a fingerprint analysis of the gun on their own initiative, because appellant himself admitted that he and others had handled the weapon.\cite{324}

Thus, the state of the law as to negligent suppression in the District of Columbia, is at this time uncertain.

**USE OF FALSE TESTIMONY OR EVIDENCE BY THE PROSECUTION**

**INTRODUCTION**

The first five sections of this comment have primarily been concerned with the suppression of evidence by the prosecution, either deliberate or negligent. This section considers the prosecutor who allows false testimony to be given by a witness or places false evidence before the court or jury. Attention must necessarily be directed to seeking answers to question such as the following: What duty does a prosecutor have to correct false testimony? To what degree must this false testimony prejudice the defendant? Are there any cases where the use of false testimony will not

\begin{footnotes}
\item[320.] *Id.* at 278, 442 P.2d at 590.
\item[321.] *Supra* note 304.
\item[322.] *Supra* note 304, at 290.
\item[323.] 420 F.2d 255 (D.C. Cir. 1969).
\item[324.] *Id.* at 258.
\end{footnotes}
result in a reversal based upon a denial of due process of law? Are there different criteria when the prosecutor is unaware that the evidence or testimony given is false?\textsuperscript{325}

\textbf{UNITED STATES SUPREME COURT INTERPRETATIONS}

In \textit{Mooney v. Holohan},\textsuperscript{326} the Supreme Court held that the acts of the prosecutor could result in a denial of due process of law. In Mooney's petition for a writ of habeas corpus, he set forth evidence which he contended established perjury by the witnesses upon whose testimony he was convicted and the knowledge of that perjury by the prosecutor. The Attorney General of California contended that the acts or omissions of a prosecuting attorney can never, in and by themselves, amount either to due process of law or a denial of due process of law:

[I]t is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied.\textsuperscript{327}

The Supreme Court rejected this contention, however, and held in a \textit{per curiam} decision:

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.\textsuperscript{328}

However, leave to file habeas corpus was denied because Mooney had not exhausted all possible legal remedies.

In two cases originating in Illinois, the Supreme Court further elaborated upon its decision in \textit{Mooney}. In \textit{Napue v. Illinois},\textsuperscript{329} the petitioner appealed from a conviction of murder. At the trial the principal state witness, who was serving a 199 year sentence for the same act, testified falsely that he had received no consideration for his testimony. The assistant state's attorney knew this to be false but allowed the statement to go uncorrected. It was upon these facts that Napue's appeal was grounded. The case is distinguishable from \textit{Mooney} in that there the deception went to a material fact, whereas in \textit{Napue} the deception went to the credibility of the witness:

\textsuperscript{325} There are no cases reported here from the sixth, eighth, or D.C. circuits.
\textsuperscript{326} 294 U.S. 103 (1935).
\textsuperscript{327} \textit{Id.} at 112.
\textsuperscript{328} \textit{Id.} at 112.
\textsuperscript{329} 360 U.S. 264 (1959).
The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witnesses.\(^\text{380}\)

In \textit{Miller v. Pate},\(^\text{381}\) an appeal from a murder conviction, the prosecutor presented as evidence, a pair of men's underwear shorts covered with large, dark, reddish-brown stains. During the trial, the prosecutor referred to them as "bloody shorts," and elicited testimony from a chemist of the state bureau of investigation that the stains were blood. The shorts were later examined and the stains were found to be, in fact, dried paint. The Court, finding this to be a deliberate misrepresentation of the truth, reversed, stating:

More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. . . . There has been no deviation from that established principle. . . . There can be no retreat from that principle here.\(^\text{382}\)

The Court in \textit{Nash v. Illinois},\(^\text{383}\) found no denial of due process of law by the prosecution. Here the petitioner had been convicted of manslaughter on the testimony of an accomplice. The accomplice was promised leniency in exchange for his testimony, but falsely testified that he had been promised nothing. The Supreme Court affirmed the conviction, but Mr. Justice Fortas, joined by Mr. Justice Warren and Mr. Justice Douglas dissented, stating:

In any event, it is by no means clear that petitioner must show that the prosecutor's knowing acquiescence in a material falsehood prejudiced him. There is no place in our system of criminal justice for prosecutorial misconduct.\(^\text{384}\)

\textbf{INTERPRETATIONS WITHIN THE CIRCUITS}

\textit{First Circuit}

In \textit{United States v. De Leo},\(^\text{385}\) the Court of Appeals for the First Circuit ruled that inconsistencies in a witness's story do not always result in a denial of due process of law for the defendant. Although it was shown that an inconsistency existed between a witness's identification as re-

\begin{itemize}
  \item \textit{Id.} at 269.
  \item 386 U.S. 1 (1967).
  \item \textit{Id.} at 7.
  \item 389 U.S. 906 (1967).
  \item \textit{Id.} at 907. Another Supreme Court case worth noting is Alcorta v. Texas, 355 U.S. 28 (1957) (fact that prosecutor coached witness to remain silent of a pertinent fact unless specifically asked amounted to a denial of due process of law).
  \item 422 F.2d 487 (1st Cir. 1970).
\end{itemize}
corded in police and F.B.I. reports, the court found no prejudicial error, explaining:

[We believe that her detailed and substantially accurate description to the F.B.I. immediately after the robbery . . . , and her positive identification of appellant as the robber in an uncontested display of photos the day after the robbery completely dispels any concern with her alleged initial confusion. In light of this and the existence of several other eye witnesses who positively identified appellant as the robber . . . we simply fail to see how appellant's knowledge of this isolated alleged inconsistency could possibly have been material to the resolution of this case.]

Second Circuit

The New York Court of Appeals utilized strong language in ruling upon an assertion of prosecutorial misconduct stemming from the use of false testimony in People v. Savvides. The defendant had been convicted of possession of marijuana. At the trial, the State's key witness falsely testified that he had not been promised any consideration in return for his testimony, and the assistant district attorney allowed this testimony to go uncorrected. The court reversed the conviction, directing itself to whether the falsehood went only to the credibility of the witness:

It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.

Third Circuit

The Supreme Court of Delaware has ruled that false testimony will result in a denial of due process only when actual knowledge on the part of the prosecutor is shown. In O'Neal v. State of Illinois, two defendants were convicted of robbery and appealed. Originally there were three defendants, but the State tried only these two while the third testified for the prosecution. The defendants claimed that this witness's testimony was false, a fact of which the prosecution was aware. The court concluded:

But there is no showing in the case before us that the prosecutor knew that Pruitt was lying about his noncomplicity. The prosecutor may have suspected it; indeed, in his opening statement and summation to the jury, the prosecutor expressed doubts as to the validity of Pruitt's exculpatory testimony. But there is a significant difference in this area between opinion and knowledge. The prosecutor was entitled to use Pruitt's testimony as previously told to the police, his personal beliefs as to Pruitt's

336. Id. at 499.
338. Id. at 557, 136 N.E.2d at 854.
339. 247 A.2d 207 (Del. 1968).
complicity notwithstanding, so long as he did not have actual knowledge to the contrary. In the absence of a showing of such knowledge, the convictions are not vulnerable upon this ground.\textsuperscript{340}

In \textit{Commonwealth of Pennsylvania v. Snyder},\textsuperscript{341} an appeal following a conviction for manslaughter, the appellant utilized a novel approach by insisting that the \textit{Napue}\textsuperscript{342} rule should be applied in reverse. He argued that "... if a witness has in the past given false testimony, then any conviction obtained on the basis of accurate testimony by this witness is tainted."\textsuperscript{343} The court dismissed this argument without comment.

In \textit{State v. Taylor},\textsuperscript{344} the Supreme Court of New Jersey considered the problem presented by a prosecutor who concealed a promise of leniency to an accomplice when the issue was raised at trial. The court compared this case to \textit{Napue v. Illinois},\textsuperscript{345} and found:

\begin{quote}
We see no substantial distinction between the failure of the state's attorney in the \textit{Napue} case to correct the witness' statement, which he knew personally was not true, and the affirmative concealment by the assistant prosecutor here of the promise made by him to recommend leniency for Sullivan in return for his testimony.\textsuperscript{346}
\end{quote}

\textbf{Fourth Circuit}

Where only a partial truth is revealed when the prosecutor knows the whole truth, reversible error occurs when the prosecutor makes no attempt to elicit the whole truth. This was the holding in \textit{Hamric v. Bailey},\textsuperscript{347} in which the State called two witnesses who testified that they had not seen any glass or wood on the decedent's body. A third party, a state policeman, knew of the presence of glass and wood but was not called by the prosecution as a witness. The presence of the glass and wood would have tended to show that the decedent was near the defendant's window as the defendant claimed, and not seventeen feet from the house as the prosecution claimed. The court suggested:

\begin{quote}
Evidence may be false either because it is perjured, or, though, not itself factually inaccurate, because it creates a false impression of facts which are known not to be true. We do not suggest that the testimony of the witnesses in the instant case was perjured; their mistake may well have been due to their lack of perception, rather than to a lack of veracity.\textsuperscript{348}
\end{quote}

\begin{thebibliography}{99}
\bibitem{340} \textit{Id.} at 210.
\bibitem{341} 427 Pa. 83, 233 A.2d 530 (1967).
\bibitem{342} \textit{Supra} note 329 and discussion in text.
\bibitem{343} \textit{Supra} note 341, at 95-96, 233 A.2d at 537.
\bibitem{344} 49 N.J. 440, 231 A.2d 212 (1967).
\bibitem{345} \textit{Supra} note 329.
\bibitem{346} \textit{Supra} note 344, at 453, 231 A.2d at 219-20.
\bibitem{347} 386 F.2d 390 (4th Cir. 1967).
\bibitem{348} \textit{Id.} at 394.
\end{thebibliography}
The court found this case to be analogous to *Miller v. Pate*\(^\text{349}\) and cited as improper, the State's calling the two favorable witnesses without also calling the state policeman. The court further held that "[i]t was incumbent on the prosecutor to adduce the evidence to the contrary on the crucial fact"\(^\text{350}\) of the presence or lack of presence of the glass or wood.

In *Jones v. State of Maryland*,\(^\text{351}\) the defendant was convicted of murder and robbery and appealed. A co-defendant testified falsely that no offer was made to him in return for his testimony. The prosecuting attorney testified that he made the offer to the witness's attorney, but that he honestly believed that the offer had not been communicated to the witness. The court citing the rules on the use of false testimony, reversed the conviction, stating:

We think the principle under discussion applies to the facts of the instant case and a prosecutor would be naive, to say the least, if he really believed an attorney could secure his client's testimony against a co-defendant without in some manner, directly or indirectly communicating the prosecutor's promise to the witness.\(^\text{352}\)

**Fifth Circuit**

In *Smith v. State of Florida*,\(^\text{353}\) the defendant, originally charged and convicted of bank robbery, appealed following a denial by the district court of his petition for a writ of habeas corpus. An accomplice of the appellant, at a different trial, testified that police officers induced him to give false testimony at the appellant's trial. The prosecuting attorney testified that he knew nothing of the false testimony or its suborning. The Florida court had relied on *Austin v. State of Florida*,\(^\text{354}\) which held that the prosecuting official had to have knowledge of the perjured testimony for there to be a denial of due process of law. This court pointed out that such a narrow interpretation is not warranted. The court citing *Pyle v. Kansas*,\(^\text{355}\) and *Barbee v. Warden, Maryland Penitentiary*,\(^\text{356}\) which held that it makes no difference if the suppression is by the prosecutor or by other public officials,\(^\text{357}\) returned the case to the district court for further evidentiary hearings.

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349. 386 F.2d 1 (1967).
352. *Id.* at 414, 260 A.2d at 353.
353. 410 F.2d 1349 (5th Cir. 1969).
356. 331 F.2d 842 (4th Cir. 1964).
This same District Court of Appeals of Florida, First District refused to place any special burden on the defense in proving false testimony in *Wolfe v. State of Florida*. Here, the defendant was convicted of armed robbery, conspiracy, and larceny. The conviction was based primarily upon the testimony of an accomplice of the defendant. The accomplice falsely testified that the only promise he received was that any sentence he received in connection with this offense would run concurrently with any possible federal conviction. He failed to state that the bargain included a promise that any sentence he received in a separate, non-connected offense would also run concurrently. The State argued that the defense had the burden to inquire about the presence or extent of any deal made by the State and that its failure to do so served to waive any objection it may have had to the State's failure to make a full disclosure. The court rejected this argument and concluded:

Counsel's failure to explore the matter further, whether through ineptness, oversight, or the belief that further pursuit of the subject was unnecessary, should not be held to constitute a waiver of appellant's right to a fair and impartial trial in accordance with due process of law.

In *Miller v. State of Mississippi*, the defendant was convicted of attempted kidnapping and appealed. One of the co-conspirators testified as to the facts of the crime. The State's Attorney asked the witness a question which resulted in an answer which was both partially true and partially false. The court ruled that because the defense had initiated the line of questioning and that the prosecutor was merely following it through, there could be no error:

The issue thus presented is whether the leading and suggestive question propounded by the State's attorney wherein he suggested that the witness "came down and made bond" is the equivalent of using false testimony with knowledge of its falsity to aid in procuring a conviction and which was condemned in *Napue*. We are of the opinion that the issue must be answered in the negative since it was not initiated by the State's attorney and there is nothing to indicate knowledge on his part of its falsity nor is there any indication that its use was deliberately made to deceive the jury.

**Seventh Circuit**

The courts of Illinois have considered three separate cases regarding the use of false testimony by the prosecution. In the first, *People v. La-

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359. *Id.* at 397.
360. 234 So. 2d 297 (Miss. 1970).
361. *Id.* at 302. See *Bogan v. State*, 211 So. 2d 74 (Dist. Ct. App. Fla. 1968) (use of false testimony by the State is a recognized ground for relief).
The Supreme Court of Illinois considered whether conflicts in a witness's testimony amount to a denial of due process of law. The defendant, convicted of robbery, appealed, contending there was a knowing use of perjured testimony by the prosecution. The witness in question had given conflicting testimony which led the petitioner to claim that the testimony had been perjured. The court discussed this question:

The knowing use of false or perjured testimony by the prosecutor to procure a conviction constitutes, of course, a denial of due process (citations omitted). However, mere conflicts in the testimony of the witness with his prior statements or with other evidence does not establish that he has perjured himself. . . . The testimony of this witness does not suggest deliberate false statements made with intent to mislead and certainly does not indicate participation in perjury by the prosecution.

In People v. Smith, the Supreme Court of Illinois considered whether a police informer was under the same obligations as the police department. In this case, the defendants were convicted of unlawful sale of narcotic drugs. A police informer, who was a narcotics addict, testified for the State. The defendants later proved that the informer gave false testimony concerning his credibility, but there was no proof that the State knew the informer had given any misinformation. The defendants relied upon Barbee v. Maryland and argued that the rationale of Barbee (state responsibility for false statements of the police) should be extended to cover false statements by an informer. The court held:

The only allegation defendants make in this connection is that the State should be held to have constructive knowledge of the witness's veracity and be responsible for the false statements of informers—just as it would be for false statements uttered by a police officer. Such conclusion is without precedent and we do not adopt it. An informer-addict does not enjoy the same credibility as a police officer and the Barbee theory does not apply.

The Illinois Appellate Court discussed prosecution coaching of witnesses in People v. McGuirk. The defendant had been convicted of raping a nine year old girl and appealed on the ground that the prosecutor had told the prosecutrix what to say in court. On re-examination, the prosecutrix testified that the prosecutor had told her "some to say" and that the man to be identified was sitting at the table. The court discussed two points: (1) the propriety of discussing testimony with a witness, and (2) the propriety of the inducement of testimony. As to the first point, the court stated, in part:

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363. Id. at 301, 235 N.E.2d at 588-89.
364. 41 Ill. 2d 158, 242 N.E.2d 198 (1968).
365. Supra note 356.
366. Supra note 364, at 163-64, 242 N.E.2d at 201.
[T]here is nothing improper in refreshing their memory before they take the stand. Reviewing their testimony before trial makes for better direct examination, facilitates the trial and lessens the possibility of irrelevant and perhaps prejudicial interpolations. It is particularly advisable in a sex case to prepare a prosecutrix for the ordeal she will face in the court room. . . . There is nothing wrong with this if the witness' essential testimony is neither altered nor colored by emphasis or suggestion.368

As to the second point, the court added that "[i]t is highly improper for a prosecutor to induce a witness to say anything but the truth and it is a denial of due process for a conviction to be obtained on testimony known by the prosecution to be false."369 The court, however, noted that what the prosecutor told the child to say was not on the record, that the prosecutrix knew the defendant, a janitor in her building, and that there was nothing improper about telling her that he would be seated at any particular table.370

Ninth Circuit

In Imbler v. Craven,371 the United States District Court for the Central District of California, discussed the prosecution's use of highly questionable testimony. In this habeas corpus proceeding, the petitioner, who was earlier found guilty of murder and other crimes, claimed that the conviction was secured by the use of false testimony and requested a new trial. The court ruled that to secure a new trial, knowledge of the false evidence by the prosecutor must be shown: "Thus the current law in this Circuit . . . is that 'knowledge' by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial."372 The court then spoke of the legal consequences of the reckless use by the prosecutor of highly suspicious testimony:

While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.373

368. Id. at 276, 245 N.E.2d at 922.
369. Id. at 276, 245 N.E.2d at 922.
370. Other seventh circuit cases on point include: People v. Rose, supra note 210; (inconsistencies are not equated with a showing of false testimony); People v. Harris, 105 Ill. App. 2d 305, 245 N.E.2d 80 (1969) (where there has been no deal communicated, subsequent favors to a witness are not proof of an inducement to testify); and United States v. Bishop, 188 F. Supp. 804 (1960) (false statements of witness in regard to favors in return for testimony necessitated a reversal).
372. Id. at 805.
373. Id. at 807-08.
In *Long v. United States*, the appellant was convicted of narcotics violations and appealed. One point of his appeal was that the Government knowingly used perjured testimony to bring about his conviction. The court outlined the necessary criteria for proving the alleged facts by the appellant: "An outline of specific facts is necessary to support an allegation that the Government knowingly used perjured or tainted testimony." The court then concluded that the appellant had failed to state his cause correctly and affirmed the conviction.

The Supreme Court of Nevada has held that one must show knowledge by the prosecution of false testimony before a reversal may be had. In *Hanley v. Sheriff of Clark County*, an appeal from a denial of a writ of habeas corpus, a prosecution witness stated after the trial that all his prior testimony at a preliminary hearing was false. The court cited a series of cases concerning the knowing use of false evidence or testimony. However, the court first pointed out that in the instant case the record did not establish knowledge on the part of the prosecution and, in affirming, stated:

One cannot discern whether he told the truth originally or later. In any event, there is nothing in the record from the prosecution to show that it knowingly offered false testimony. Such evidence was present in the cited United States Supreme Court cases. We shall not infer such knowledge in the prosecution from the testimony of the recanting witness alone.

**Tenth Circuit**

In *Kostal v. People*, the defendant appealed the denial of his motion to vacate judgment. The basis for his appeal was that the prosecutor used false evidence to obtain his conviction, namely, an expended cartridge case, with reference made to *Miller v. Pate*. The defendant conceded that he believed the district attorney acted in good faith. The court distinguished this case from *Miller* because: "In that case it was made to appear that the prosecution deliberately misrepresented the truth and obtained a conviction by the knowing use of false evidence." Since the defendant did not allege a knowing or deliberate misrepresentation, and in fact, conceded the good faith of the district attorney, the court ruled there could be no reversal of the earlier conviction and affirmed.

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374. 422 F.2d 1024 (9th Cir. 1970).
375. *Id.* at 1026.
377. *Id.* at 617, 460 P.2d at 163.
379. *Supra* note 349.
In *Rodgers v. State of Kansas*, the Supreme Court of Kansas agreed that the use of false testimony by the prosecution without an attempt to correct that testimony, would amount to a violation of due process of law. The court, in referring to the allegations of the defendant who argued that the prosecution used false testimony and failed to correct that testimony, stated that, “[i]f all of the facts alleged in the motion are true the movant might have been deprived of due process in violation of the Fifth Amendment to the United States Constitution . . . ” However, the court found that the evidence presented a clear showing that there was no use of false testimony and affirmed the earlier conviction.

**CONCLUSION**

Generalization from a survey such as this is difficult due to the absence of specific requirements and guidelines provided by the higher courts. It is clear, however, that boundaries, while vague and ill-defined, have been established to prevent a denial of due process of law stemming from the acts or omissions of the prosecution. Until more specific guidelines are provided, the prosecutor or defense attorney must refer to the decisions of the particular jurisdiction involved, bearing in mind the general guidelines established by *Mooney, Giles*, and *Brady*. Such is the only valid conclusion which may be drawn in an area which is developing in an atmosphere of everchanging ideologies and interpretations.

*Charles Aron*

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382. *Id.* at 766, 443 P.2d at 253.
383. This field will be more clearly delineated when the United States Supreme Court rules on the pending case of *Moore v. Illinois*, 42 Ill. 2d 73, 246 N.E.2d 299 (1970), *cert. granted*, 402 U.S. 91 (1971). The Court will be given the opportunity to determine whether a police agency’s non-disclosure may be charged to the prosecution.

Recently, the Supreme Court has clarified the obligation of the prosecutor, holding that the failure by the trial attorney to disclose an Assistant United States Attorney’s promise not to prosecute a key witness was material to the credibility of the witness, and therefore reversible error—even though the trial attorney had no knowledge of the promise. *Giglio v. United States*, 40 U.S.L.W. 4209 (Feb. 24, 1972).