

CRIMINAL DISCOVERY IN OHIO: “CIVILIZING” CRIMINAL RULE 16

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I. INTRODUCTION

Thus far, there have been 270 people exonerated in the United States through the use of DNA evidence alone.¹ There are others who have been wrongfully convicted and will never be exonerated, if for no other reason than DNA evidence simply is or was not available. Sadly, there will be more wrongful convictions. The reasons for this travesty are legion. Obviously, not all wrongful convictions can be blamed on discovery violations; but in fairness, many can.²

The many reasons for wrongful convictions range from honest mistake to deliberate misrepresentation. The idea that one might *bear false witness* is hardly a new concept. Any change in law regarding discovery rules can have some impact in preventing a wrongful conviction regardless of cause. From the perspective of the defense, the best shield is pretrial preparation, which can only be accomplished if there is meaningful and abundant pretrial discovery.

One might argue that despite the best efforts, even going so far as to adopt nearly all the discovery rules employed in civil litigation, not all causes of wrongful conviction would thereby be eliminated. That argument is true, perhaps, especially in the case of deliberate falsehood. Opponents of open discovery in criminal cases might go so far as to suggest that it is readily foreseeable that a greater number of truly guilty will escape punishment. This argument, also, is true. The counter argument is, of

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¹ *Innocence Project Case Files*, INNOCENCEPROJECT.ORG (Jan. 30, 2011, 7:36 PM), www.innocenceproject.org/know.

² See THE OHIO ASS'N OF CRIMINAL DEF. LAWYERS, BROKEN DUTY: A HISTORICAL GUIDE TO THE FAILURE TO DISCLOSE EVIDENCE BY OHIO PROSECUTORS i-ii (2005), available at http://associationdatabase.com/aws/OACDL/asset_manager/get_file/16884?ver=56.

course, that the greater evil is the conviction of the innocent. That the prosecution cannot insure against all possibilities of wrongful conviction is obvious. The government should, however, always remain vigilant in this regard, recognizing that with each new prosecution, there is also a possibility of a wrongful conviction.

Society has not only the right but the duty to prosecute, and without the exercise of that duty it could not function. But, given the usual disparity between the resources of the government and those of the individual, extreme care should always be exercised in every prosecution to avoid a wrongful conviction. “Better that ten guilty persons escape, than that one innocent suffer”³ While there have been wrongful convictions, and while we should recognize there will be more, we should likewise recognize that one of the best tools to guard against wrongful conviction is the proper regulation of discovery in criminal cases. Even in the case of deliberate misrepresentation, perhaps, especially in such instances, according the accused wide latitude in the discovery process is the best insurance against wrongful conviction. The policy should always be in favor of disclosure from the government to the accused, and any reason accepted for nondisclosure by the state should be carefully circumscribed.

On July 1, 2010, the Ohio Supreme Court unanimously adopted a new version of Criminal Rule 16 (hereinafter “Crim. R. 16”). The new rule was the result of collaboration between many judges, prosecutors, and defense attorneys, and credit is especially given to the late Chief Justice of the Ohio Supreme Court, Thomas J. Moyer. The stated purpose of the revision was to provide more open discovery in criminal cases. The committee included members of both the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, who worked on rewriting the rule for a substantial period of time. Unfortunately, the Chief Justice passed away April 2, 2010, and did not live to see the results of his efforts.

Along with the rewriting of Crim. R. 16, the Ohio Supreme Court also undertook to amend Criminal Rules 12, 41, and 59. At the same time, five rules of appellate procedure were amended, primarily to provide for an en banc process for courts of appeal to follow in the case of a conflict of decisions of the court upon which they sit.⁴

³ Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352).

⁴ Rules of Appellate Procedure 14, 15, 25, and 26 were amended to implement the procedure outlined in *McFadden v. Cleveland State University*. See OHIO R. APP. P. 14, 15, 29; *McFadden v. Cleveland State Univ.*, 896 N.E.2d 672, 676-77 (Ohio 2008). Rule of Appellate Procedure 43 was also amended to reflect the effective date of the above rules. See OHIO R. APP. P. 43.

II. CHANGES - OLD vs. NEW

By far, the most notable change in the Criminal Rules was made to Crim. R. 16. The old Rule 16 became effective July 1, 1973, and was adopted in conjunction with an overhaul of the Ohio Criminal Code which became effective January 1, 1974.⁵ The rule remained completely unchanged until the adoption of the new rule in 2010.⁶ In its completed form, the new rule represents a vast improvement over the previous iteration and promises to provide for more fair resolutions of criminal cases. Nothing, however, is perfect, and even with the changes, there still remain certain concerns, at least from the perspective of the defense. Such is the case with the results of compromise; no one is completely happy.

It is a fair criticism of the old rule that it was, at best, biased. Perhaps it was considered an improvement over what had been required or permitted up to that point, but it was decidedly favorable to the prosecution and certainly unfavorable to the defense. The best example of how skewed the rule was in favor of the prosecution was the rule which allowed the opposing side to see a witness' statement for the first time only after the witness completed his or her direct examination at trial.⁷ Strictly read, the prosecution could call a witness (assuming the witness had been disclosed, if required, in advance) and complete the direct examination of the witness. Only then would the prosecution be required to produce that witness' written or recorded statement previously made to agents of the state. The attorneys would then enter the judge's chambers, and "with the defense attorney and prosecuting attorney present and participating," the judge would review the statement to determine whether there were any inconsistencies between the testimony just received in open court and the previous statement.⁸ If the court was convinced there were inconsistencies, the defense would then be given a copy of the statement and allowed to cross-examine on it. However, if the judge was not so convinced, the defense counsel not only was prohibited from cross-examining on any perceived inconsistencies, he or she would also not be given a copy of the statement. Defense counsel could not even comment on the statement.⁹ The rule also provided for the possibility that the entire statement might not be provided to counsel, but in that event the entire statement was to be preserved in the court's file in case of appeal.¹⁰

⁵ THE OHIO CRIMINAL LAW HANDBOOK iii (Ronald D. Major ed., 1976); 1 ROBERT H. GORMAN ET AL., ANDERSON'S OHIO CRIMINAL PRACTICE AND PROCEDURE iii (2d ed. 1996); OHIO R. CRIM. P. 16(A).

⁶ A proposed amendment to Crim. R. 16 was published for comment in both the *Ohio Official Reports* in January 1995 and in the *1995 Court Rules Bulletin #2*; however, the amendments were never adopted. See 2 GORMAN ET AL., *supra* note 5, at 15 (note following Crim. R. 16).

⁷ See OHIO R. CRIM. P. 16(B)(1)(g) (1973) (amended 2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In fairness, the reverse was also true. Defense counsel could call a witness, and only after direct examination could the prosecutor move for an *in camera* inspection of any previous statement.¹¹ The judge would then be required to determine whether inconsistencies existed, and the same rules applied concerning cross-examination and comment. Statements by the accused were excepted.¹² But, rather than being viewed merely as a level playing field, the reality is that in a great many cases, if not most, the prosecution has the greater number of witnesses, and more to the point, the prosecution must produce at least a sufficient number of witnesses to establish the *corpus* of the crime, the identity of the accused, and the jurisdiction of the court. Thus, the prosecution always has at least one witness, whereas the defense might not have any.

Under the old Ohio rule, if strictly applied, the prosecution had the advantage by design. The defense could not prepare a cross-examination in advance as it related to the statement because the contents were unknown. The prosecution, by contrast, had the opportunity to review the contents of the statement, to meet with the witness in advance, and to resolve any differences, if possible, between the statement and the expected testimony. This rule was, of course, the Ohio procedural codification of the Jencks Act.¹³

The Jencks Act was an immediate Congressional response to the Supreme Court's opinion in *Jencks v. United States*.¹⁴ Clinton Jencks, a union official, was indicted in 1953 for making false statements to the NLRB that he was not a communist.¹⁵ He was convicted, and the Fifth Circuit Court of Appeals affirmed.¹⁶ At issue before the Supreme Court was the failure of the government to provide defense counsel with copies of statements made by the prosecution's primary witnesses who were paid informants.¹⁷ The defense had sought copies of only portions of the statements for use in cross-examination.¹⁸ The Supreme Court reversed.¹⁹ Without explicitly mentioning either a deprivation of the Sixth Amendment right to effective assistance of counsel or the right of confrontation, the Court did say, "[b]ecause 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

¹¹ *Id.* 16(C)(1)(d).

¹² *Id.* However, this was at best pointless. This seems to presuppose that a defense attorney would have a client make a written or otherwise recorded statement only to have it used by the prosecution to the client's detriment.

¹³ See 18 U.S.C. § 3500 (2006).

¹⁴ Heather E. Williams, *Letter of the Law: Behind the Headlines, Beyond Jail Jencks Act Materials*, 41 ARIZ. ATT'Y 28, 28 (2005).

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 32-33.

¹⁷ *Jencks v. United States*, 353 U.S. 657, 659 (1957).

¹⁸ *Id.* at 673 n.1 (Burton, J., concurring).

¹⁹ *Id.* at 672 (majority opinion).

initially be entitled to see them to determine what use may be made of them. Justice requires no less.”²⁰

This was not a new concept. The Court drew upon the opinion of Chief Justice Marshall in *United States v. Burr*, where the court went even further than requiring disclosure in advance of a statement given by a witness:

Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge.²¹

The old Ohio rule is nothing new to the criminal defense bar in federal court, with the exception that under the federal rule the judge may review the “statement” without defense counsel’s participation.²² Clearly, both the federal and the old Ohio rules were designed for no other purpose than to limit the effectiveness of defense counsel, despite condemnation

²⁰ *Id.* at 668-69.

²¹ *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694). What is truly interesting, aside from the fact the defendant was Aaron Burr, is that this discovery issue first arose pre-indictment. The defense was being prepared even before Burr had been indicted by the grand jury. John Marshall, sitting on the Circuit Court of Virginia at the time, along with District Court Judge Griffin, addressed the issue of a motion for a subpoena *duces tecum* directed to President Jefferson:

So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence [sic], and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. That would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by the grand jury.

United States v. Burr, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692d).

²² See FED. R. CRIM. P. 16; 18 U.S.C. § 3500(b) (2006) (“After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.”); *cf.* 18 U.S.C. § 3500(c) (“If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.”).

going back to at least 1807.²³

The idea that the prosecution could thwart the defense from preparing for cross-examination was no doubt popular, especially immediately after *Jencks* was decided. This was, after all, during the height of anti-communist sentiment in the United States. The Jencks Act was passed the same year as the Supreme Court decided *Jencks* in 1957. So controversial was the opinion that the legislation which would ultimately become the Jencks Act was introduced the day after the opinion was announced.²⁴

That the rule survives should be considered anathema. The argument, reduced to its basics, is two-fold. First, the rule operates to deny a defendant the right to counsel. It is axiomatic that a criminal defendant is entitled to counsel.²⁵ The assistance of counsel necessarily means the assistance of effective counsel.²⁶ Jencks Act-type rules are specifically promulgated to hinder preparation for trial by denying counsel copies of witness statements until after the witness has testified on direct examination.²⁷ The deprivation of the effective assistance of counsel is a deprivation of due process.²⁸

Second, the rule denies a defendant of the right of confrontation. A defendant in a criminal case generally enjoys the right to confront his accuser in open court and to cross-examine the witness.²⁹ Jencks Act-type rules impinge on this right to confront by limiting cross-examination.³⁰ This

²³ The trial of Aaron Burr presented an early opportunity for the construction of compulsory process clause. *United States v. Burr (Burr I)*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D); *United States v. Burr (Burr II)*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14, 694). Burr brought motions for subpoenas to compel the production of letters originally sent to President Jefferson, one of which was in the custody of the Attorney General. *Burr I, supra*, at 32. With respect to the motion to subpoena granted for one of the letters, the government argued in opposition (1) that a subpoena *duces tecum* was not covered by the Sixth Amendment, which related only to witnesses and not documents; (2) that the defendant's showing was insufficient, having only stated that the letter may be material to his defense; (3) the motion was premature because the defendant was not yet indicted; (4) the motion was invalid with respect to a United States President who is privileged from subpoena. *Id.* at 36-37. In his decision of June 13, 1807, Justice John Marshall ruled against all these objections and the subpoena issued to Jefferson. *Id.* at 37-38. Jefferson complied by the delivery of a letter, dated October 21, 1806. MARK J. MAHONEY, *THE RIGHT TO PRESENT A DEFENSE*, 6 (July 24, 2008), <http://www.harringtonmahoney.com/publications/Rtpad2008-02.pdf>.

²⁴ "Legislation to repeal the Court's decision was introduced the day after it was adopted and the measure was enacted in little over two months." Stephen C. Leckar, *Unveiling Informant Testimony: The Unconstitutionality of the Jencks Act*, 3 AM. U. WASH. C. L. CRIM. L. BRIEF 40, 44 n.1 (2007).

²⁵ U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

²⁶ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

²⁷ See 18 U.S.C. § 3500(a); FED. R. CRIM. P. 16; OHIO R. CRIM. P. 16(B)(1)(g) (1973) (amended 2010).

²⁸ *Gideon*, 372 U.S. at 341-43; see also *Powell v. Alabama*, 287 U.S. 45, 64-65 (1932) (providing this right in limited circumstances such as capital cases).

²⁹ U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004).

³⁰ Under both the federal rule and the old Ohio rule, the judge first must determine whether the defense can utilize the statement. Additionally, strict application of such rules has been recognized as being at odds with the concept of a fair trial many times. For example, in *United States v. Owens*, the court stated:

also raises due process concerns.³¹

It is instructive to compare the relative degree of freedom accorded civil litigants. Even in a lawsuit involving a sum just above the jurisdictional limit of a *small claims* court, both parties enjoy the right of liberal discovery. Not only the parties, but witnesses may also be deposed. Interrogatories and requests for admission are commonplace. With greater amounts at issue, the discovery process leaves virtually no stone unturned. By the time of trial, each side can know almost every detail of the other party's case. The cynic might suggest such is the case where money is at stake. Such is not always the case, however, in a criminal trial where only a person's life or liberty is in jeopardy. Thankfully, Ohio has seen fit to adopt the new discovery rules, ameliorating some of these concerns, and, in effect, has granted criminal defendants some, if only a few, avenues of discovery similar to those afforded civil litigants.

So, what has really changed? The biggest changes favoring the accused concern the availability of witness statements and police reports in advance of trial. In certain jurisdictions, such availability was already the norm.³² In other jurisdictions, however, prosecutors were free to conduct the prosecution strictly "by the book."³³ It was a patchwork across the state. Now all defendants are entitled to copies of any written or recorded statements of most witnesses whether the state intends to use them in the case-in-chief or in rebuttal.³⁴ Defendants, at least through counsel, are also entitled to "[a]ll reports from peace officers [or] the Ohio State Highway Patrol," and can use them, apparently, to cross-examine, subject to certain limitations.³⁵ The staff notes point out that the rule now requires the materials to be copied or photographed, as opposed to merely permitting the

The failure to provide full disclosure of the government's case early in the proceedings limits a defendant's ability to investigate the background and character of government witnesses and the veracity of their testimony. For example, strict compliance with the Jencks Act necessitates frequent delays and adjournments. Counsel often need time to digest and investigate the information received. As a practical matter, any thorough investigation at that juncture of the proceedings may usually be impossible, and counsel must do the best that they can in the brief time usually allotted. The court and the jury are inconvenienced by even brief delays; the rights of the defendants are jeopardized because such delays, if granted, often are not sufficient. The restrictions, therefore, not only impinge upon the right of defendants to a fair trial, but also severely hamper the orderly process of criminal trials. They are wrong in principle and cause delay in practice.

United States v. Owens, 933 F. Supp. 76, 78 (D. Mass. 1996) (quoting Hon. H. Lee Sarokin & William E. Zukermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1090 (1991)).

³¹ See *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

³² Montgomery Cnty. Court Loc. R. 3.03(I)(D)(2)(a)(4)(a)-(f).

³³ Cf. OHIO R. CRIM. P. 16 (1973) (amended 2010).

³⁴ OHIO R. CRIM. P. 16(B)(7). *But see id.* 16(D).

³⁵ *Id.* 16(B)(6). The rule provides that counsel for the defense shall be given all police reports, "provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness" *Id.*

defendant to inspect and copy or photograph as under the old rule.³⁶

As in the previous version of the rule,³⁷ discovery is triggered by the demand of the defendant, and, once triggered, it provides for a reciprocal, continuing duty to a standard of due diligence.³⁸ The balance of new Crim. R. 16(B), however, provides no real discernable change from the old version. New Crim. R. 16(B)(1) through (4), while not verbatim, substantially mirrors old Crim. R. 16(B)(1)(a) through (d).³⁹ The new rule is at least more concise.

The *Brady* rule is contained in Crim. R. 16(B)(5).⁴⁰ However, even by the terms of the new rule, compliance with *Brady* is conditioned on written demand for discovery.⁴¹ Absent such demand, the prosecution has no obligation, at least under the rule, to divulge any evidence favorable to the defendant.⁴² *Brady* itself states, “[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁴³ “Prosecutorial disclosure of *Brady* evidence is not automatic. Prosecutors are typically required to provide *Brady* evidence only upon a request.”⁴⁴ A strict reading of both *Brady* and the new rule would lead one to the conclusion that in the absence of a discovery demand, the state, even with knowledge of its exculpatory nature, could withhold material information and not violate either *Brady* or the rule. Because no change in the *Brady* rule appears to have been intended by the adoption of the new discovery rules, the prosecution might claim no duty absent a proper demand. That claim would be completely wrong.

In *Kyles v. Whitley*, the court stated that “a defendant’s failure to request favorable evidence [does] not leave the Government free of all

³⁶ *Id.* staff notes div. (H).

³⁷ Under the old rule, Crim. R. 16(A) provided, “Upon written request each party shall forthwith provide the discovery herein allowed.” OHIO R. CRIM. P. 16(A) (1973) (amended 2010). It would, at first, appear as if either party might make the request; however, closer inspection of the rule shows, in each instance, it was the defense which had to first initiate the discovery process. *Cf. id.* 16(B)(1)(a)-(f); *id.* 16(C)(1)(a)-(c).

³⁸ OHIO R. CRIM. P. 16(A).

³⁹ *Id.* 16(B)(1)-(4); OHIO R. CRIM. P. 16(B)(1)(a)-(d) (1973) (amended 2010).

⁴⁰ OHIO R. CRIM. P. 16(B)(5); see *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁴¹ OHIO R. CRIM. P. 16(B).

⁴² Crim. R. 16(A) and (B) expressly mention the discovery demand as the predicate for any duty placed on the prosecution. *Id.* 16(A) (stating discovery begins once it “is initiated by demand of the defendant”); *id.* 16(B) (providing discovery begins, “[u]pon receipt of a written demand for discovery by the defendant”). “There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded’” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (emphasis added) (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

⁴³ *Brady*, 373 U.S. at 87 (emphasis added).

⁴⁴ Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 534 (2007).

obligation.”⁴⁵ The court cited *United States v. Agurs*, which stated in *dictum*:

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for “all Brady material” or for “anything exculpatory.” Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor’s duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all.⁴⁶

It should also be noted that the duty of disclosure the state has under *Brady* extends to impeachment evidence and is not limited to exculpatory evidence.⁴⁷ It includes evidence known to the prosecutor, as well as evidence unknown to the prosecutor but known to police investigators, because “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”⁴⁸

In *State v. Russell*, the Eighth District Court of Appeals stated, “[t]he state must disclose evidence favorable to the defendant and material either to guilt or punishment, even if it is not requested, and the state’s good or bad faith in meeting this standard is irrelevant.”⁴⁹ Likewise, in *State v. Chaney*, the Third District Court of Appeals held, “[t]he state must disclose favorable and material evidence, even if it is not requested, and the state’s good or bad faith in meeting this standard is irrelevant.”⁵⁰

Crim. R. 16(B)(6) provides for the discovery of “[a]ll reports from

⁴⁵ *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Agurs*, 427 U.S. 97 (1976)).

⁴⁶ *Agurs*, 427 U.S. 97, 106-07 (1976).

⁴⁷ *United States v. Bagley*, 473 U.S. 667, 676 (1985).

⁴⁸ *Kyles*, 514 U.S. at 437.

⁴⁹ *State v. Russell*, No. 94345, 2010 WL 4867620, at *4 (Ohio Ct. App. Nov. 24, 2010). On reconsideration, *Russell* was later vacated and a new opinion was journalized. See *State v. Russell*, No. 94345, 2011 WL 494744, at *1 (Ohio Ct. App. Feb. 10, 2011). Neither the ultimate result nor the applicable holding was thereby affected.

⁵⁰ *State v. Chaney*, 862 N.E.2d 559, 563 (Ohio Ct. App. 2006) (citing *Kyles*, 514 U.S. at 432).

peace officers [or] the Ohio State Highway Patrol”⁵¹ Under the former rule, such reports were governed by Rules 16(B)(1)(g) and 16(B)(2).⁵² Former Crim. R. 16(B)(2) provided:

Except as provided [elsewhere], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.⁵³

When it came to police reports, courts read the two rules in *pari materia* and concluded that some portions of police reports might be discoverable, while other portions might not. For example, in *State v. Jenkins*, the Ohio Supreme Court stated:

This is not to say that all portions of a police report are discoverable under Crim.R. 16(B)(1)(g). Reading this section in *pari materia* with Crim.R. 16(B)(2), it becomes apparent that those portions of a testifying police officer’s signed report concerning his observations and recollection of the events are “statements” within the meaning of Crim.R. 16(B)(1)(g). Those portions which recite matters beyond the witness’ personal observations, such as notes regarding another witness’ statement or the officer’s investigative decisions, interpretations and interpolations, are privileged and excluded from discovery under Crim.R. 16(B)(2). Hence, once it is determined that a report in which a producible out-of-court statement of the witness being examined exists, the trial court, on motion of the defendant, must afford attorneys for all parties the opportunity to inspect the “statement” portions personally.⁵⁴

The rule has been parsed even further. It has been held, for instance, that the use of a witness’ statement by the defense during a motion hearing was not warranted because the requirement that the statement be produced after direct examination only applied “at trial.”⁵⁵ Thus, the defendant was prevented from using the witness’ statement for impeachment

⁵¹ OHIO R. CRIM. P. 16(B)(2).

⁵² *See, e.g., State v. Jenkins*, 473 N.E.2d 264, 315 (1984) (holding portions of testifying police officer’s reports are statements under Crim. R. 16(B)(1)(g) and 16(B)(2)); *State v. Lambert*, No. 13483, 1993 WL 79273, at *3 (Ohio Ct. App. Mar. 16, 1993) (holding local rule invalid and unenforceable because it directly contradicted the limitations contained in Crim. R. 16(B)(2)).

⁵³ OHIO R. CRIM. P. 16(B)(2) (1973) (amended 2010).

⁵⁴ *Jenkins*, 473 N.E.2d at 316 (internal citations omitted). *Jenkins* was a capital case where the death penalty was upheld. *Id.* at 325.

⁵⁵ *State v. Moreland*, No. 43369, 1981 WL 4603, at *5 (Ohio Ct. App. Nov. 5, 1981); *State v. Robinson*, No. 66316, 1994 WL 716559, at *3 (Ohio Ct. App. Dec. 22, 1994).

during his cross-examination at the motion hearing.

Crim. R. 16(B)(7) provides for the discovery of any statement made by any other witness which the prosecution reasonably anticipates calling either during its case-in-chief or in rebuttal.⁵⁶ This provision appears to reinforce, as a *catch-all*, the previous discovery requirements otherwise set forth in Crim. R. 16(B).

New to the rule is Crim. R. 16(C), the controversial “counsel only” provision. Under the old rule, there was no such provision. There was broad authorization under Crim. R. 16(E), which provided for the regulation of discovery, under which the trial court was empowered to limit the use of discovery materials; but there was nothing that granted the prosecution the right, on its own, to restrict the use of materials provided.⁵⁷ The new rule specifically provides that the prosecution can designate any discovery materials as “counsel only.”⁵⁸ Once so designated, defense counsel is prohibited from showing these materials to the defendant. Additionally, defense counsel is further prohibited from disseminating the materials in any way. Counsel may “orally communicate” the contents to the defendant, but while counsel can give the defendant a copy of all other materials, such is not the case where the prosecutor elects to restrict the materials.

The rule has no defense analog in the case of reciprocal discovery, nor is there any guidance or standard to govern which materials can be restricted. It appears as though the entire “discovery packet” could be designated “counsel only” as long as the prosecutor stamps the words “counsel only” on each page or item. The use of this restriction is bound to vary and may engender some litigation, not the least of which will involve Crim. R. 16(F), which apparently limits courts to review based only upon abuse of discretion.⁵⁹

The staff notes to Crim. R. 16(C) state that counsel, being an officer of the court, has a duty to abide by the restrictions placed upon him or her by the prosecution.⁶⁰ Almost dismissively, the notes claim, “[c]ounsel’s

⁵⁶ OHIO R. CRIM. P. 16(B)(7).

⁵⁷ See OHIO R. CRIM. P. 16(E) (1973) (amended 2010).

⁵⁸ OHIO R. CRIM. P. 16(C).

⁵⁹ Crim. R. 16(F) provides, “[u]pon motion of the defendant, the trial court shall review the prosecuting attorney’s decision of nondisclosure or designation of ‘counsel only’ material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.” *Id.* 16(F) (emphasis in original). Thus, it seems as if an abuse of discretion standard applies to both materials not disclosed under a certification of nondisclosure as well as all materials designated as “counsel only.”

⁶⁰ *Id.* staff notes div. (C).

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as ‘Counsel Only’ may be orally interpreted to the Defendant, or to counsel’s agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to physically retain “Counsel Only” material, and to limit its dissemination. Counsel’s duty to the

duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the ‘Counsel Only’ material.”⁶¹ This is a somewhat curious phrasing. The rule states that counsel may orally “communicate the *content*” of the material; whereas, the staff note states “the *nature*” of the material may be orally communicated.⁶² If counsel is authorized by the rule to read the “content” to the defendant, and to do so verbatim, as nothing in the rule prohibits such, then it appears to be a broader term than merely communicating the “nature” of the material. It is speculated that this subsection was adopted to prevent the possibility of a defendant confronting a potential witness with an actual copy of the witness’ statement out of court. However, there is already a prohibition against this sort of behavior.⁶³

In addition to the prosecution’s ability to restrict materials provided, the prosecution may also certify that there are materials being deliberately withheld.⁶⁴ The prosecution is required by Crim. R. 16(D) to give one or more of the five designated reasons. The first reason is a concern of intimidation, coercion, or safety of a witness, victim, or third party.⁶⁵ The second reason is a concern of “substantial risk of serious economic harm.”⁶⁶ Either of these first two reasons for nondisclosure must be based on “reasonable, articulable grounds.”⁶⁷ The third reason is a concern that “[d]isclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation”⁶⁸ This reason may be given regardless of whether such disclosure involves the defendant.⁶⁹ Additionally, unlike the first two reasons, the prosecution need not articulate reasonable grounds, or any grounds at all; an assertion to this effect appears to be sufficient. The fourth reason for nondisclosure is a concern that the material is the statement “of a child victim of [a] sexually oriented offense under the age of thirteen”⁷⁰ However, this provision is subject to disclosure under seal and pursuant to a protective order.⁷¹ The fifth and final reason for nondisclosure is both broad and undefined: “[t]he interests of justice require non-disclosure.”⁷² Given that “reasonable, articulable grounds” must be provided for the first two reasons but not for

client is not implicated, since the rule expressly allows oral communication of the nature of the ‘Counsel Only’ material.

Id.

⁶¹ *Id.*

⁶² *Id.* 16(C); *id.* staff notes div. (C).

⁶³ OHIO REV. CODE ANN. § 2921.04(B) (West 2006).

⁶⁴ OHIO R. CRIM. P. 16(D).

⁶⁵ *Id.* 16(D)(1).

⁶⁶ *Id.* 16(D)(2).

⁶⁷ *Id.* 16(D)(1)-(2).

⁶⁸ *Id.* 16(D)(3).

⁶⁹ *Id.*

⁷⁰ *Id.* 16(D)(4).

⁷¹ *Id.* 16(E)(2).

⁷² *Id.* 16(D)(5).

the final three reasons, it can be inferred that such grounds are not required for the final three reasons. The claim of “the interests of justice” thus appears to be nearly *carte blanche* and more than mere support for an argument based on objective facts.

Following the list of reasons supporting nondisclosure is a guide, as opposed to a definition, for a determination of what constitutes “reasonable, articulable grounds.” It is not an exhaustive list. It includes witness tampering or intimidation, threats, the nature of the case, and “any other relevant information.”⁷³ Aside from the fact that this requirement that the prosecution needs only set forth “reasonable, articulable grounds” to support nondisclosure under the first two reasons, might the mere fact that a defendant represents himself or herself be, by itself, a reason to support nondisclosure?⁷⁴ A defendant does have a constitutional right to represent himself.⁷⁵ The new rule does require the prosecutor to “identify the nondisclosed material.”⁷⁶ However, “[t]he certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in [Crim.R. 16](F).”⁷⁷

In the event of a prosecutor’s certification of nondisclosure, the defense, in order to protect the record, ought to consider filing a motion to compel the discovery of the nondisclosed material immediately. Consideration should also be given to filing a separate, but related motion to challenge the certification.⁷⁸ Even though it is an affirmative duty on the part of the prosecution to certify that material otherwise subject to disclosure is not being disclosed (and thus disclosing its existence), care should, nevertheless, be taken to include a request for such material in the initial discovery demand as a matter of course. As a practical matter, the odds favor the nondisclosed material as being favorable to the accused, and decidedly unfavorable to the state. Therefore, any certification of nondisclosure should immediately raise *Brady* concerns.⁷⁹

⁷³ The full text of Crim. R. 16(D)(5) reads as follows:

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information. The prosecuting attorney’s certification shall identify the nondisclosed material.

Id.

⁷⁴ *Id.*

⁷⁵ OHIO CONST. art. 1, § 10; *see, e.g.*, *Faretta v. California*, 422 U.S. 806, 836 (1975) (holding that the state could not constitutionally force a lawyer upon the defendant because he was literate, competent, understanding, and he voluntarily exercised his informed free will in waiving his right to counsel).

⁷⁶ OHIO R. CRIM. P. 16(D).

⁷⁷ *Id.* staff notes div. (D).

⁷⁸ Alternatively, two separate branches in the same motion could, in theory, effect the same result.

⁷⁹ OHIO R. CRIM. P. 16(B)(5).

Next, the new rule turns to the separately-treated category of sexual assault cases.⁸⁰ The discovery rules in such cases are an exception to the rules under Crim. R. 16(B).⁸¹ As long as the materials relate to the charge, defense counsel is allowed to inspect the photographs, the hospital reports, and the results of any physical or mental examinations.⁸² If unrelated to the indictment, information, or complaint, then defense counsel is not permitted to inspect them, and they are not subject to disclosure.⁸³ Copies are authorized to be made and delivered to the defendant's expert, but only to the expert, and then only under seal pursuant to a protective order.⁸⁴ Defense counsel is not, by the terms of the rule, entitled to receive copies.⁸⁵ Of course, this means that the defense must disclose the fact that it has retained an expert, as well as the expert's identity, regardless of whether the defense uses, or even intends to use, the expert at trial. The state is not so encumbered. The prosecution is, apparently, allowed to engage the services of any expert it chooses, and, if no report is generated, then there does not appear to be any requirement of a disclosure that the state even consulted with an expert. There would not be any results or reports, and potentially, at least, nothing which would fit within the description of any materials which are subject to disclosure.⁸⁶

In sexual assault cases, the defense is allowed a copy of the complainant's statement well in advance of trial unless the alleged victim is less than thirteen years of age.⁸⁷ This rule is unclear. The rule would obviously apply if the assault is alleged to have occurred before the complainant turned thirteen, reported the alleged incident before turning thirteen, and scheduled to testify before attaining the age of thirteen. Should the alleged victim turn thirteen before the defendant is scheduled for trial, would the statement be discoverable? If the rule is interpreted to deny discovery in any case where complainant was less than thirteen at the time of the alleged act, would the statement be discoverable if it was not reported until the alleged victim was an adult? In the event of an accusation of sexual assault upon one who is under thirteen, but who then makes a statement on his or her thirteenth birthday, would the statement be provided in the normal course of discovery?

One thing is clear—the rule was obviously written by the prosecution. For example, Crim. R. 16(E)(2) begins with the following statement: “[i]n cases involving a victim of a sexually oriented offense less

⁸⁰ *Id.* 16(E).

⁸¹ *Id.* staff notes div. (E).

⁸² *Id.* 16(E)(1).

⁸³ *Id.*

⁸⁴ *Id.* Copies will be released only upon motion by the defendant.

⁸⁵ *Id.* staff notes div. (E) (“Upon motion of the defendant, the court may, in its discretion, permit these materials under seal to defense counsel and the defendant’s expert.”).

⁸⁶ *See id.* 16(B)(3)-(7).

⁸⁷ *Id.* 16(E)(1)-(2); *cf. id.* 16(B)(7).

than thirteen years of age”⁸⁸ This statement contains no mention of an allegation, alleged victim, complainant, or similar language. The complainant is already a victim. Perhaps this is too pedantic an observation, but perhaps this explains, at least in part, the perceived need to treat sexual assault cases differently from any other criminal case, and why the rule, as it relates to the age of the presumed victim, is so ill-defined.

The staff notes concerning Crim. R. 16(E) make the claim that this rule represents a *balance* between the rights of a criminal defendant and “the interests in the privacy and dignity of the victim.”⁸⁹ Again, the term “victim” is used without any modifier. This balance is struck, it is claimed, “by permitting inspection, but not copying, of certain materials.”⁹⁰ The rule provides that copies of photographs, results of tests, and hospital reports may only be sent to experts.⁹¹ The rule also provides that statements of a “victim . . . less than thirteen” may only be provided “to defense counsel and the defendant’s expert.”⁹² The question arises whether the defense must already have an expert. In the case of receiving copies of photographs, results of tests, and hospital reports, the answer is clear—they may only be sent to an expert.⁹³

But consider the case of statements of a “victim . . . less than thirteen” which may only be provided “to defense counsel and the defendant’s expert.”⁹⁴ Does this mean that the defense must already have an expert? Or, is this to be interpreted as permitting the report to be sent to either the defense counsel or the defendant’s expert? The rule *graciously* provides, “[n]otwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.”⁹⁵ Why this sentence is even in the rule is a mystery. The term “the expert” obviously refers to the defendant’s expert mentioned in the immediately preceding sentence of the staff note.⁹⁶ But, is the defense first required to have an expert before it is entitled to see the statement? The staff notes appear to lean that way. “This provision [Crim. R. 16(E)(2)] facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.”⁹⁷ The next paragraph contains the following clarification: “[t]his division is designed to provide an exception to the nondisclosure procedure

⁸⁸ *Id.* 16(E)(2).

⁸⁹ *Id.* staff notes div. (E).

⁹⁰ *Id.*

⁹¹ *Id.* 16(E)(1).

⁹² *Id.* 16(E)(2).

⁹³ Exactly who is deemed an expert is not defined, and one can envision disagreement over this issue before the state agrees to provide the discovery.

⁹⁴ OHIO R. CRIM. P. 16(E)(2).

⁹⁵ *Id.*

⁹⁶ *Id.* staff notes div. (E).

⁹⁷ *Id.*

sufficient to permit the expert and defense counsel to effectively evaluate the statement.”⁹⁸ These passages lend support for the proposition that the defense must first retain an expert, and then disclose that expert to the state, as a predicate for its being given a copy of the alleged child-victim’s statement. If that is true, and if that is the way this rule is to be construed, then defense counsel will not have the ability to make a determination of the actual need for an expert. The defense will almost be forced to hire an expert with any case involving an alleged child-victim.

This is not to suggest that cases involving alleged child-victims should not be given special attention, especially those involving allegations of abuse or sexual assault. Many policy considerations militate in favor of doing so.⁹⁹ However, the unique treatment of access to a child’s statement accorded by this rule does little, if anything, to further legitimate policy goals and more to hamper the defendant’s trial preparation.

Oversight of the prosecutor’s decision either not to disclose or to designate material as “counsel only” is provided in subsection (F).¹⁰⁰ The rule contemplates a hearing in chambers one week before the trial, provided the defense files the appropriate motion.¹⁰¹ Even if the defense filed its motion to compel discovery at the outset, the rule sets the one-week-before-trial hearing date as the benchmark. The standard of review is abuse of discretion.¹⁰² The selection of this time period was apparently a contentious issue, as evidenced by the staff notes, which state, “[t]here was substantial debate regarding the time for this review.”¹⁰³ It is clear that prosecuting attorneys were responsible for this subsection as well. The first paragraph of the rule states, “Upon motion of the defendant, the trial court *shall* review the prosecuting attorney’s decision of nondisclosure or designation of ‘counsel only’ material . . . seven days prior to trial”¹⁰⁴ The rule does not contain the phrase, “at least seven days,” or any other such language, but instead is written as a mandate. The staff notes support this interpretation. Two paragraphs of the notes are devoted to the executive function of the prosecutor and justifying the limited time frame contemplated for

⁹⁸ *Id.* staff notes div. (E)(2).

⁹⁹ See, e.g., Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio’s Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants - Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994) (addressing many evidentiary and constitutional questions raised in criminal and dependency cases involving child abuse).

¹⁰⁰ OHIO R. CRIM. P. 16(F).

¹⁰¹ *Id.*

¹⁰² *Id.* The term “abuse of discretion” has generally been defined as more than an error of law or of mere judgment; it implies that the one exercising discretion did so unreasonably, arbitrarily or unconscionably. *State v. Adams*, 404 N.E.2d 144, 148-49 (Ohio 1980); *State v. Moreland*, 552 N.E.2d 894, 898 (Ohio 1990).

¹⁰³ OHIO R. CRIM. P. 16 staff notes div. (F).

¹⁰⁴ *Id.* 16(F) (emphasis added).

disclosure.¹⁰⁵ The seven days time-frame is recognized as the end of “the trial preparation stage,”¹⁰⁶ but it was deliberately chosen for its “protective purpose.”¹⁰⁷

The staff notes concerning Crim. R. 16(F) appear to be as much about justifying the subsection as explaining it. “The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure”¹⁰⁸ The sum and substance of subsection (F) is to provide the prosecution with the option of waiting until the last moment to release, if at all, the most crucial information to the defense. Subsection (F) along with subsection (G) appears as the last vestige of the old rule. While perhaps not as draconian as the old rule allowing discovery of a witness statement only after direct examination, subsection (F) is designed both clearly in favor of the prosecution and clearly to thwart pretrial preparation by the defense.

Should the trial court find that the prosecution has abused its discretion in not divulging the material, it can “order disclosure, grant a continuance, or other appropriate relief.”¹⁰⁹ While the remedies are listed in the disjunctive, the broad phrase “other appropriate relief” should be viewed as encompassing both disclosure and continuance. Thus, it should be understood that a trial court has the authority to take any or all steps to adequately remedy the abuse.

Should a court make a finding of abuse, the prosecution has the right to take an interlocutory appeal within seven days.¹¹⁰ However, should the prosecution decide to take an appeal to avoid disclosure, the defendant *must* be released on his own recognizance, except in capital cases.¹¹¹ The rule does not list a *conditional* own recognizance as an option; only a simple recognizance bond appears to be authorized. If the defendant is out of custody on a posted bond, then the trial court should modify the bond to simple recognizance. If the prosecution should appeal the trial court’s finding of abuse of discretion, and if the remedy ordered by the trial court was one of suppressing or excluding evidence, then the state is barred from prosecuting the defendant for the same offense, “except upon a showing of newly discovered evidence” which could not have been known, with

¹⁰⁵ *Id.* staff notes div. (F).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* To paraphrase Ronald Reagan, “there [they] go again” presuming there *is* a victim. Interview by Jim Loehrer with President Ronald Reagan (Aug. 7, 1989), <http://www.pbs.org/newshour/debatingourdestiny/interviews/reagan.html>.

¹⁰⁹ OHIO R. CRIM. P. 16(F)(1).

¹¹⁰ *Id.* 16(F)(2); OHIO R. CRIM. P. 12(K).

¹¹¹ OHIO R. CRIM. P. 12(K).

reasonable diligence, at the time of the appeal.¹¹²

If the trial court does not suppress or exclude the disputed material, but instead orders the prosecutor to disclose it to the defense, then the material automatically becomes “counsel only,” unless the defendant can convince the trial court that good cause exists for the material to be treated otherwise.¹¹³ An interesting question might arise were the accused to exercise his constitutional right to represent himself or herself.¹¹⁴ In such a case, a trial court might be required to decide whether that fact alone constitutes “good cause.” Yet another question might arise in the case of a pro se defendant where the prosecution elects to file an interlocutory appeal. Would the trial court be required to appoint counsel for purposes of appeal?¹¹⁵

Statements of alleged victims of sexual assault who are under thirteen are treated differently.¹¹⁶ The rule is somewhat confusing. If the prosecution has not certified for nondisclosure¹¹⁷ and the trial court finds no abuse of discretion, or if the prosecution has filed for nondisclosure and the trial court has found an abuse of discretion, defense counsel (and his agents or employees) may then inspect the statement but does not, yet, get a copy.¹¹⁸ If, however, the prosecution has filed for nondisclosure, and if the trial court finds no abuse of discretion in its doing so, then, in the absence of a defense expert, defense counsel is, apparently, not entitled to see the statement until the start of trial.¹¹⁹

The final deadline for the production of any discoverable material, in the absence of a finding of an abuse of discretion on the part of the prosecution, is the “commencement of trial.”¹²⁰ Should the trial court grant the accused a continuance following its receipt of the material, the prosecution has the unqualified right to preserve the testimony of “any witness.”¹²¹ This appears to apply to any witness (arguably it applies only to the state’s witnesses) whether the material disclosed was related to the witness or not.

The right of the state to perpetuate testimony is reinforced by Crim.

¹¹² *Id.*

¹¹³ *Id.* 16(F)(3).

¹¹⁴ *Faretta v. California*, 422 U.S. 806, 807 (1975); *Godinez v. Moran*, 509 U.S. 389, 391 (1993).

¹¹⁵ *See, e.g., Martinez v. Cal. Ct. App.*, 528 U.S. 152, 163-64 (2000) (holding that defendants do not have a federal right to represent themselves pro se on appeal). However, *Martinez* was a direct appeal of a conviction, not an interlocutory appeal. Under this scenario, the question would be whether to appoint counsel, even over the objection(s) of the accused, solely for the interlocutory appeal.

¹¹⁶ OHIO R. CRIM. P. 16(F)(4).

¹¹⁷ *See id.* 16(D)(1)-(2) (providing prosecutors with an option to certify to the court that he is not disclosing material).

¹¹⁸ Under Crim. R. 16(E)(2) counsel may already have seen the statement if the defense has an expert. *Id.* 16(E)(2).

¹¹⁹ *Id.* 16(F)(5).

¹²⁰ *Id.*

¹²¹ *Id.*

R. 16(G).¹²² If the court, at the *in camera* hearing held one week before the trial, orders disclosure of material which the prosecution has certified, then the prosecution also has the absolute right to the preservation of the testimony of “relevant witnesses” during a hearing before the court. The defendant “shall have the right of cross-examination.”¹²³ Both subsections grant only the state the absolute right to the perpetuation of testimony.¹²⁴ Both subsections are drafted so as to limit the time the defense might have to prepare for cross-examination. Only in the case where material is provided to the defendant at the commencement of trial, and a continuance is granted, is there any authority for providing further cross-examination beyond the hearing, and even that is limited by requiring the defense to make a showing of “good cause.”¹²⁵ In essence, the prosecution, but not the defense, is given the right to depose witnesses under certain circumstances without first obtaining a court order as required under Crim. R. 15.¹²⁶

The defendant is under a reciprocal duty of disclosure from the moment written demand for discovery “or any other pleading seeking disclosure of evidence” is served upon the prosecution.¹²⁷ There was a similar duty under the old rule.¹²⁸ The new rule includes the material required to be disclosed under the old rule.¹²⁹ However, the material now required to be disclosed is much broader than before, and includes any intended evidence “material to the innocence or alibi of the defendant.”¹³⁰ This requirement is new. For the first time, the defense has a duty to provide the prosecution with evidence supporting either innocence or alibi.¹³¹ This requirement is supposed to allow the state “to properly assess its case, and re-evaluate the prosecution.”¹³² This is a curious requirement. Once a defendant initiates discovery, he is essentially, by rule, bound to furnish the prosecution with copies or photographs (or at least allow the prosecution to copy or photograph) of all evidence the defense intends to introduce. However, in addition to this requirement, the defendant is also required to divulge the existence of “items related to the particular case . . . and which . . . were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant”¹³³

Apart from the rule’s presumption (once again) that there *is* a victim

¹²² *Id.* 16(G).

¹²³ *Id.*

¹²⁴ *Id.* 16(F)(5), (G).

¹²⁵ *Id.* 16(F)(5).

¹²⁶ Crim. R. 15 provides for depositions of witnesses under limited circumstances; it was not amended. OHIO R. CRIM. P. 15.

¹²⁷ OHIO R. CRIM. P. 16(H).

¹²⁸ OHIO R. CRIM. P. 16(C) (1973) (amended 2010).

¹²⁹ *Id.* 16(C)(1)(a)-(b).

¹³⁰ OHIO R. CRIM. P. 16(H).

¹³¹ *Id.*

¹³² *Id.* staff note div. (H).

¹³³ *Id.* 16(H).

as opposed to an alleged victim, there is no requirement that the “items” be intended for use as evidence by the defendant. A strict reading of the rule would require a defendant to allow the prosecutor to examine, copy, or photograph any item belonging to the “victim” regardless of whether the defense intended to refer to it at all during trial. Obviously, this provision needs to be dealt with cautiously. The potential implications are enormous. The rule states, “nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant”¹³⁴ Still, the mere fact that a certain item is found in the possession or under the control of a defendant could be used to suggest identification, knowledge, plan, or absence of mistake. These facts could bolster the otherwise weak evidence of the prosecution, or supplement other evidence. The fact that one defendant is in possession of an item “obtained from or belong[ing] to the victim” might implicate a codefendant.¹³⁵ That, in turn, might raise other concerns.¹³⁶

Each side must disclose a witness list.¹³⁷ As under the old rule, neither side may comment on the witness list, but it still does not prohibit counsel from commenting on either the presence or absence of a witness.¹³⁸ The state’s witness list must include those witnesses which the state “reasonably anticipates” calling in rebuttal.¹³⁹ The defense is now required to “reasonably anticipate” surrebuttal witnesses and to provide any written or recorded statements of those witnesses.¹⁴⁰ It seems the new rule encourages the defense to use surrebuttal witnesses, and, thus, the witness list should address this issue.

Excepted from disclosure requirements are work product,¹⁴¹ “[t]ranscripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant,”¹⁴² and materials covered by privilege, confidentiality, “or are otherwise prohibited from disclosure.”¹⁴³

Expert witnesses are treated differently under the new rule.¹⁴⁴ If an expert is to testify for either side, that expert must first prepare a written

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *E.g.*, *Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding an accomplice’s oral confession to be inadmissible hearsay and it violated the defendant’s Sixth Amendment right to cross-examine witnesses against him).

¹³⁷ OHIO R. CRIM. P. 16(I).

¹³⁸ *Id.* staff notes div. (I) (citing *State v. Hannah*, 374 N.E.2d 1359 (Ohio 1978)).

¹³⁹ *Id.* 16(I). The state must have provided any recorded or written statement of that witness pursuant to Ohio Criminal Rule 16(B)(7). *Id.* 16(B)(7).

¹⁴⁰ *Id.* 16(H)(5), (I).

¹⁴¹ *Id.* 16(J)(1).

¹⁴² *Id.* 16(J)(2). The prosecution is not required to turn over transcripts of grand jury testimony of anyone except that of the defendant or codefendant. *Id.* 16(B)(1). It was the same under the old rule. OHIO R. CRIM. P. 16(B)(1)(a)(iii) (1973) (amended 2010).

¹⁴³ OHIO R. CRIM. P. 16(J)(3).

¹⁴⁴ *See id.* 16(K).

report.¹⁴⁵ The expert must also include a summary of his or her qualifications, and both the report and summary of qualifications must be disclosed no later than twenty-one days prior of trial.¹⁴⁶ The failure to provide these materials precludes the testimony of the expert at trial.¹⁴⁷ The language is mandatory, not permissive.

Trial courts generally enjoy broad discretion with respect to the admission or exclusion of evidence, and such exercise is rarely disturbed on appeal.¹⁴⁸ Trial courts also generally enjoy broad discretion in deciding whom to qualify as an expert. “A trial court’s decision to allow a witness to testify as an expert will not be reversed absent an abuse of discretion.”¹⁴⁹ However, under this new rule, while the trial court may still retain discretion as to who is an expert, a failure to disclose the required report and summary of qualifications “shall preclude the expert’s testimony at trial.”¹⁵⁰ Proponents of expert testimony who fail to deliver the requisite report might, as a last-ditch effort, attempt to rely on the language which allows the trial court to *modify* the period within which disclosure must be made.¹⁵¹ However, there must be a written report, and the absence of a written report precludes the exercise of discretion in favor of the proponent.

In *State v. Newton*, the Eleventh District Court of Appeals dealt with this issue.¹⁵² “Unlike the new version of Crim.R. 16, the prior version of the rule, which was in effect at the time of the instant trial, did not require an expert to prepare a written report.”¹⁵³ Occasionally, the line between expert testimony and factual testimony is not clear. In *State v. Drummond*, the Ohio Supreme Court noted, “[w]hile the state never formally tendered Lambert as an expert, defense counsel never challenged his qualifications to testify and thus waived all but plain error.”¹⁵⁴ Should any expert evidence be offered,¹⁵⁵ and no objection made by the opponent, the protections accorded under the Criminal Rules may be deemed waived.

The final two subsections of the new rule contain only two changes of any real significance from the former rule.¹⁵⁶ The trial court still has the authority to regulate discovery as long as any such orders are not

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (The twenty-one day period “may be modified by the court for good cause.”).

¹⁴⁷ *Id.*

¹⁴⁸ *State v. Hogan*, No. 09-CA-33, 2009 WL 2894578, at *7 (Ohio Ct. App. Sept. 8, 2009) (citing *State v. Sage*, 510 N.E.2d 343, 348 (Ohio 1987)).

¹⁴⁹ *State v. Quinones*, No. 94082, 2010 WL 4296619, at *4 (Ohio Ct. App. Oct. 28, 2010) (citing *State v. Mack*, 653 N.E.2d 329, 337 (Ohio 1995)).

¹⁵⁰ OHIO R. CRIM. P. 16(K) (emphasis added).

¹⁵¹ *Id.*

¹⁵² *State v. Newton*, No. 2009-L-137, 2010 WL 5550226, at *5 (Ohio Ct. App. 2010).

¹⁵³ *Id.*

¹⁵⁴ *State v. Drummond*, 854 N.E.2d 1038, 1063 (Ohio 2006).

¹⁵⁵ See OHIO R. EVID. 702.

¹⁵⁶ OHIO R. CRIM. P. 16(L)-(M); OHIO R. CRIM. P. 16(E)(3)-(F) (1973) (amended 2010).

inconsistent with the new rule.¹⁵⁷ The court may still prohibit the introduction of withheld evidence, grant a continuance to the aggrieved party, or make such other order(s) as the court deems just.¹⁵⁸ The time for the filing of discovery demands and motions has not changed. Under the old rule, the defendant was to make his *motion* for discovery within twenty-one days after arraignment or seven days before trial, whichever was earlier.¹⁵⁹ Now, the defendant is to make his *demand* within the same time frame.¹⁶⁰

What has changed is the way in which pro se defendants are treated. First, as long as the material is discoverable, the trial court has the authority to regulate the time, place and manner of access to the defendant. The only restriction is that the court cannot exceed the scope of the discovery rules in giving access to the defendant.¹⁶¹

The second significant change regarding discovery regulation is when the attorney-client relationship is terminated “prior to trial for any reason.”¹⁶² In such an event, defense counsel is *required* to return any material designated as “counsel only” or any material which was limited by a protective order to the state.¹⁶³ Defense counsel is prohibited from providing the former client with any work product derived from this material.¹⁶⁴ The reason for these restrictions is to avoid the possibility that a defendant might *fire* the attorney upon learning that the defendant is not entitled to see some of the discovery material. The defendant might then expect to have the same access to the discovery as did his lawyer. The concern among some of the committee that authored the new rules was preventing the release of certain material to certain defendants.¹⁶⁵ These rules prevent a client from firing his attorney, and then demanding “everything in the attorney’s file.”¹⁶⁶

III. CONCLUSION

While many Ohio counties have had some form of *open discovery* in place for some time, well before the adoption of these new rules, several have not. As near as possible, though, the practice of criminal law should be consistent throughout the state. Justice should not depend upon geography. These changes are, therefore, welcomed. They represent the best efforts of

¹⁵⁷ Crim. R. 16(L)(1), with the addition of one sentence, is, verbatim, the old Crim. R. 16(E)(3). OHIO R. CRIM. P. 16 (L)(1); OHIO R. CRIM. P. 16(E)(3) (1973) (amended 2010).

¹⁵⁸ OHIO R. CRIM. P. 16(L)(3).

¹⁵⁹ OHIO R. CRIM. P. 16(F) (1973) (amended 2010).

¹⁶⁰ OHIO R. CRIM. P. 16(M).

¹⁶¹ *Id.* 16(L)(2).

¹⁶² *Id.* 16(L)(3).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* staff notes div. (L).

¹⁶⁶ *Id.*

many good people who had, and continue to have, profound differences over criminal discovery issues. Perhaps some of these differences can be resolved in the near future, and we can hope that the new rules are not to be considered static for the next thirty-seven years.

Other states have adopted broader open discovery rules. Florida specifically allows discovery depositions of almost every witness in felony cases.¹⁶⁷ It is suggested that this leads to well-informed plea negotiations, and it is further suggested that little can be withheld wrongfully from either side. Perhaps this will be explored in some jurisdictions and accurate data will be compiled to determine its effectiveness in reducing judicial caseloads and, to the extent possible, its effectiveness in reducing wrongful convictions.

Far from considering this as an end, it is hoped this is a start. Once fears of untoward and unintended consequences are dispelled by the passage of time, and once it is accepted that the more open the process, the fairer the process, then, perhaps, the report of a wrongful conviction will be a rare happenstance, indeed.

¹⁶⁷ FLA. R. CRIM. P. 3.220(h)(1). The Florida discovery rule is as follows:

(A) The defendant may, without leave of court, take the deposition of any witness listed by the prosecutor as a Category A witness or listed by a co-defendant as a witness to be called at a joint trial or hearing. After receipt by the defendant of the Discovery Exhibit, the defendant may, without leave of court, take the deposition of any unlisted witness who may have information relevant to the offense charged. The prosecutor may, without leave of court, take the deposition of any witness listed by the defendant to be called at a trial or hearing.

(B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition.

(C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

Id.

