BROKEN DUTY

A Historical Guide to the Failure to Disclose Evidence by Ohio Prosecutors

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FORWARD

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Obtaining more open discovery in criminal cases is critical to ensuring that the process is fair and a just result is obtained. Police investigators are often the first to respond to crime scenes. They collect evidence, identify and interview witnesses, and secure statements while memories are still fresh. The person charged with a crime and facing the possibility of loss of life or liberty enters the process late. Evidence has been collected or destroyed, potential witnesses have left, and memories are now unclear. Moreover, much of this detail is unavailable to the defense. The defense cannot examine crime scenes and often cannot review the details of police investigations. A person charged with a crime has access to less information than a person who is suing to recover damages in a contract dispute.

This process is unbalanced and unfair. It increases the likelihood that critical evidence will be lost or withheld and increases the risk that innocent defendants will be wrongfully convicted. This process assigns the person charged with prosecuting the accused to review and decide what evidence is exculpatory and should be released. The prosecutor, regardless of degree of diligence and good will, is not in a position to assess the importance of information to the defense. As a result, critical witnesses viewed by the State as being unimportant or unreliable will not be identified.

In *Brady v. Maryland* (1963), 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, at 87. "*Brady* is an expression of the constitutional mandate of due process and declares that any trial, whether in state or federal court, is inherently unfair if the accused has not been apprised of information in the possession of the prosecution which may exonerate him or reduce punishment." *United States v. Eley* (N.D. Ga. 1972), 335 F.Supp. 353, 358.

With respect to the application and enforcement of Crim.R. 16, the Ohio Supreme Court has noted:

> * * * This rule is applied inconsistently throughout the state, resulting in greater costs to the criminal justice system in areas where discoverable material is not readily made available.* * * A more open and uniform discovery process would reduce the need for court intervention in the discovery process, facilitate settlement of cases, and result in better case preparation, all of which would reduce the cost of providing representation to indigent defendants.

State, ex rel. Steckman v. Jackson (1994), 70 Ohio St.3d 420, 436; *State v. Decker,* 2003-Ohio-4645.

Moreover, open discovery often leads to resolution short of trial. It reduces the strain upon an already overburdened court system and decreases the costs of running the system. Justice Pfeifer noted in a concurring opinion in *State v. Lambert* (1994), 69 Ohio St.3d 356, 357, 632 N.E.2d 511, that open criminal discovery, "prevents meaningless, resource-wasting 'hide the thimble' games by the state in criminal matters."

This Report documents a part of the problem created by the current criminal discovery rules. It cannot identify every defendant who was convicted because critical evidence was lost, withheld or destroyed or every accused who was forced to enter a plea when faced with conviction when unable to show innocence. The Report, however, does reflect an increasing exasperation on the part of reviewing courts with prosecutors who intentionally or unintentionally failed to provide the defense with exculpatory evidence. These errors undermine justice and taint the public's perception of the system. They also result in expensive and needless litigation.

These are errors that can be addressed through a broader exchange of information, without endangering work product or confidential information. We have an opportunity now to streamline the currently burdensome discovery rule with one that is fair and balanced and that promotes an expeditious resolution of cases. That rule provides for open discovery. One example of an open discovery system is in place in Montgomery County. Discovery in that jurisdiction occurs without any of the problems that critics of open discovery often suggest would occur. In *Steckman,* Justice Pfeifer noted that, "[w]ithout further delay, we should integrate relevant portions of Loc.R. 3.03 I(D)(2)(d) of the Montgomery County Court of Common Pleas Criminal Rules of Practice and Procedure into Crim.R. 16."

NOTE ON METHODOLOGY

The following is a compilation of criminal cases in which there is a documented claim of failure to provide discovery by Ohio prosecutors to Ohio defendants. The cases span the period of time from the promulgation of Criminal Rule 16 to the present, from 1973 to 2005.

At its essence, a "documented claim" means a finding by a trial court or an appellate court that the prosecutor was under a legal duty to disclose information, and did not do so, or that clemency was granted by the Governor of Ohio based, in whole or part, upon an expressed failure of the prosecution to disclose information which undermined confidence in the outcome of the trial.

The "duty to disclose" in these cases is used in the broadest sense, including for example, duty to disclose witnesses, science reports, evidence favorable to the accused and material to guilt or innocence, and continuing duty to disclose. Cases that involved a failure by the prosecutor to disclose evidence favorable to the accused (Brady claims) are specifically noted (*).

Cases are included irrespective of either the imposition of judicial sanctions by the trial court or the outcome of appellate review of the discovery error, and thus includes cases in which appellate courts have deemed the discovery error to be non-prejudicial, affirmed under the "harmless error" doctrine, or the discovery error was determined to be undeserving of the sanction imposed by the trial court.

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CASES & ANNOTATIONS

State v. Larkins, 2004 Ohio 5928*

Cuyahoga County prosecutors failed to disclose exculpatory police records which included: (1) eyewitness descriptions of the robber that did not match defendant; (2) the description by a cooperating witness which did not match defendant; (3) that a witness who was present at the planning of the crime did not identify defendant as being involved and who said she saw both robbers after defendant had already left town; (4) that one witness named defendant only after police told her that defendant was known by a certain nickname; (5) that one cooperating witness lied on the stand about her criminal record; and (6) contrary to the testimony of a cooperating witness that she received nothing in exchange for her testimony, the prosecutor wrote a letter in her behalf to the Ohio Parole Board indicating that he "promised" to do everything to get her off parole in exchange for her assistance. New trial ordered. On remand, because police records inadvertently came into Defendant's possession after ten years of unsuccessful post-trial efforts to obtain them, and thereafter prosecutors argued for four years that the records were non-discoverable, and prejudice accrued to the defendant (2 witnesses had died) from post-indictment delay (19 years), the trial court found that dismissal of the indictment, rather than retrial of the defendant, to be the only appropriate remedy. Case no. CR-166827 (Cuyahoga C.P.)

State v. Kreischer, case nos. 01 CA 04 & 01 CA 18 (Perry App.) (unreported)*

Perry County Prosecutor failed to disclose written statement of victim and deputy sheriff's summary of victim's statements which materially contradicted victim's trial testimony and theory of the prosecution (excessive use of self-defense). Conviction affirmed and post-conviction denied because outcome of the trial would not have been different. [*Ed*: Gov. Taft subsequently granted commutation (October 25, 2004) of prison sentence.]

State v. Wogenstahl, 2004-Ohio-5994*

Hamilton County prosecutors failed to disclose that key capital case witness had been arrested and adjudicated delinquent for marijuana trafficking during the pendency of the capital case, and allowed perjured deposition and trial testimony by the witness that he had never sold marijuana or seen it around his house. Police testified in habeas corpus depositions that they called Joe Deters on the phone (he said "Oh shit. . . .") and spoke to other prosecutors about the arrest. Court affirms based upon harmless error, but states that prosecutors conduct is sufficiently egregious that it states that Disciplinary Counsel should review the case.

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* Denotes Brady claim

State v. Gary James (4/16/03), case no. 76CR-12-3207(A) (Franklin C.P.)*
State v. Timothy Howard (4/16/03), case no. 76CR-12-3207(B)(Franklin C.P.)*

Franklin County prosecutors failed to disclose in two separate trials that: (1) courtroom identifying witness had made negative photographic identification; (2) the courtroom identifying witness made pretrial statement that she had went into a state of shock at time of the offense and could remember nothing of the details of the offense; (3) the negative photographic identification made by another witness; and (4) fingerprints taken from the scene which did not match either defendant. Post-conviction granted after defendants had served 26 years in prison.

Office of Disciplinary Counsel v. Wrenn, (2003), 99 Ohio St. 3d 222, 2003 Ohio 3288*

Trumbull County prosecutor failed to disclose in pretrial discovery or at plea and sentencing hearing that forensic DNA laboratory reports were favorable to the Defendant as well as a victim's change-of-story obtained subsequent to the DNA lab reports. Court holds information was material and that prosecutor breached ethical and legal obligations. Prosecutor sentenced to six month suspended suspension of law license [*Ed*: ouch !].

In re Jerome Campbell (June 26, 2003)*

Gov. Taft grants commutation of death sentence in part due to Hamilton County prosecutors' failure to disclose leniency agreements with two jailhouse informants who testified against defendant as to inculpatory statements made by defendant while in pretrial custody.

Castleberry v. Brigano, 349 F.3d 286 (6th Cir)(10/24/03)*

Sixth Circuit grants habeas corpus to capital defendant due to failure of Franklin County Prosecutors disclose: (1) the original description of the offender given by the sole eyewitness to the offense materially different from defendant; (2) another pretrial statement given to the police by a witness who reported hearing the state's key witness plotting to commit the robbery of the victim; and (3) reports from neighbors of the victim who reported seeing suspicious persons in the vicinity of the attack on the victim. The Court held that the state courts and lower federal court failed to consider the collective probative value of these various evidentiary matters. "No reasonable court can have confidence in the decision of a jury that did not hear this withheld evidence." Retrial ordered.

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*Denotes Brady claim

Jamison v. Collins, 291 F. 3d 380 (6th Cir. 2002)*

Hamilton County prosecutor failed to disclose exculpatory police records which police had not provided to them: (1) that eyewitness had initially identified two mug shots of other persons as the offenders; (2) inconsistent accounts of the offense given to the police by the cooperating co-defendant; (3) statements given to police by another eyewitness which discredited the account provided by the testifying co-defendant; (4) descriptions of the offenders given to police by bystanders which contradicted the co-defendant's account, undermined the prosecution's theory of the case, and suggested other suspects; (4) police records of other suspects investigated in the course of a series of robberies ("other acts" which were introduced against defendant) which rendered them material suspects of this offense; and (5) police records which showed that the victim of one of the other robberies ("other act" evidence) could not initially identify defendant as the offender at the time of the offense (although she later identified him at a lineup). Convictions and death sentence vacated.

State v. Decker, 2003 Ohio 4645

Seneca County prosecutor failed to disclose four witnesses and a BCI firearm report and drug analysis until the Friday before a Monday trial. The trial court imposed sanction of excluding the witnesses and the report. State certifies it was unable to proceed, and appeals. Court of Appeals upholds the trial court sanction order. The Court borrows from dicta from Ohio Supreme Court decisions lamenting the inconsistent application of discovery sanctions throughout the state and "the cost to the criminal justice system in areas where discoverable material is not readily made available." "More recently, the Ohio Supreme Court has observed that 'much could be said concerning Crim R. 16 and the theory of 'open file' discovery of the type authorized by local rule.'"

State v. Reynolds, 2002 Ohio 135*

Columbiana County prosecutors failed to disclose "deals" made with cooperating witnesses. Post-trial discovery of a $5,000 payment from sheriff and prosecutor made to cooperating witness. Sheriff and witnesses perjured themselves at trial in denying paying/receiving compensation for cooperation. Prosecutor's admission and explanation presented in post-oral argument supplemental brief deemed "at best disingenuous." Reversed and remanded for post-conviction evidentiary hearing.

State v. Kalejs, 2002 Ohio 6657, 150 Ohio App. 3d 465*

Hamilton County prosecutors failed to disclose tape-recorded statements by an arson witness which significantly varied from a subsequent statement and her trial testimony. Arson investigators testified that statement was given to prosecutors. Court of appeals deems the suppressed statement material. Reversed and remanded.

State v. McKinnon, 2001 Ohio 3527*

Columbiana prosecutors failed to disclose a rape victim's contemporaneous account of incident which significantly contradicted her other witness statements and trial testimony, while arguing to the jury that her strong credibility was demonstrated the consistency of her other prior statements. Reversed and remanded.

State v. Iacona, (2001), 93 Ohio St. 3d 83*

Medina prosecutor failed to disclose favorable blood culture laboratory report prior to bindover in juvenile case. Court holds that Brady applies to juvenile, and the report was proper Brady material, but affirms conviction based upon harmless error doctrine.

State v. Karl (2001), 142 Ohio App. 3d 800*

Columbiana County prosecutor did not disclose that the state's forensic handwriting expert had reported that the victim's forged signature on a power of attorney was consistent with the co-defendant's handwriting.

State v. Henderson (June 9, 2000), no. C-990657 (Hamilton App.)(unreported), 2000 Ohio App. LEXIS 2451*

Hamilton County prosecutors failed to disclose police photographs of its two critical witnesses in gang attire and holding semi-automatic weapons, even though both denied in their trial testimony being involved in gangs or weapons, and also failed to produce an exonerating tape-recorded police interview with another witness to the offense. Due to the complete lack of physical evidence, the entire case turned on the credibility of the two state witnesses. Reversed and remanded.

State v. Glander (2000), 139 Ohio App. 3d 490

Prior to the day before trial, Preble County prosecutor neglected to disclose statement to police officer attributed to defendant which was testified to by deputy and denied by defendant. Omission was inexplicable; would have benefitted the defense in preparing for trial. Retrial ordered.

State v. Harris (Sept. 26, 2000), no. 99AP-1380 (Franklin App.)(unreported), 2000 Ohio App. LEXIS 4406*

Franklin County prosecutors failed to disclose until after trial that the prosecution victim's trial testimony differed significantly on key factual matters from prior testimony before the grand jury, indicating perjury by prosecution victim. Reversed and remanded.

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* Denotes Brady claim

State v. Johnson (Aug. 11, 2000), no. 99-A-0030 (Ashtabula App.)(unreported), 2000 Ohio App. LEXIS 3657

Ashtabula County prosecutor failed to disclose the name of the confidential informant and copies of audio and video recordings despite order to compel entered by trial court. Trial court thereafter entered order excluding testimony of witnesses not made available by the State in discovery. State appealed, and the appellate court held that it was an abuse of the trial court's discretion to enter the sanction order without holding a hearing to inquire into the facts and circumstances.

State v. Jones (March 16, 1999), no. 98AP-544 (Franklin App.)(unreported), 1999 Ohio App. LEXIS 1138

Franklin County prosecutor failed to disclose statement of defendant given to FCCS agent the prosecutor attempted to cross examine the defendant with the statement. Trial court overrule the objection on the basis the discovery rule did not apply to statements not used in the prosecutor's case-in-chief. Although the Court of Appeals finds that the discovery error was not willful, the Court holds that a continuance was not a reasonable sanction or remedy since the defendant had already testified, and the defendant was prejudiced because knowledge of the statement might have caused to remain silent. Reversed and remanded.

State v. Harris, (June 2, 1998), case no 97APA07-955, 956 (Franklin App.)(unreported)*

Franklin County prosecutor failed to disclose airline records that revealed that co-defendants had never been issued claim checks for the luggage that were found to contain marijuana. Existence of airline records in possession of the detective and prosecutor "discovered" during cross-examination of detective. Declaration of mistrial and dismissal indictment affirmed on appeal.

State v. Gau (Dec. 11, 1998), no. 97-L-197, 1998 LEXIS 5991*

Lake County prosecutor failed to disclose police investigation witness statements which were inconsistent with the trial testimony and police statements given by rape victim. Denial of post-conviction claim reversed and remanded for evidentiary hearing.

State v. Aldridge (1997), 120 Ohio App. 3d 122*

Montgomery County prosecutors failed to disclose negative medical examinations of minor victims, inability of one state witness to identify the defendant, inconsistent statements (including a denial of abuse) of one victim, and threats made against state

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* Denotes Brady claim

witnesses by a police detective as to their denials of any crimes. Post-conviction granted by trial court, and the life sentences of two defendants vacated. Affirmed on appeal.

State v. Ponce (Oct. 10 1996), 95APA11-1450 (Franklin App.) (unreported)*

Franklin County prosecutors failed to disclose that the adolescent victim of sex abuse made inconsistent statements to investigating police officers and Children Services Investigators, and other FCCS records detailing a prior accusation by the victim's older sister of physical abuse against the victim's father because he was upset that she was "messing around" with older boys. Reversed and remanded for new trial.

State v. Brown (1996), 112 Ohio App. 3d 583

Clermont County prosecutors provided discovery in case-in-chief at trial in front of jury that a child witness made pretrial statement to police that "a bad man" [not female defendant] threw a brick at victim [instead of being run over by a vehicle]. Appeals court affirms conviction because of inability to conclude that a reasonable probability of different outcome if defendant received pretrial disclosure. Defendant had failed to pursue a "bad man did it" line of defense in her case.

State v. Stambaugh (Oct. 22, 1996), no. 96APC04-475 (Franklin App.)(unreported), 1996 Ohio App. LEXIS 4655

Columbus City prosecutor failed to disclose a tape recording of a telephone call from Defendant to the victim of telephone harassment. Tape is discovered by prosecutor during overnight recess of trial, and discovery immediately made. Court of Appeals finds that the discovery error was not willful. Because defendant declined the trial court's offer of a five day continuance, and because there was no surprise (a log summary of the telephone call had been provided in discovery and two other tapes of calls had been provided in discovery), there was no prejudice to defendant, and therefore the trial court did not abuse discretion by refusing to exclude the evidence of the tape recorded telephone call.

State v. Bradley (Dec. 2, 1996), no. 95CA2364 (Scioto App.)(unreported), 1996 LEXIS 5560*

Scioto County prosecutors failed to disclose information that showed that a state's witness's testimony was false, or to withdraw testimony, and withheld evidence from inmate.

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* Denotes Brady claim

State v. Lang (1995), 102 Ohio App. 3d 243

Hamilton County prosecutor verbally disclosed to defense counsel on the day of trial statements made by defendant during police questioning. Over objection, trial court ruled statements admissible. Court of Appeals upholds ruling based upon a non-willful discovery violation, and that the statements in question were actually elicited by defense counsel who "opened the door" in questioning detective.

State v. Bidnost (1994), 71 Ohio St.3d 449

Cuyahoga County prosecutor failed to disclose to defendant a written summary of the defendant's purported statements to police at the time of his arrest. SCO holds not to be an abuse of discretion by the trial court to admit statements based on record that showed defendant received pretrial verbal disclosure of statement, and the defendant was not prejudiced by admission of the statement.

State v. Scudder (1994), 71 Ohio St. 3d 263

Franklin County prosecutors failed to disclose three separate experts (fingerprint; blood spatter; DNA forensic expert on population frequencies) prior to capital case trial. Supreme Court holds admission of expert testimony was not abuse of discretion where the trial court recessed proceedings for 48 hours before one testified, and that the failure to disclose the other two experts was not willful, the defense was not unfairly surprised by the testimony, and the defense requested no continuance as an alternative to exclusion.

State v. Haddix (1994), 93 Ohio App. 3d 470

Ohio Attorney General failed to disclose intention to use defendant's past tax returns as impeachment or rebuttal evidence. Court of Appeals holds non-disclosure to be discovery violation, but affirms conviction because error was harmless in view of other evidence of guilt.

State v. Linton (Dec. 6, 1994), no. 94APA03-300 (Franklin App.)(unreported), 1994 Ohio App. LEXIS 5524

Franklin County prosecutor failed to disclose the name of a witness (the only witness on the issue of motive) until near the end of its case-in-chief. Trial prosecutor did not know of the identity of the witness until that day, although the prior prosecutor on the case had known of the witness over two years previously. Although defense counsel was able to interview the witness overnight, the court of appeals finds that the trial court abused its discretion in refusing to suppress the testimony, finding that

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* Denotes Brady claim

the knowledge of one prosecutor must be imputed to the other. Based upon the prejudice to the defendant, the court of appeals holds that exclusion of the witness testimony was the only appropriate sanction for the discovery error under the circumstances. Reversed and remanded.

State v. Wilson (1993), 91 Ohio App. 3d 611

Montgomery County prosecutor failed to disclose the name of a key witness called in its case-in-chief until the day before trial. Trial court abused judicial discretion by allowing the testimony over objection and failing to inquire into the defendant's need for a continuance to prepare for cross-examination or pursue independent means to challenge the credibility of the witness. Reversed and remanded.

State v. Horton (1993), 90 Ohio App. 3d 157

Franklin County prosecutor failed to disclose a tape-recording of the defendant's statements to police at the time of his arrest, after having caused a previous continuance of the trial due to delayed discovery. Citing persistent delays of discovery by the prosecutor's office which resulted in frequent continuances of trials, the trial court dismissed the case with prejudice. The Court of Appeals held that the trial court failed to consider sanctions short of dismissal and reversed and remanded for a hearing on sanctions.

State v. Rayford (April 30, 1993), no. 92WD083 (Wood App.)(unreported), 1993 Ohio App. LEXIS 2280

Wood County prosecutor failed to disclose name of confidential informant called as a rebuttal witness. Trial Court excluded the testimony due to discovery error. State appeals, and the Court of Appeals holds that the trial court did not abuse discretion in entering sanction of exclusion.

State v. Callihan (1992), 80 Ohio App. 3d 184

Scioto County prosecutor failed to disclose until the day of trial an oral statement of defendant made at the time of his arrest. The Court of Appeals rejects State's argument that no disclosure is required if no written summary of a defendant's oral statement exists, but affirms conviction because the failure to disclose was not willful because the factual issue was not anticipated to be material and the error was not prejudicial to defendant.

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* Denotes Brady claim

State v. Wiles (1991), 59 Ohio St. 3d 71

Portage County prosecutors failed to disclose by the time of a pretrial discovery deadline in a capital case the name of a corrections officer to testify in its case-in-chief regarding statements of the defendant. The Court holds it was not an abuse of discretion for the trial court to admit the testimony where the failure to disclose was not willful, there was no indication that the defense was unfairly prejudiced by the testimony, and the defendant did not seek a continuance as alternative to exclusion of the evidence.

State v. Wamsley (1991), 71 Ohio App. 3d 607

Gallia County prosecutor failed to disclose the name of one trial witness until the Friday before trial, and failed to disclose a rebuttal witness prior to trial. The trial court offered defendant a continuance of the trial which was declined. A divided court of appeals (Grey, J., dissenting) holds that the trial court did not abuse judicial discretion in failing to exclude the rebuttal witness testimony.

State v.Heinish (1990), 50 Ohio St. 3d 231

Cuyahoga County prosecutors failed to disclose the name of a witness in its case-in-chief until the day of her testimony in this capital trial. Court holds the trial court did not abuse discretion even though defense counsel moved for a continuance which was denied. The Court finds that the failure to disclose was not willful, and that the prosecutor agreed to allow the defendant to recall the witness later in the trial after the ability to prepare for cross-examination (which defense counsel did not do).

State v. Wickline (1990), 50 Ohio St. 3d 114

Mid-trial disclosure by Franklin County prosecutors of police records relating to information re whereabouts of missing victim. SCO holds Brady does not apply to mid-trial disclosure; properly considered as Crim R. 16(E) issue of appropriate sanctions. Since defense refused offer of continuance, no abuse of discretion in denying mistrial. Capital conviction and sentence affirmed.

State v. Parks (1990), 69 Ohio App. 3d 150

Montgomery County prosecutor willfully withheld address of prosecution witness until the day before trial without having sought a protective order. Court of Appeals holds that it was error for the trial court to refuse the defendant a continuance because of its right to investigate the witness.

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* Denotes Brady claim

State v. Lorraine (Aug. 10, 1990), no. 3838 (Trumbull App.)(unreported), 1990 Ohio App. LEXIS 3324

Trumbull County prosecutors failed to disclose in a captial case the names of four rebuttal witnesses, including one forensic expert. Defense objected, and asked for a continuance to prepare for the forensic expert. The trial court granted a one day continuance. The Court of Appeals holds that the prosecution's argument that the witnesses were not "reasonably anticipated" to be unpersuasive, and states that the prosecution's practice is "considered poor practice which is greatly disapproved by this court." The Court holds that the trial court did not abuse discretion in its inquiry into the circumstances and its choice of sanctions to remedy the violation.

State v. Hancock (1990), 67 Ohio App. 328

Athens County prosecutor failed to disclose the identity of a confidential informant and other fingerprint evidence, based upon the police department's refusal to provide the prosecutor with the information even after an order to compel was granted. The trial court dismissed the indictment as the sanction for non-compliance. The Court of Appeals holds that the trial court did not abuse its discretion in dismissing the indictment.

State v. Finnerty (1989), 45 Ohio St. 3d 104

Lorain County prosecutor failed to disclose the name of a rebuttal witness who testified that the defendant had, several months before the murder, stated that "I'll kill that son of a bitch someday." Defense objected (overruled) but did not request a continuance. The Court of Appeals reversed the conviction on this basis, but the Supreme Court held that it was not an abuse of judicial discretion for the trial court to refuse to exclude the rebuttal testimony since the absence of requesting a continuance "the trial court properly concluded that defense counsel was prepared to go forward at that time."

State v. Moore (1988), 40 Ohio St. 3d 63

Van Wert prosecutor failed to disclose a tape recording of the defendant and a confidential informant, which was played during the rebuttal testimony of the informant after defendant testified and denied that he had a conversation with informant on that day. Court finds discovery error, rejecting State's contention thta the discovery does not require statements that are believed relevant to the defendant. Court doubts prosecutor's averment that the discovery error was not willful. Finds that the suppressed tape surprised the defendant and prejudiced defendant who might not have testified if he had been provided with discovery of the tape. Reverse and remanded.

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* Denotes Brady claim

State v. Johnson (1988), 39 Ohio St. 3d 48*

Hocking County prosecutor failed disclose investigative information that the victim may have been killed by a different person in a different location. SCO follows Brady, and reasonable probability of a different outcome. Capital conviction and sentence reversed. Case dismissed. *Ed*: tate settles claim of wrongful imprisonment for $.]

State v. Abi-Sarkis (1988), 41 Ohio App. 3d 333

Cuyahoga County prosecutor failed to disclose the identity of a rebuttal witness. The Court of Appeals holds that the trial court does not abuse discretion by failing to exclude the rebuttal testimony where the defendant fails to request a continuance, recess or opportunity to voir dire the witness, and the cross-examination of the wtiness is vigorous an d complete.

State v. Eubank (1987), 38 Ohio App. 3d 141*

Lucas County prosecutors failed to disclose a tape recording of its key witness (and co-defendant) discussing with other state witnesses efforts to prevent a rape victim from testifying against defendant. Appeals court affirms trial court's dismissal of motion for new trial, finding that the suppressed evidence would not change the result of the trial.

State v. Wilson (1987), 30 Ohio St. 3d 99

Lucas County prosecutors disclosed a forensic lab test which appeared favorable to the defense, but did not disclose supplemental information from the forensic expert which indicated otherwise, violating supplemental duty to disclose evidence. Court condemns strategy of "trial by ambush." Reversed and remanded.

State v. Smith (1986), 34 Ohio App. 3d 180

Ross County prosecutor failed to disclose names and addresses of state witnesses until 4 days prior to trial it disclosed 4 names (2 with incorrect addresses) and then on the day of trial 13 names and addresses. Prosecutorial misconduct requires precluding witnesses' testimony. Reversed and remanded.

State v. Watters (1985) 27 Ohio App. 3d 186

Hamilton County prosecutors failed to disclose the names of two rebuttal witnesses for whom prosecutors had fore-knowledge of the defendant's inculpatory statements. Rule 16 violation required reversal as non-disclosure seriously handicapped the defense (*i.e.*, whether defendant should testify).

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* Denotes Brady claim

State v. Gertenslager (1985), 29 Ohio App. 3d 19*

Contempt conviction ($500 fine) of Cuyahoga County Assistant Prosecuting Attorney is affirmed for failure to comply with court order disclose hospital records of medical examinations of the rape victim. Subsequent disclosure (five months after discovery requested) revealed negative finding as to presence of sperm and that the victim was pregnant. Defendant in criminal case (Khong) was acquitted subsequent to belated disclosure.

State v. Walden (1984), 19 Ohio App. 3d 141*

Franklin County prosecutor failed to disclose exculpatory police records that the defendant in a murder case alleging self-defense had called police to make a complaint of harassing telephone calls from the victim a week before the killing. Prosecutor challenged defendant's credibility in her testimony of harassment and burglary by the victim prior to the admitted killing. Reversed and remanded.

State v. Parson (1983), 6 Ohio 3d 442

Hamilton County prosecutors failed to disclose oral statements re alibi made by co-defendant to police prior to charges being filed. Trial judge grants motion to strike. In defense case, defendant calls alibi witnesses who also testify that co-defendant was with defendant intermittently on the day of the offense. Trial judge allows police officer to testify in rebuttal as to co-defendant's remarks. SCO finds the statements to be discoverable even though it was rebuttal evidence and even though not actually reduced to a written summary prior to the demand for discovery. However, Court rules defendant not prejudiced by non-willful failure to disclose; he knew of the statement at the time he called alibi witnesses.

State v. Montgomery (1982), 3 Ohio App. 3d 280

Hamilton County prosecutor failed to disclose a written statement of a co-defendant who testified for the State. Mistrial ordered.

State v. Hill (March 25, 1982), case no. 81AP-663 (Franklin App.)(unreported)*

Franklin County prosecutor failed to disclose that prosecution witness had been hypnotized in effort to assist their recollection.

State v. Tomblin (1981), 3 Ohio App. 3d 17

Hamilton County prosecutors refused to provide defendant with a copy of his tape-recorded statement to police, and asked for protective order contending that he did not intend to make it part of his case file and therefore it was not available to or in the

* Denotes Brady claim

possession of the State. Appeals court finds "police are part of the state and its prosecutorial machinery." Refusal of access denied due process and fair trial because it handicapped defendant in preparation of his defense (*i.e.*, whether to testify).

State v. Beel (June 26, 1984), no. 83AP-51 (unreported)(Franklin App.)

Franklin Count prosecutor failed to disclose until 2nd day of trial an inculpatory oral statement given by co-defendant to police officer. Reversed and remanded for new trial.

State v. Ready (June 12, 1980), no. 41212 (unreported)(Cuy. App.)

Cuyahoga County prosecutor failed to disclose until after the defendant's testimony at trial a tape-recorded police interview with defendant. Court of Appeals finds no prejudicial error where the trial court suppressed the non-disclosed evidence but denied a motion for mistrial.

State v. Calvin; State v. McGugan (May 1, 1980), nos 40328; 40340 & 40357 (unreported)(Cuy. App.)

Cuyahoga County prosecutor failed to disclose the names and addresses of two witness until the second day of trial. Court of Appeals condemns the "ineptitude" of the prosecutor, but concludes that no prejudice resulted since the defense counsel was able to speak with one witness before testifying and their testimony was "to some extent" cumulative.

State v. Keran (April 6, 1979), no. L-77-191 (unreported)(Lucas)

Lucas County prosecutor failed to disclose names and addresses of two rebuttal witnesses to refute a claim of alibi. Court of Appeals holds prosecutor require d to disclose in the "interest of full discovery and avoidance of gamesmanship, but finds it was not prejudicial error.

State v. Howard (1978), 56 Ohio St. 2d 328

Franklin County prosecutor failed to disclose the name of a rebuttal witness prior to trial. The Supreme Court holds that the prosecution must disclose all witnesses that it reasonably anticipates it is likely to call whether in its case-in-chief or in rebuttal. The Court further holds that it was not prejudicial error to admit the testimony where no request for a continuance was made by the defense, and the trial court had given a cautionary instruction limiting the rebuttal testimony to the defendant's credibility.

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* Denotes Brady claim

State v. Golden (July 1, 1976), no. 8004 (unreported)(Summit)

Summit County prosecutor failed to disclose tape-recorded police questioning of two eyewitnesses who had already testified for the State. Court of Appeals holds there was no prejudice, where there was no inconsistency with the trial testimony of the witnesses, and the trial court gave defendant the right to recall the witnesses.

State v. Hicks (May 8, 1976), 48 Ohio App. 2d 135

Cuyahoga County prosecutor failed to provide written summary of an oral statement of defendant obtained by police. Court of Appeals holds the trial court did not abuse discretion admitting the undisclosed oral statement where the defendant failed to file a motion to compel discovery of the contents after learning in pretrial proceedings that an oral statement had been obtained.

State v. Edwards (1976), 49 Ohio St. 2d 31

Summit County prosecutor failed to disclose the name of a witness it called in its case-in-chief. Supreme Court holds that the trial court did not abuse discretion in refusing to exclude the witness testimony where the prosecutor's mistake was inadvertent, that the defense was not surprised by the testimony and the defendant did not request a continuance of the trial.

ANALYSIS

- Discovery abuse commonly results in prejudicial error. New trials were ordered in approximately one-third (25 of 65) of these cases.

- Suppression of favorable evidence from the defense is a very common form of discovery abuse. Over one-third of these cases (27 of 65) involve claims that the prosecutors failed to disclose evidence that was favorable to the defendant (Brady claims).

- The problem of discovery abuse is getting worse. 28 of these cases have been decided since 1995; 10 cases in years 2003 & 2004 alone.

- Who are the worst offenders in failing to disclose evidence?

    - Franklin County prosecutors (15 cases)
    - Hamilton County prosecutors (9 cases)
    - Cuyahoga County prosecutors (7 cases)

- How statewide is the pattern of discovery abuse? (26 different county prosecuting attorney offices and the Ohio Attorney General)

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 16 (2005)

Rule 16. DISCOVERY AND INSPECTION

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

(B) *Disclosure of evidence by the prosecuting attorney.*

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

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

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

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

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

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

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the

prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

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

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

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

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

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

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

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) *Disclosure of evidence by the defendant.*

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or

within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

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

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

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

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

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

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

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

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

(E) *Regulation of discovery.*

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or

part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

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

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

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

NOTE: The *PROPOSED* amendment to CrimR 16 published in *Ohio Official Reports* for comment in January 1995 and in *1995 Court Rules Bulletin #2* did not go into effect.

MONTGOMERY COUNTY
RULES OF PRACTICE AND PROCEDURE OF THE COURT OF COMMON PLEAS

CRIMINAL RULES OF PRACTICE AND PROCEDURE

RULE 3.01 Purpose

The purpose of these rules of criminal practice is to provide the fairest and most expeditious administration of criminal justice possible within the requirements of the Ohio Rules of Criminal Procedure; and the provisions of the Ohio Revised Code, the Ohio Constitution and the U.S. Constitution. These rules shall be construed and applied to eliminate delay, unnecessary expense, and all other impediments to a just determination of criminal cases. Further, the disclosure and discovery requirements placed upon both the prosecution and the defense are to fully implement Rule 16 of the Ohio Rules of Criminal Procedure and the requirements of Brady vs. Maryland, 373 U.S. 83 (1963). The rules of practice of this Court for civil cases apply to all criminal proceedings, except where clearly inapplicable.

RULE 3.03 Arraignment, pretrial, and scheduling conference

I. Arraignment

D. Pleas Made During Arraignment

1. Guilty

(a) Felony Offense

If the defendant enters a guilty plea to a felony offense, a disposition date shall be set before the assigned judge pursuant to Section III.B. of Local Rule 1.19.

(b) Misdemeanor Offense

If the defendant enters a guilty plea to a misdemeanor offense, the Arraignment Judge may make an immediate disposition.

2. Not Guilty or Not Guilty By Reason of Insanity

If the defendant enters a not guilty plea or a not guilty by reason of insanity plea, the following provisions shall apply:

(a) The defendant must be present, except that the Arraignment Judge, with the written consent of the defendant and the approval of the prosecuting attorney, may permit arraignment without the presence of the defendant, if a plea of not guilty is entered.

(b) The Arraignment Judge shall set a date and time for a scheduling conference before the judge who is assigned to the case pursuant to Local Rule 1.19. The Arraignment Judge shall also order defense counsel to meet with the prosecutor for a pretrial conference prior to the scheduling conference.

(c) If a not guilty by reason of insanity plea is entered, the assigned judge shall be notified so that the appropriate referrals for evaluations can be made to determine the defendant's mental condition at the time of the commission of the offense.

(d) An information packet shall be delivered to the defendant's counsel upon the execution of a Demand and Receipt for the information packet. The information packet shall contain:

(i) All police reports including the defendant's prior criminal record;

(ii) All witness statements;

(iii) All statements made by the defendants and/or by the co-defendant(s);

(iv) All reports of examinations and tests that are made in connection with the particular case and are available to or within the possession, custody, or control of the state;

(v) The names and addresses of all witnesses; and

(vi) All documents and tangible objects which are available to or within the possession, custody, or control of the state, and which are material to the preparation of the defendant's defense, or are intended for use by the prosecuting attorney as evidence at trial, or were obtained from or belong to the defendant.

(e) No police reports supplied in the information packet shall be used for the cross-examination of any witness unless it is properly qualified under Rule 16(B)(1)(g) of the Ohio Rules of Criminal Procedure and Rule 613 of the Ohio Rules of Evidence.

(f) The execution of a demand and receipt for an information packet and the acceptance of an information packet by counsel for the defendant automatically obligates the defendant to provide to the prosecutor reciprocal discovery as set forth in Section (I)(D)(2)(d) of this local rule and as required by Rule 16 of the Ohio Rules of Criminal Procedure.

*69 Ohio St. 3d 356, *; 1994 Ohio 388;*
*632 N.E.2d 511; 1994 Ohio LEXIS 1052, **

The State of Ohio, Appellee, v. Lambert, Appellant

No. 93-934

Supreme Court of Ohio

69 Ohio St. 3d 356; 1994 Ohio 388; 632 N.E.2d 511; 1994 Ohio LEXIS 1052

April 6, 1994, Submitted
May 25, 1994, Decided

PRIOR HISTORY: [1]**

Appeal from the Court of Appeals for Montgomery County, No. 13483.

HEADNOTES:

Appeal dismissed for want of final appealable order.

COUNSEL: *Lee I. Fisher*, Attorney General, and *Brad L. Tammaro*, Assistant Attorney General, Environmental Enforcement Section; *Mathias H. Heck, Jr.*, Montgomery County Prosecuting Attorney, for appellee.

Bieser, Greer & Landis, David C. Greer and *Sharon L. Ovington; Arter & Hadden* and *John P. Gartland*, for appellant.

JUDGES: Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.

OPINION: [*356] The judgment of the court of appeals is vacated and the appeal is dismissed for want of a final appealable order. The cause is remanded to the trial court for reinstatement of its order.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.

CONCURBY: PFEIFER

CONCUR: Pfeifer, J., concurring.

I regret that by finding no final appealable order in this case we have missed an opportunity to improve Ohio's criminal discovery rules. Montgomery County Common Pleas Court Loc.R. 3.03 (I)(D)(2)(d) is a well thought-out, effective rule which does not conflict with Crim.R. 16. Loc.R. 3.03(I)(D)(2)(d) provides that upon defense counsel's demand, **[**2]** a criminal defendant **[*357]** shall be provided with an "information packet" which contains all police reports, witness statements, defendant's statements, and laboratory reports, and the names and addresses of all witnesses. Loc.R. 3.03(1)(D)(2)(d) has many beneficial aspects and no apparent downside. It prevents meaningless, resource-wasting "hide the thimble" games by the state in criminal matters. I recommend the statewide adoption of Loc.R. 3.03(I)(D)(2)(d).

offender sentence (the maximum is life). Pretty meaningless except for the continued erosion of the principle of judicial discretion in sentencing.

Who knows?

SB215: OVI bill prohibiting operation under the influence of drugs. Passed the Senate Judiciary Committee on 12/7/04, in slightly modified form. On the Senate floor session agenda for 12/8/04. Why they are taking up time at this stage of the Lame Duck session on this bill which must still have to pass the House before it can become law beats me. Question: is there some sneaky House strategy to get it to the floor before final adjournment? Stay tuned.

Of Interest.....

THE SUPREME COURT RULES ADVISORY COMMITTEE:

HISTORY, FUNCTION, AND THE 1995 EFFORT TO AMEND RULE 16 OF THE RULES OF CRIMINAL PROCEDURE

Richard A. Dove, Director of Policy and Programs
Supreme Court of Ohio

> *The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the Court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.*
>
> Ohio Constitution, Article IV, Section 5(B)

In 1968, the citizens of Ohio approved a series of amendments to the Ohio Constitution that commonly are referred to as the Modern Courts Amendment. Along with reorganizing the Judicial Article of the Ohio Constitution, the Modern Courts Amendment significantly expanded the rule-making authority of the Supreme Court of Ohio. Included in the 1968 amendments was Article IV, Section 5(B), which requires the Supreme Court to prescribe rules governing practice and procedure in courts throughout Ohio. In the 36 years since the Modern Courts Amendment was approved by the voters, the Supreme Court has established and refined a process to execute its constitutional responsibility and has promulgated and maintained rules governing procedure in civil, criminal, juvenile, and appellate cases as well as Rules of Evidence. This article will outline the process used by the Court and the Rules Advisory Committee in preparing and adopting rules of procedure and discuss the 1995 effort to amend Rules 16 of the Ohio Rules of Criminal Procedure.

Initial Efforts to Prepare Rules of Practice and Procedure

Within two months of approval of the Modern Courts Amendment, the Supreme Court commenced efforts to exercise the rule-making responsibility conferred by Article IV, Section 5(B). In July 1968, Chief Justice Kingsley Taft appointed an advisory committee of the Ohio Judicial Conference to draft rules of practice and procedure for consideration by the Supreme Court. The advisory committee was chaired by highly respected jurist John V. Corrigan of Cuyahoga County and consisted of 27 judges and seven attorneys. In four consecutive years, the Court approved and submitted to the General Assembly proposed rules of practice and procedure, commencing with the Rules of Civil Procedure in 1970. The Court subsequently promulgated rules governing procedure in appellate (1971), juvenile (1972), and criminal (1973) matters.

With the exception of the Rules of Criminal Procedure, the initial rules promulgated by the Court generated minimal controversy. The Criminal Rules were subject to legislative attempts to disapprove the proposed rules in 1972 and 1973. Although the General Assembly did not adopt the 1972 resolution, the proposed rules apparently were withdrawn, revised, and refiled in January 1973. Two resolutions to disapprove the 1973 version of the proposed Criminal Rules were introduced in the House of Representatives, although neither resolution was reported by the House Judiciary Committee.

The development of Rules of Evidence represents the most controversial attempt on the part of the Supreme Court to exercise the rule-making responsibility granted by the voters in 1968. Following the adoption of procedure rules in 1970-1973, the Supreme Court appointed a 23-member Advisory Committee, charged specifically with the drafting of Rules of Evidence. The Evidence Rules Advisory Committee began its work in June 1975, and its efforts culminated in the filing of proposed Rules of Evidence with the General Assembly in January 1977. The efforts of the Supreme Court to promulgate Rules of Evidence generated significant debate and controversy among the bench, bar, and General Assembly. In a 1977 resolution wherein the General Assembly sought to exercise its authority to disapprove the proposed Evidence Rules, the legislature expressed serious doubt as to whether the promulgation of evidence rules was within the scope of the Court's authority to adopt procedural rules and believed that the adoption of rules of evidence was a legislative, and not a judicial, function. The resolution goes on to express reluctance on the part of the General Assembly to approve rules that granted discretion to trial judges and uncertainty as to the effect of the proposed rules on then-existing law. This latter point was made, in part, because the proposed rules were not accompanied by staff notes or other explanatory text.

The nature of this debate and discussion resulted in the General Assembly disapproval of the proposed amendments in June 1977. The Court refiled the proposed rules, without changes, in January 1978, and the General Assembly again rejected the rules in June 1978.

After an additional year of study, the Court filed proposed Rules of Evidence with the General Assembly in January 1980. On this occasion, the General Assembly appointed a joint House-Senate Committee, complete with staff, to undertake a comprehensive review of the proposed rules. This committee completed work on a portion of the proposed rules and submitted

its recommendations to the Court in April 1980. The Court made minimal changes to the proposed rules prior to the May 1 deadline contained in Article IV, Section 5(B). The Senate acted to disapprove the resolution; however, the House did not concur in the action, and the proposed Rules of Evidence became effective on July 1, 1980.

Supreme Court Rules Advisory Committee

The initial, *ad hoc* advisory committees appointed by the Supreme Court performed significant service in contributing to the promulgation of rules of practice and procedure, and their work carries forward to this day. As the Court was completing work on the Rules of Evidence, it elected to formalize a procedure to ensure the rules would remain current and relevant to litigation in Ohio. In 1979, the Court issued an order establishing the Supreme Court Rules Advisory Committee as a standing committee of the Court. The Rules Advisory Committee consisted of seven judicial association appointees, one designee of the Ohio State Bar Association, , and the director of the Ohio CLE Institute. The Court supplemented these designees by appointing three attorneys, two law professors, and one nonattorney to the Committee. The membership of the Committee was codified by the Court through adoption of Rule XII of the Supreme Court Rules for the Government of the Bar of Ohio in 1990. In addition to establishing the membership of the Committee, Gov. Bar R. XII provides for the appointment by the Court of a chair and vice-chair and the designation of a secretary to assist the Committee. Members of the Committee are not compensated for their services but are reimbursed for expenses associated with their Committee service.

Since the adoption of Gov. Bar R. XII in 1990, the membership of the Committee has been altered on two occasions. In 1993, the Court added a magistrate to the Committee and replaced the lay member and director of the Ohio CLE Institute with two practicing attorney members. In 1996, the Court added a representative of the Domestic Relations Judges Association, a prosecutor, and a criminal defense attorney. The two latter additions were significant because they represented the first and, to date, only designation of attorney members by areas of practice.

Operation of the Rules Advisory Committee

The Rules Advisory Committee is divided into five subcommittees, corresponding to the Rules of Civil, Criminal, Juvenile, and Appellate Procedure and the Rules of Evidence. Except for the chair of the Rules Advisory Committee, each Committee member serves on one of the five subcommittees. From time-to-time, a Committee member may volunteer or be invited to serve as a temporary, nonvoting member of another subcommittee that is considering a rule or subject of interest to that member. For example, the Civil Rules Subcommittee has been working for the past year on revisions to Civil Rule 53 relative to proceedings before magistrates, and the magistrate member of the Committee volunteered to assist the subcommittee in developing these revisions. Each subcommittee also is entitled to a subcommittee counsel, who assists the subcommittee in conducting research, preparing draft rules and amendments, and drafting staff notes to accompany rules and amendments. Subcommittee counsel are volunteers and traditionally serve at the pleasure of the subcommittee chair.

The Rules Advisory Committee receives suggestions on proposed amendments from several sources. The most common sources of proposed amendments are judges and attorneys who will submit proposed amendments individually, based on their experience in a pending case or cases, or collectively through their professional associations. The General Assembly occasionally will ask the Court to exercise its rule-making authority, most commonly in the form of uncodified law requesting that the Court adopt a procedural rule to give full effect to a legislative enactment. This occurred most recently in three legislative enactments of the 125th General Assembly (H.B. 215, H.B. 292, and H.B. 342). A third source of rule amendments is the Supreme Court, which in the context of a case that came before the Court, may note the need to clarify procedures in a particular area. A recent example is a suggestion from the Court to incorporate its holding in *State v. Comer*, 99 Ohio St.3d 463 (2003) in Criminal Rule 32. The Court may include its observation in a merit opinion or via written memorandum to the Committee if the Court did not issue an opinion in the pending matter.

Regardless of the source of the suggestion, all proposals are assigned, upon receipt, to a subcommittee of the Rules Advisory Committee. Each subcommittee is responsible for thoroughly researching and debating a proposal and formulating a recommendation to the full Committee. Depending on the nature and complexity of a proposal, the work of the subcommittee in researching, discussing, and finalizing a proposal can occur in a few weeks or during the course of several months.

If a subcommittee recommends one or more amendments to address a pending proposal, the subcommittee is charged with preparing the appropriate amendments and staff notes for consideration by the Committee. Staff notes contain an explanation of or rationale for the proposed amendments, including citations to relevant case law, statutes, and other legal resources. The subcommittee then presents proposed amendments and staff notes in the form of a subcommittee report, and the report and recommendation of the subcommittee is discussed and debated by the Committee. At the conclusion of the discussion, the Committee may ask the subcommittee to revise the proposal or may adopt the recommendation of the subcommittee, with or without revisions. The recommendations of the Committee are then submitted to the Supreme Court.

Article IV, Section 5(B) provides that the Supreme Court may file proposed rule amendments with the General Assembly only one time each year, that being prior to January 15 of a given year. Thus, the Rules Advisory Committee has developed a schedule to guide its work each year. The Committee generally begins work on proposed amendments 12 to 15 months in advance of the January date by which the amendments, if approved by the Supreme Court, would be filed with the General Assembly. This means that in the Autumn of 2004, the Committee will commence work on amendments that will not be filed with the General Assembly before January 2006. In many instances, the subcommittees and full Committee will work on proposed amendments for a full year, finalizing the amendments that will be recommended to the Court at the September meeting that precedes the anticipated January filing date. The Committee's recommendations for the coming year are normally presented to the Supreme Court in late September or early October.

Following its initial consideration of the Committee's recommendations, the Court will publish the approved recommendations for comment. At the conclusion of the initial comment period, the Committee will meet to review comments received and recommend any revisions to the published amendments that the Committee deems necessary. The revisions recommended by the Committee, together with the comments received during the publication period, are forwarded to the Supreme Court in December or early January. At that time, the Court will determine what amendments will be filed with the General Assembly in advance of the January 15 deadline contained in Article IV, Section 5(B).

The amendments filed with the General Assembly are published for a second public comment period in late January or early February. The Rules Advisory Committee considers comments received during this second comment period and recommends to the Court any revisions in the amendments that were filed with the General Assembly. The Court then has until May 1 to revise or withdraw any of the proposed amendments that were filed in January. The text of Article IV, Section 5(B) suggests that the Court may not include new rule amendments in this filing, but only revisions to the amendments that were proposed in January of that year. If the General Assembly does not adopt a concurrent resolution to disapprove the proposed amendments prior to July 1, the amendments become effective on that date. The final amendments are posted immediately on the Supreme Court web site and published in the Ohio Official Reports Advance Sheets and Ohio State Bar Association Report.

The 1995 Amendments to Criminal Rule 16

Since the disapproval of the proposed Rules of Evidence in 1977 and 1978, the General Assembly has exercised its authority to disapprove proposed rules of practice on only one occasion. This occurred in 1995 when the Supreme Court filed proposed amendments to Rule 16 of the Rules of Criminal Procedure.

The effort to revise Criminal Rule 16 relating to discovery in criminal cases dated to a Task Force that was created in July 1991. House Bill 298 of the 119th General Assembly established a 21-member Task Force to Study Court Costs and Indigent Defense to conduct a comprehensive review of the funding and delivery of legal representation to indigent criminal defendants. Under the leadership of then-Justice Craig Wright, the Task Force issued a report in September 1992 that contained 23 recommendations. Under the heading of "Cost Containment and Recoupment" was the following recommendation:

> The Rules of Criminal Procedure should be amended to facilitate discovery by criminal defendants.

The Task Force found that discovery rules were applied inconsistently throughout Ohio and resulted in greater costs in those counties where discoverable material is not readily made available to defense counsel. The Task Force further expressed the view that:

> * * * a more open and uniform discovery process would reduce the need for court intervention in the discovery process, facilitate settlement of cases, and result in better case preparation, all of which would reduce the costs of providing

representation to indigent defendants.

This recommendation was transmitted to the Rules Advisory Committee in October 1992 and was assigned to the Criminal Rules Subcommittee for review. After a study by the Criminal Rules Subcommittee and debate by the Rules Advisory Committee, recommendations were transmitted to the Supreme Court in mid-1994. The initial proposed amendments were published by the Court in October 1994.

The October 1994 version of Criminal Rule 16 reorganized the existing rule and revised the time frame for providing discovery. The most significant and controversial changes related to the additional items that would be discoverable by the defense prior to trial:

- Criminal history of the defendant and the state's witnesses
- Criminal history of the defendant's witnesses, if obtained by the state
- Telephone number of the state's potential witnesses
- Statements by the state's potential witnesses
- Police reports

The initial publication of the proposed amendments to Criminal Rule 16 resulted in the receipt of 325 comments. This represents perhaps the greatest number of written comments received on any proposed rule amendment being considered by the Court. The vast majority of these comments opposed the revisions being proposed by the Court, and virtually all comments in opposition came from prosecutors, law enforcement, crime victims, and victims' advocates. The primary arguments against the proposed amendments were that the amendments would facilitate perjury and lead to increased intimidation of victims and witnesses. The Court received several comments in support of the proposed amendments, primarily from the Ohio Association of Criminal Defense Lawyers, public defenders, and individual attorneys. All comments were reviewed by the Rules Advisory Committee and provided to the Court in late 1994.

After reviewing the proposed amendments, the Court elected to revise proposed Criminal Rule 16 before filing amendments with the General Assembly. The Court retained the proposed amendments requiring disclosure of criminal history of the defendant and various witnesses and the provision that the statements of testifying witnesses must be disclosed prior to trial. Retained was the provision that would require the state to provide statements of nontestifying witnesses, although the new language required the redaction of identifying information from those statements. Deleted from the proposed amendments was language that would have required the state to provide telephone numbers of potential state witnesses and that would have required the state to provide police reports prior to trial.

The proposed amendments to Criminal Rule 16 were filed with the General Assembly on January 11, 1995 and published for a second public comment period in late January 1995. Once again, the vast majority of the 85 comments received by the Court expressed opposition to the proposed amendments for many of the same

reasons noted above. In addition to the comments received from prosecutors, law enforcement, and victims' advocates, a number of individuals who wrote in support of the prior version of the rule expressed their disappointment with the fact that many of the original proposed changes had been deleted from the amendments filed with the General Assembly.

During or shortly after the conclusion of the second public comment period, resolutions to disapprove the proposed amendments to Criminal Rule 16 were introduced in the House of Representatives and Senate. House Concurrent Resolution 16 was introduced on February 28, 1995 by Representative George Terwilliger of Warren County and referred to the House Judiciary Committee. Senator Tim Greenwood of Lucas County introduced Senate Concurrent Resolution 11 on March 7, 1995, and the resolution was referred to the Senate Judiciary Committee. The chairmen of the House and Senate Judiciary Committees agreed to delay consideration of each resolution until the Supreme Court had an opportunity to review comments received during the second public comment period and determine what, if any, revisions to make in the proposed amendments.

In March 1995, the Rules Advisory Committee reviewed the comments following the second publication period and prepared its recommendations to the Supreme Court. The Court considered the proposed amendments, comments, and report of the Rules Advisory Committee, and in April adopted further revisions to the proposed rewrite of Criminal Rule 16. Deleted from the January 1995 version was the requirement that the state provide the criminal history of its proposed witnesses; instead the state would have to inform the defense of any felony convictions on the part of its witnesses. Also deleted from the proposed rule were provisions requiring disclosure of police reports and statements of witnesses who the state would not be calling at trial. A revised proposed version of Criminal Rule 16 was filed with the General Assembly on April 25, 1995.

The opponents of Criminal Rule 16 recommenced an intensive lobbying effort, even before the Court had the opportunity to file the revised, proposed amendments with the General Assembly. Many prosecutors and victims' advocates contacted individual members of the General Assembly and testified before the House and Senate Judiciary Committees to encourage adoption of the disapproval resolutions. The opponents were aided in their efforts by the state Attorney General, who encouraged former legislative colleagues to disapprove Criminal Rule 16. A significant portion of the legislative testimony focused not on the perceived impact the changes would have on the discovery process, but rather attacked the process used to develop the proposed rule. Opponents of the proposed amendments claimed that prosecutors and others were denied the opportunity to have input on the content of the amendments.

The Court and members of the Rules Advisory Committee mounted a spirited defense of the proposed amendments, securing favorable testimony from judges and practitioners who had direct experience in working with an "open file" discovery system. In addition, the chairman of the Rules Advisory Committee and chair of the Criminal Rules Subcommittee provided a detailed history of the development of the proposed amendments and the work of the Rules Advisory Committee.

Notwithstanding the efforts of the proponents of Criminal Rule 16, the General Assembly adopted House Concurrent Resolution 16 in the last ten days of June 1995. The House Judiciary Committee favorably recommended the resolution by a one-vote margin on June 21, and the full House adopted the resolution the following day by a vote of 72-24. The following week, the Senate Judiciary Committee took additional testimony and approved the resolution by a vote of 6-4. Later the same day, House Concurrent Resolution 16 was adopted by the Senate on a 24-8 vote.

Since the 1995 effort, neither the Rules Advisory Committee nor the Supreme Court has proposed amendments to Criminal Rule 16. Any future efforts to examine Criminal Rule 16 should consist of a cooperative effort among the defense bar, prosecutors, and judges to produce mutually agreeable revisions and avoid a prolonged disapproval effort before the General Assembly.